



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 346 OF 2012

V. CHOKAA & CO. ADVOCATES.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA as a

Successor of MUNICIPAL COUNCIL OF MOMBASA...RESPONDENT

R U L I N G

1. On 24/6/2013, the Advocate/applicant had his bill of costs dated 8/10/2012 taxed in the sum of Kshs.2,471,418. That sum was duly certified by the Deputy Registration by a certificate of costs issued on 14/10/2013. In the ruling by the taxing officer, instruction fees was taxed at Kshs.1,926,000/= based on the sum of settlement recorded rather than the sum claimed by the client in the suit, HCC No. 159 of 2010.
2. That decision aggrieved the Advocate/Applicant who then filed a reference dated 4th July 2013. The reference only sought to challenge the decision on instructions fees on the basic that the Deputy Registrar had misconstrued and misapplied the provision of schedule VI 1 1(b) of the Advocate (Remuneration) order.
3. The reference was heard by Kasango J, and determined by a ruling dated 5/3/2015. It is that ruling the Advocate now seeks to have reviewed and the grounds put forth for review is that there is an apparent error on the face of the Record in that there is no compromise of HCC No. 159 of 2010 hence sufficient reason for review.
4. That application was opposed by the client/Respondent who filed a Notice of Preliminary Objection dated 30/9/2015. That notice of preliminary faulted the application as not lying because the Advocate/applicant had in fact preferred an appeal by filling a notice of appeal dated 13/3/2015 and filed on the 16/3/2015. Therefore the client contended that the application was barred by the operation of provisions of Order 45 Rule 1 (2) Civil Procedure Rules. It was further contended that the matter was premature due to the absence of framework envisioned under the Transition to Devolved Government Act, Cap 265A.
5. The parties filed written submissions and did attend court on the 11/4/2017 to highlight the same. For the advocate/Applicant submissions were made that there was no evidence of the suit to which the bill related having been compromised hence the judge in reference ought to have not held that the matter was compromised.

6. For the Client/Respondent submissions were made that there was no grounds for review as much as the right had been extinguished when the Advocate/Applicant opted to appeal.

Analysis and determination

7. In this matter the issue for determination is whether or not there is an apparent error on the face of the record in the nature that there was never a compromise of the suit the bill related to. There is equally the objection taken that the application cannot lie because the Advocate had opted to appeal before seeking review.

8. I propose to deal with the merits of the application first then consider the technical objecting raised thereafter. I have looked at the proceedings before the taxing officer as well as the submissions offered before Judge Kasango. It is clear that before Kasango J, the advocate never contended that the suit had not been compromised. The contention by the advocate before Kasango J, is to be found at paragraph 6 of the submissions dated 6/10/2014 and filed in court on the 8/10/2014. In those submissions it is said and averred:-

“The taxing officer erred in principles as to instruction fees”.

9. That was the only matter the Judge was expect to consider and determine. When the matter was put to consideration by the judge, the judge said:-

“The parties are in agreement that there was a compromised judgment for the lesser amount than that which was in the plaint and that being so the taxing officer was correct to have paid regard to what is stated at schedule VI I (iii) (b)”.

10. The above being the state of facts on the record, I am unable to discern any error apparent on the face of the records ever availed to court while dealing with the reference on the lack of compromise. The parties took common stand that there had been a compromise and it should not come from the advocate now in the application for review to say otherwise. One gets the impression that the advocate is seeking to urge the reference afresh and on new grounds. That is not acceptable and the application therefore cannot succeed but must fail.

Does the application lie?

11. The law under Order 45 Rule 1(2) is clearly put:-

“A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency or an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”.

12. For purposes of an appeal to the Court of Appeal, an appeal is instituted by filing a Notice of Appeal. It is not denied that the Advocate prior to filing the application for review had filed and served a Notice of Appeal. He had thus opted to appeal and therefore relinquished his option to seek review. That to me is the clear and undeniable interpretation I give to Order 45 Rule 1(2). Therefore even beyond the merits as stated above, this application would not lie for being barred by the rule. That is the interpretation the Court of Appeal gave to the rule in its decision in *Kisya Investments Ltd vs Attorney General & Another [1996] eKLR* when it said and held:-

“A review application is incompetent after appeal is preferred”.

13. On the contention that the matter is premature due to the lack of legal framework anticipated under the Transition to Devolved Government Act, I find no merit at all. I understand the transition provisions under sixth schedule, section 33, to say that the County Government of Mombasa is the successor of the defunct Municipal Council of Mombasa, and that provision is not superceded on made subject to be

operationalized by the Transition to devolved Government Act. That submissions is not sustainable.

14. For the foregoing reasons, the application for review is misconceived, does not lie and is thus dismissed with costs.

Dated and delivered at **Mombasa** this **04th** day of **August 2017**.

P.J.O. OTIENO

JUDGE