



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. APPLICATION NO.62 OF 2010

KAKAMEGA TEACHERS SACCO LTD.....APPLICANT

VERSUS

LABAN AKULA ANZIYA T/A AMASAKHA, ANZIYA

MUNYENDO & CO. ADVOCATESRESPONDENT

RULING

1. The applicant herein, *Kakamega Teachers Sacco Ltd*, has filed an application dated 5th October 2016 seeking that the orders made by *Sitati J* on 15th June 2016 giving leave to the respondent to tax the advocate –client bill of costs and the subsequent taxation order made on 21st August 2016 be reviewed and /or set aside. The application is based on the grounds that there has been discovery of new and important evidence which was not placed before the court and which was not within the knowledge of the applicant. The application is supported by the affidavit of the Chief Executive Officer of the applicant one *Peter Vuhya*.

2. The application is opposed by the respondent through the replying affidavit of *Laban Akula Anziya* who states that the applicant had not demonstrated that there has been discovery of new and important matter of evidence that was not in possession of the applicant at the time that the application dated 15th June 2016 was made.

Background to the application:

3. The applicant had appointed an agent, Mwalimu Centre Sacco Society Ltd, for the purposes of collecting rent at a building in Kakamega town owned by the applicant. That sometimes in the year 2009 or thereabouts, Mwalimu Centre Investment Co-operative Society Ltd was placed in liquidation. The Commissioner of Co-operatives appointed a liquidator over the Society for a period of one year.

4. In January 2009 the liquidator was sued by one Tobias Odhiambo in Kakamega High Court Civil Suit No.1 of 2009. The respondents who are a firm of advocates alleges to have then been appointed to represent Mwalimu Centre Sacco over the matter but they were not paid their professional fees. After the appointed period of the liquidator ran out, the respondents wrote letters to the applicant seeking for payments but they did not get any response. They then filed an application dated 2nd December 2010 against the applicant seeking for leave of the court to tax advocate-client bill of costs. The respondents were alleging that Mwalimu centre Sacco were agents of the applicants. In their response the applicants admitted that Mwalimu centre Sacco were their agents. The application was granted by Justice Sitati on 15th June 2016. Subsequently the bill of costs was taxed by consent of the parties on 25th August 2016. The respondent now seeks to have the said orders set aside and or reviewed on grounds of discovery of

new evidence.

The grounds of the application:

5. The Chief Executive Officer of the applicant states in his supporting affidavit that he only learnt a week before the filing of the current application that one Michael Obiero Ongilo was the liquidator of Mwalimu Centre Sacco as per an appointment letter dated 3rd March 2008 – marked ‘PV2’. That the liquidator had then written a letter to all the tenants at Mwalimu Centre informing them of the change of management as evidenced by a copy of a letter marked ‘PV3’. That the applicant was also instructed by the liquidator to pay rent to the liquidator vide a letter date 1st April 2008 marked ‘PV4’. That in the foregoing the applicant was neither the liquidator nor agent of Mwalimu Centre Sacco. That there is no time that the applicant took over the assets or liabilities of Mwalimu Centre Sacco. Further that it has come to his knowledge that the liquidator did invite through gazettelement any claims and the respondent never lodged any claim with the liquidator. That in the circumstances the respondent is estopped from making any claim. Further that the claim, if any, is statutorily time barred. Further that neither Mwalimu Centre Sacco nor the aforesaid liquidator instructed the respondent to act in Kakamega HCCC No.1 of 2009.

The response:

6. Mr Laban Akula Anziya depones in his replying affidavit, inter alia, that the fact that Mwalimu Investments Sacco was liquidated is not new to the applicant as this fact was alluded to in Mr Vuhya’s replying affidavit sworn on 26th January 2011. However that the work of the liquidator was limited for a certain period and the applicant has not explained what happened after liquidation of Mwalimu Investment Sacco. That the supporting affidavit of the applicant is setting out a fresh case for the applicant and the applicant is thus asking the court to sit on appeal of its decision.

Submissions:

7. The advocates for the applicant, Fwaya & Co. Advocates, submitted that it is clear from the averment in the supporting affidavit and the annexures now placed before the court that the applicant was neither the liquidator of Mwalimu Centre Sacco nor its agent. That the aforesaid documents were not in possession of the applicant and that it is upon receipt of the same that the current application was filed.

8. The advocates for the respondents, M/s Akwala & Co. Advocates, on the other hand submitted that the applicant knew of the existence of the liquidator long before the filing of the main application for leave to tax the bill of costs. That the applicant had admitted in the pleadings that Mwalimu Sacco was their agent in respect to rent collection. That they admitted ownership of the building in issue in High Court Civil Court No.1 of 2009. That it is trite law that the principal is bound by the actions of the agent for acts committed within the scope of their relationship. That the alleged discovery cannot alter the relationship that existed between Mwalimu Sacco and the applicant.

9. Further that the applicant has failed to establish the test set out in order 45 Rule 1 of the Civil Procedure Rules in respect of discovery of new evidence.

Further that order 11 of the Advocates Remuneration Order provides the procedure for setting aside taxed costs and therefore that the court cannot set aside taxed costs in the manner proposed in the application herein.

Determination:

10. The application is brought under *Sections 1A,1B, 3A and 80* of the Civil Procedure Act and more particularly under *order 45 Rules 1, 2 and 3* of the Civil Procedure Rules 2010. *Order 45 Rule (1)* provides as follows:-

(1) Any person considering himself aggrieved -

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

Order 45 Rule 3 provides that:-

(1) Where it appears to the court that there is no sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of the opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

11. An application under *order 45* is limited to the grounds set out in the said order which are:-

(1) discover of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made.

(2) on account of some mistake or error apparent on the face of the record.

(3) for any other sufficient cause.

An applicant can select to base his/her application on any or all of the above grounds. The applicant herein has restricted his application to the discovery of new and important evidence. They were under duty to strictly prove that assertion.

12. The applicant in reply to the application dated 2nd December 2010 had pleaded that there was principal/agent relationship between the applicant and Mwalimu Centre Sacco. It is on that basis that Justice Sitati entered judgment for the respondent. The applicant however now says that they have discovered that there was no such agency relationship between them and Mwalimu Centre Sacco. The chief Executive officer of the applicant Mr Vuhya deponend that he learnt of the appointment of the liquidator in 2015 despite him having sworn an affidavit in 2011 alluding to the appointment of the liquidator. He wants the court to believe that he learnt in 2016 that their institution was paying rent to the liquidator.

13. It is the liquidator who was sued in *Kakamega High Court Civil Suit No. 1 of 2009*. The liquidator had been appointed for a period of one year. The liquidator's period had run out when the respondents filed the application for leave to tax advocate-client bill of costs in December 2010. The applicants seem to have wrongly admitted that Mwalimu centre Sacco was their agent when the same was under liquidation and the person who was answerable at the time that the respondents were appointed to represent Mwalimu centre Sacco was the liquidator.

14. The appointment of the liquidator is something that could not have escaped the attention of Mr Vuhya as the Chief Executive officer of the applicant. The liquidator sent a letter to all the tenants at the centre

upon his appointment and instructed them to be paying rent to them. Mr Vuhya admits that they were paying rent to the liquidator. The issues were therefore in the knowledge of Mr Vuhya in 2011 when he deponed his replying affidavit on 26th January, 2011. I do not believe that the issues came to his attention a week before the filing of the current application. The documents he produced were expected to be in his custody as the Chief Executive officer of Kakamega Teachers Sacco. If they were not in his custody he has not explained from whom he received them. The documents could easily have come to the knowledge of Mr Vuhya if he had acted with due diligence.

15. Courts are required to act with a lot of caution when considering applications based on discovery of new and important evidence. In Salama Mahmoud Saad vs Kikas Investments Ltd & Another (2014) eKLR, Justice F. Gikonyo quoted the case of D.J. Lowe & Co. Ltd vs Banque Indosuex, Civil Application No. Nai 217/98 (UR) where the Court of Appeal stated that:-

“where such a review application is based on fact of discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

16. It is apparent to me that the applicants have realized that they made an error in making the wrong pleadings in the initial application despite the fact that they had all the evidence at their disposal and which they could easily have procured if they had acted with diligence. In that case, their application should have been based on some other grounds other than discovery of new evidence as the stated evidence was not new to them. It is not for this court to consider any other ground that was not argued before it. Suffice it to say that there was no discovery of new evidence which was not within the knowledge of the applicants as at the time that the orders complained of were made. The applicants have not proved their case against the respondent.

In the foregoing the application dated 5th October 2015 is dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 20th day of September, 2017.

J. NJAGI

JUDGE

In the presence of:

Shifwoka H/B Akwala - for Applicants

Atulo H/B - for Respondents

George - Court Assistant

Applicant - absent

Respondent - absent