



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**HCCC CASE NO. 706 OF 2008**

**TWIGA MOTORS LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**HON. DALMAS OTIENO ONYANGO.....DEFENDANT/RESPONDENT**

**RULING**

1. The Notice of Motion dated **9 February 2015** was filed by the Plaintiff/Applicant pursuant to the provisions of **Section 80 of the Civil Procedure Act, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules** as well as **Rule 11 of the Advocates Remuneration Order** for orders that the Court be pleased to set aside and review the orders given on the **26 January 2015** dismissing the Plaintiff's Chamber Summons application dated **27 May 2014** and filed in Court on **28 May 2014**, and that costs of the application be provided for.
2. The application is supported by the Affidavit of **Alice Gacheri Nyagah** sworn on **9 February 2015**, the Supplementary Affidavit sworn on **20 May 2015** and the following grounds:
  - a) **There is an error apparent on the face of the record, in that the Ruling on the Bill of Costs was delivered by the Registrar on the 6 February 2014 and the Reasons given on 22 May 2014.**
  - b) **That the Application under Rule 11 of the Advocates Remuneration Order was filed within 14 days of delivery of the Reasons; and that the delay in the delivery of the Reasons is not attributable to the Applicant.**
  - c) **That there is an error apparent on the face of the record in that the Court calculated the time stipulated from the date of taxation as opposed to the date when the Reasons were furnished to the Applicant.**
  - d) **That no appeal from the Ruling has been preferred, but that as a result of the said error, the Plaintiff/Applicant has been gravely prejudiced, hence the application.**
  - e) **That the application has been brought without inordinate delay.**
3. The background information provided in the Supporting Affidavit is to the effect that the Plaintiff's Bill of Costs for the sum of **Kshs. 2,713,321** was taxed at **Kshs. 491,709** in a Ruling delivered on **6 February 2014**. Being dissatisfied with the decision of the Taxing Master, the Plaintiff filed an objection and a request for Reasons for the decision vide the letter dated **11**

**February 2014** marked **AGN-1**. According to the Plaintiff/Applicant, in spite of reminders vide the letters dated **3 April 2014** and **5 May 2014**, no Reasons were supplied, for the Deputy Registrar's ultimate communication dated **22 May 2014** was to the effect that the Reasons for Taxation were in the Ruling dated the **6 February 2014**. Thereupon, the Plaintiff prepared and filed the Chamber Summons Application dated **27 May 2014**, which is the Application that was dismissed on **26 January 2015** for having been filed out of time.

4. The Plaintiff's posturing therefore is that, in dismissing the aforesaid application, the Court computed time from the date of delivery of the Ruling on Taxation, namely, **6 February 2014**, and not **22 May 2014**, which was the date when, according to the Plaintiff/Applicant, the Reasons were given by the Taxing Officer; and that this amounts to an error apparent on the face of the record to warrant a review.
5. The Defendant/Respondent opposed the Application and relied on the Grounds of Opposition dated 25 February 2015, contending that:

a) **Granting the orders sought would amount to the court sitting on its own appeal;**

b) **There is no error on the face of the record;**

c) **that there is inordinate delay in bringing the instant Application;**

d) **That the application of 27 May 2014 having been dismissed for lack of supporting affidavit cannot in law be reinstated by way of review.**

6. The Court has carefully considered the Notice of Motion, the affidavits filed in respect thereof as well as the written submissions filed herein. **Order 45 Rule 1** of the **Civil Procedure Rules**, under which the instant application has been brought 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 way 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, 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.”**

7. The above provisions were restated in the case of *Muyodi –vs- Industrial & Commercial Development Corporation & Another (2006) 1 EA 243* wherein the court held thus:-

***“For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”***

8. Under Rule 11 of the Advocates Remuneration Order, it is stipulated thus:

**“(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."**

9. The proceedings show that, for the reason that the Plaintiff/Applicant did not attach an affidavit to support its Chamber Application dated **27 May 2014** to explain the three months delay in filing the said application, the Court, in its Ruling dated **26 January 2015**, came to the conclusion that the said application was time-barred, hence its dismissal. At paragraph 7 of the said Ruling, the court's observation was thus:

**"Bearing in mind that the decision of the taxing master was rendered on 6<sup>th</sup> February 2014, the court was unable to understand the circumstances under which the Plaintiff filed its present application on 27<sup>th</sup> May 2014, which was more than three (3) months from the date the said decision was given."**

10. It is evident therefore that the Plaintiff/Applicant did not place before the court the correspondence that he attached to the instant application, which documents were in its possession at the time and could have been easily availed for the Court's consideration. In the premises, it can hardly be said that the Court fell into error when it was the Plaintiff's own fault that the relevant material was not placed before the court.
11. It could however be argued that Paragraph 11(2) of the Advocates Remuneration Order does not require that a Chamber Summons filed thereunder be accompanied by an affidavit; and that the facts relating to the Reference herein could be ascertained from the court record. Nevertheless, since no reasons were given vide the letter of **22 May 2014**, for that letter merely stated that the Reasons for Taxation were in the Ruling dated the **6 February 2014**, the fact would remain that the 14 days from the date of Ruling would be reckoned from **6 February 2014**, and therefore had long elapsed. Thus, the only way out of the situation in which the Plaintiff/Applicant found itself after the letter of **22 May 2014** was to apply for extension of time pursuant to **Paragraph 11(4) of the Advocates (Remuneration) Order, which provides that:**

**"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 ... notwithstanding that the time sought to be enlarged may have already expired."**

In the premises, even if the court were inclined to grant a review, it would serve no useful purpose in the circumstances herein. This was the viewpoint taken by the court in the case of **Evans Thiga Gaturu vs. Kenya Commercial Bank Limited [2012] eKLR** by Odunga J thus:

**"In the present case, the ruling on taxation was made on 6<sup>th</sup> July 2011. If the client considered the said decision to contain the reasons, he could file the reference within 14 days from the date thereof. If, on the other hand, he was of the view that there were no reasons contained in the decision, he could request for the same in writing, in which case he would be bound to wait for the same. If, however, at a later stage he decided to prefer the reference notwithstanding the failure by the Taxing Master, after the lapse of the 14 day period, it is my view that he would be bound to apply for extension of time under paragraph 11(4) of the Remuneration Order, in which case one of the grounds if not the only ground would be the failure by the Taxing Master to furnish him with the reasons...However, a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given..."**

12. I would entirely agree with the foregoing exposition of the law and hold that, from the facts of this case, the Plaintiff/Applicant has failed to demonstrate that there is an error apparent on the face of the record, or that the Learned Judge erred in computing time.
13. The foregoing being my view of the matter, I would dismiss the Notice of Motion dated **9 February 2015** with costs.

*Orders accordingly.*

***OLGA SEWE***

***JUDGE***

***DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF APRIL, 2016***

***CHARLES KARIUKI***

***JUDGE***