



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. APPLICATION NO. 4 OF 2014

TRANSLAKES LIMITED.....1ST APPLICANT

MELLECH ENG. CONSTRUCTION CO. LTD.....2ND APPLICANT

VERSUS

ANDREW MOMANY & ANOTHER.....RESPONDENT

RULING

What is before me is the 1st Defendant's Notice of Motion dated 9th July 2014 which seeks, firstly, a review of the ruling of Muchelule J delivered herein on 27th June 2014 which dismissed the applicant's application dated 21st January 2014 and secondly an order that the taxing officer give reasons for taxing the costs at Kshs.134,830/= in a taxation conducted exparte. The application further seeks an order for taking accounts and that the costs of this application be provided for.

The application is premised on grounds that:

“(a) On 21st January 2014 the 1st Defendant/Applicant filed an application against the Plaintiff/Respondent seeking prayers inter alia a stay of execution restraining the respondents from executing its property and leave to appeal against a judgment herein, KISUMU CMCC 184 OF 2012 out of time.

(b)The said judgment from KISUMU CMCC 184 OF 2012, that the Applicant sought leave to appeal against out of time was delivered ex-parte, and further, the Applicant was never served with a Notice of delivery of the said judgment and was therefore not aware that there was such a judgment against it.

(c) The respondents later moved to tax their bill and did so ex-parte and failed to serve the Applicant with both the Notice of Taxation and the bill itself.

(d) Pursuant to this, the Respondents made an application for execution and the 1st Defendant/Applicant was never served with a Notice to Show Cause why it should not be attached and only learnt about the said decree upon being served with proclamation forms by MUHATIA PALA AUCTIONEERS.

(e) In response to the Application dated 21st January 2014 aforesaid, the Respondents filed grounds of opposition and a Notice to Raise Preliminary Objection. The Respondent did not traverse any of the allegations made in the pleadings and should therefore be deemed as an

admission from them.

(f) The said Application was diarised for inter parties hearing on 19th March 2014 both parties were present, all the issues aforementioned were raised by the advocates on record for the Applicant. The Respondent did not traverse the allegation in the application and depended entirely on their grounds of opposition but withdrew their Notice to raise a preliminary objection.

(g) The presiding Judge, Muchelule J asked the Respondent if they served the Applicant and to provide proof that they had served any Notice of entry of the judgment from KISUMU CMCC 184 OF 2012 upon the Applicant and they failed to do so.

(h) Therefore the decision of the Court was reached without any consideration of all the relevant facts and the Ruling delivered on 27th June 2014 does not reflect the Applicant's pleadings or the Applicant's submissions in court.

(i) Further, the Applicant's main reason for not lodging an appeal and not filing a draft memo alongside the application dated 21st January 2014, is because it has never set eyes on that judgment it intends to appeal against and because of undelivered proceedings and a copy of the said judgment from the lower court owing to the fact that the court file was missing at the material time.

(j) The Respondents will soon be in a position to execute the decree obtained in these proceedings to the detriment of the Applicant and dismiss the entire suit, thereby denying the Applicant its chance in Court to seek justice.

(k) As such, it is only fair and just that the Court do review its Ruling and set aside the Order that dismissing the Applicant's application with costs and reinstate the Applicant's application dated 21st January 2014 for hearing on its merits.”

It would appear that the contest before me is between the 1st Defendant and the 2nd Defendant but not the Plaintiff as the replying affidavit is sworn by the Managing Director of the 2nd Defendant and submissions were filed by the two Defendants but not the Plaintiff. The gist of the Defendants' application is that the judgment in issue was read in its absence and that no notice was issued; that the subsequent taxation was also done in its absence as it had also not been served with the notice of taxation factors which were not taken into account when their application to file appeal out of time was dismissed.

In his ruling dated 10th June 2014 but delivered on 27th June 2014, Muchelule J stated that the basis for extension of time to appeal had not been laid. He found that no draft Memorandum of Appeal was filed alongside the application and the Court could not therefore tell the nature of the appeal and whether it had merit. He also stated that it had not been disclosed when the judgment was delivered and therefore by how many days the 1st Defendant was late in filing the appeal. More significantly he found that the reasons for the delay in filing the appeal within the requisite time were not given. Those reasons are what appear to be disclosed in the grounds for the present application as well as in the affidavit of Agasna Afrophilia, Advocate, for the 1st Defendant. In summary they are that no notice of delivery of the judgment was sent to the 1st Defendant and so the judgment was delivered in her absence and that to date the 1st Defendant has not had sight of that judgment as the lower court file went missing.

This being an application for review this court is concerned with whether there is new and important evidence or some mistake or error apparent on the face of the record or any other sufficient reason that would warrant a review – see Order 45 Rule 1(1) of the Civil Procedure Rules.

The issues raised in this application were not raised in the application dated 21st January 2014 which culminated in the ruling/orders now sought to be reviewed. It is of note that that application principally sought leave to file appeal out of time. That application was supported by an affidavit sworn on 21st January 2014 by Kiplimo Lagat Advocate who like Agasna Afrophilia is from the firm of Lumumba &

Lumumba Advocates, where at paragraph 1 he deposes that he had acted for the Defendant throughout the trial. At paragraph 2 he acknowledges that at the conclusion of the trial judgment was entered in favour of the Plaintiff. Nowhere does he depose that the judgment was delivered in his absence and without notice. It is only in regard to the taxation that at paragraphs 4 and 5 he deposes that the bill of costs was taxed *ex parte* and that it was never served on his client. The claim that the judgment was read in the absence of the 1st Defendant and that no notice was given and that the lower court file cannot be found is therefore a new matter as it is raised for the first time in this application. However it does not warrant a review of the impugned ruling as it was a matter that was always within the knowledge of the 1st Defendant/Applicant and his Advocate. To me it even sounds more of an after thought than new evidence. It has not also been demonstrated that even at the time the earlier application was argued the file could not be found. Moreover now just as during the earlier application no order/decreed or even judgment has been placed before this Court that would aid this Court in determining whether the judgment was in fact delivered in the absence of the applicant, whether there was notice of that judgment and how long the applicant had delayed in filing the appeal, or indeed point to an error apparent on the face of the record. The application for review is therefore not merited

The prayer to order the taxing officer to give reasons is also not merited. Either party to a taxation is entitled to request a taxing officer to give reasons for the taxation and does not require the leave of this court to do so, the explanation that the taxation proceeded *ex parte* notwithstanding.

The prayer for taking of accounts was not an issue before Muchelule J and as no basis for it has been advanced it is also dismissed. In arriving at this determination I have taken into account the submissions of the 1st Defendant/Applicant filed on 24th November 2014 and those of the 1st Defendant filed on 27th November 2014 and on 31st January 2017. Needless to say I have here been concerned only with the substance and the merits of the application but not the technical issues raised. The application is dismissed in its entirety with costs to the Respondent.

Signed, dated and delivered at Kisumu this 23rd day of February 2017

E. N. MAINA

JUDGE

In the presence of:-

N/A for the 1st Applicant

N/A for the 2nd Applicant

N/A for the Respondent

Otieno – Court Assistant