REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI [MILIMANI]

MISCELLANEOUS CIVIL APPLICATION NO. 5 0F 2017

IN THE MATTER OF THE ADVOCATES ACT, CHAPTER 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR THE TAXATION OF COSTS AS BETWEEN ADVOCATE AND CLIENT

BETWEEN

PROF. TOM OJIENDA & ASSOCIATES.....APPLICANT

AND

NAIROBI CITY COUNTY ASSEMBLY…....RESPONDENT

RULING

Respondent/Applicant's Case

1. On 4th October, 2017, I delivered a ruling in this case in which I dismissed the Respondents' amended Motion dated 29th June, 2017 in which the Respondent was seeking a stay execution of all the proceedings to enforce the Certificate of Taxation dated 2nd May 2017 and all other consequential orders pending the filing, hearing and determination of a reference against decision of Taxing Officer made on the 10th April 2017. I then proceeded to allow the applicant's application dated 9th May, 2017 and entered judgement in terms of the same together with interests at the rate of 9% pursuant to rule 7 of the ***Advocates (Remuneration) Order*** and costs.

2. The Respondent has now moved this Court vide a Notice of Motion dated 27th October, 2017 seeking substantially an order that this Court reviews, varies and/or sets aside the said ruling and order.

3. According to the Respondent, the said decision was based on an error apparent on the face of the record as the Court did not have an opportunity to consider the Respondent's Application filed on 3rd August, 2017 which was not placed on the Court file by the registry. According to the Respondent, the applicant's application was allowed exclusively because the Respondent had not disclosed any steps they had taken towards the filing of the reference and that they had not indicated that they had sought to enlarge time within which to file a reference against the decision of the taxing officer.

4. It was disclosed however that the said Chamber Summons seeking to extend time for filing a reference was filed and received in Court on 3rd August, 2017. To the Respondent, the omission by the Court registry to place the said application on record by the Registry was an error apparent on the face of the

record and order and presents a sufficient, concrete and cogent reason that is in the interest of justice to allow the application.

5. It was the Respondent's case that if the orders sought herein are not granted, the applicant/respondent will be condemned unheard and forced to pay the Respondent with the tax-payers' monies without lawful justification.

6. It was submitted that had the Court been aware of the application dated 3rd August, 2017, it would have allowed the Respondent's application as the observation that led to the dismissal of the application would not have been made. It was submitted that the fact of the existence of the said application dated 3rd August, 2017 was even alluded to in the submissions which were filed in support of the Respondent's application.

7. In support of the submissions, learned counsel, **Mr Mugoye**, relied on section 80 of the ***Civil Procedure Act***, Order 45 of the ***Civil Procedure Rules*** and Articles 20(3) and 35(2) of the Constitution.

Applicant/Respondent's Case

8. The application was opposed by the Applicant. According to the applicant, before this Court's decision sought to be reviewed, was arrived at, the only application that the respondent brought before this Court was for stay of taxation issued on 2nd May, 2017.

9. It was contended that during the Court attendances in Court the respondent never raised the fact that they had made an application dated 3rd August, 2017 before the ruling was made. Further neither the court nor the applicant was made aware of the said application as the same was not served.

10. It was the applicant's case that an error apparent on the face of the record as a ground for review does not apply in this instance as it operates on the notion that the court should have been aware of a certain fact and did not take consideration of the same fact and on the face of it would have made an impact on the decision. It was therefore the applicant's case that there is no error on the face of record.

11. In support of the applicant's case, **Miss Otieno** reiterated the foregoing.

Determination

12. I have considered the issues raised in the instant application.

13. The instant application is expressed to be brought under the provisions of section 80 of the ***Civil Procedure Act***, Order 22 Rule 25 and Order 45 rules 1 & 2 of the ***Civil Procedure Rules*** and all other enabling provisions of the law.

14. In my decision delivered on 4th October, 2017, I dealt with the relevancy of Order 22 Rule 25 afore-cited and expressed myself as hereunder:

> **"For this provision to apply, there must be two suits between say A and B. In one suit there must be a decree in favour of A against B. In the other suit, it must be B who is suing A. In this case, the Respondents are seeking stay of execution pending the filing, hearing and determination of the reference against the ruling and taxation in High Court Misc. Cause No. 4 of 2016. In other words the Respondents are yet to file their reference and hence there is no suit by the Respondents against the Applicant."**

15. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the ***Civil Procedure Rules***, certain requirements must be met. The said provision 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.***

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of 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."

16. In this case, the Respondent's case is that the sole reason why its application was dismissed was because it had not taken steps towards the filing of the reference. However this was not so as there was in fact an application dated 3rd August, 2017 which unfortunately was not placed on the Court file as at the time of the hearing.

17. In my decision of 4th October, 2017, I expressed myself as hereunder:

> **"First that provision expressly applies to application in which a relief in the nature of an order of certiorari is sought which is not the case in the instant proceedings. Secondly, it applies where either there is an appeal or where the time for appealing has not lapsed. In this case even if the reference was to be equated to an appeal, there is no reference pending. Further, pursuant to the provisions of rule 11(1) of the *Advocates (Remuneration) Order*, if any party should object to the decision of the taxing officer he should within 14 days after the decision give notice of the items of the taxation to which he objects. It is true that rule 11(4) of the *Advocates (Remuneration) Order* gives the court power to enlarge time if the same lapses before a step needed to be done is done or taken. However, the decision whether or not to enlarge time is discretionary and this Curt cannot speculate as to how that discretion will be exercised assuming an application for extension of time will be made in the first place…It therefore clear that a person who intends to challenge the decision of the Taxing Master is required to express such intention by giving notice in writing to the taxing officer of the items of taxation to which he objects. In this case, the Respondent has not disclosed the steps, if any, taken by them towards the filing of the reference. They have not stated that they have notified the Taxing officer of the items they are aggrieved with. They have not indicated that they have sought extension of time to commence the proceedings challenging the taxation either."**

18. In arriving at its decision, the Court relied on rule 11(1) of the ***Advocates Remuneration Order*** which provides that:

> ***(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.***
>
> ***(2)The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.***
>
> ***(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge***

under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4)The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

19. One of the steps that a party who intends to challenge the decision made on taxation is to, ***within fourteen days after the decision, give notice in writing to the taxing officer of the items of taxation to which he objects.*** The Court was clear in its decision that this had not been done and that the Respondent had not made an application for enlargement of time to comply with this requirement.

20. In the application dated 3rd August, 2017, what is sought is enlargement of time within which to file a reference against the Taxing Officer's order. I do not construe that to be the same as enlargement of time within which to give a notice in terms of rule 11(1) of the ***Advocates Remuneration Order***. Without dealing with the merits of the application dated 3rd August, 2017, a *prima facie* reading of rule 11(2) of the ***Advocates Remuneration Order*** is that ***the objector is required within fourteen days from the receipt of the reasons to apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.*** In other words reference is filed within 14 days of receipt of the reasons which reasons are to be asked for within 14 days of the decision. In this case however the application does not seek enlargement of time within which to seek the reasons and that was this Court's view when it held that:

> **"In this case, the Respondent has not disclosed the steps, if any, taken by them towards the filing of the reference.** ***They have not stated that they have notified the Taxing officer of the items they are aggrieved with*****."** [Emphasis added].

21. The decision whether or not to review a Court's decision was well captured by the Court of Appeal in **Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002,** where it was held that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

22. That was the Court of Appeal's decision in **Anthony Gachara Ayub vs. Francis Mahinda Thinwa [2014] eKLR** which quoted with approval the judgment of the High Court in **Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation**, by stating:

> **"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible."**

23. I agree with **Warsame, J** (as he then was) in **Sara Lee Household & Body Care (K) Ltd vs. Damji Pramji Mandavia Kisumu HCCC No. 114 of 2004** that the essence of a review must ordinarily be to

deal with straight forward issues which would not fundamentally and radically change the judgement intended to be reviewed, otherwise parties would loose direction as to the finality of a decision made by a particular court as on occasions a review may necessarily entail arriving at a decision different from the one originally arrived at. This was the position in **Atilio vs. Mbowe (1969) THCD** where it was held that an application for review should not be granted if it will result into the orders, which were not contemplated.

24. In this case the Court was clear that there was no evidence that steps such as the notification for intention to file a reference and the particularisation of the items sought to be challenged had been made. Though the Respondent now states that there was an application seeking to enlarge time for the filing of a reference, it is silent as regards the issue whether a step in the proceedings, that is the notification under Rule 11(1) of the ***Advocates Remuneration Order*** was made and if not whether an application has been made to enlarge time for the taking of that step.

25. In other words the substratum of the decision sought to be reviewed remains the same notwithstanding the grounds relied upon in the instant application.

26. The law is that only where the review would have the effect of arriving at a decision which was contemplated by the Court, should the Court grant the review in order to give the judgement its true meaning. That does not seem to be the case here.

Order

27. In the premises the Notice of Motion dated 27th October, 2017 fails and is dismissed with costs to the applicant.

28. Orders accordingly.

Dated at Nairobi this 14th day of December, 2017.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Maura for the applicant

Mr Nderitu for Mr Mugoye for the Respondent

CA Ooko