REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLICATION NO. 117B OF 2014

MORRIS GUCHURA NJAGE..... APPLICANT

VERSUS

LIZ CATHERINE WANGARI MWANGI.....1ST RESPONDENT

HON. ATTONEY GENERAL.....……..2ND RESPONDENT

R U L I N G

1. This is the application dated 9/11/2015 seeking that the court be pleased to stay execution of the ruling delivered on 1/8/2014 pending hearing and determination of the application and that the court be pleased to stay proceedings in Nairobi Misc. Judicial Review Application 171 of 2014 and the order issued on 21/11/14 pending hearing and determination of the application.

2. The applicant further seeks that the court be pleased to recall and interpret the ruling delivered on 1/8/14 and the order issued on 10/9/2015. The application is supported by the affidavit of Morris Guchura Njage. In the supporting affidavit, it is stated that on 13/12/2004 the Litigation Fund Against Torture herein referred to as the Fund and the firm of Morris Njage & Company Advocates herein referred to as the firm entered into a legal service agreement.

3. The Fund paid instruction and filing fees of Kshs.70,000/= which the firm used to pay filing fees for three cases namely Embu HCCC Misc. application No. 74 of 2007, Embu HCCC No. 31 of 2007 and Embu HCCA No. 74 of 2008. The applicant states that on 3/3/2009 the 1st respondent entered into a fees agreement whereas she agreed to pay the firm 25% of gross decretal amount plus disbursements. On 29/9/2010 judgment was delivered in favour of the 1st respondent and a certificate of order for costs against the government was issued. The 1st Respondent later filed a complaint against the applicant with the Law Society of Kenya. The Commission on Administrative Justice later filed Judicial Review proceedings Nairobi JR No. 171 of 2014 to compel the Principal Secretary Ministry of Interior and the 2nd Respondent to pay the 1st respondent the decretal amount which summons were successful.

4. The applicant subsequently filed originating summons in this case to safeguard his fees. The applicant was in October 2014 enjoined as an interested party in the Judicial Review proceedings. The Independent Medico Legal Unit (IMLU) later came in record on the Judicial Review proceedings and unilaterally extracted the order of 21/11/2014 staying payment of the applicant's fees pending an agreement with IMLU on the same.

5. IMLU filed a notice of motion dated 31/3/2015 seeking to tax the applicant's fees and are relying on the ruling delivered on 1/8/2014 to claim privity to the applicant's relationship with the 1st respondent. It is argued that there is no evidence that IMLU was privy to the agreement dated 13/12/2014 between

Litigation Fund Against Torture and the firm. Further that there is also no evidence that IMLU is the successor of Litigation Against Torture. There is no evidence that the applicant consented to the assignment of the agreement dated 13/12/2004 to IMLU.

6. The 2nd and 3rd respondent in the replying affidavit stated that the issue of the instructing client being IMLU was decided by Hon. Justice H.I. Ong'udi in a ruling dated 1/8/2014. It is argued that the application before this court is defective as the orders sought cannot issue. The respondents contend that there is a pending application by the 1st and 3rd respondent dated 31/3/2015 seeking to implement the orders of 1/8/2014 by way of taxation of the applicant's fees. This is the application that ought to be heard so as to bring to an end this litigation between the parties.

7. The applicant is abusing the court process for he had already filed Originating Summons dated 1/7/2014 which the court rendered its ruling on 1/8/2014. The court ordered the applicant to file his bill of costs for taxation but he did not do so. It was in order for the 1st respondent filed judicial review proceedings seeking to compel the 2nd respondent to pay the decretal amount awarded in HCCC No. 31 of 2007.

8. The Judicial Review court on 24/10/2014 ordered that part of the decretal amount amounting to KShs.5,422,726.35 be paid to the 1st respondent and the balance be deposited in court which orders were duly complied with. The court order was clear that the amount deposited in court would await determination of the fees between the firm and the 3rd respondent. The respondents contend that there is nothing ambiguous in the ruling dated 1/8/2014 justifying any interpretation orders as pleaded by the applicant.

9. It is further argued that the ruling dated 1/8/2014 cannot also be reviewed as there is no discovery of any new and important matters or evidence, mistake or error on the face of the record. The applicant is guilty of laches and does not deserve the orders sought. It is contended that prayer No. 4 of the application cannot issue as the proceedings in the matter are before a court of concurrent jurisdiction. The court having issued its decision on 1/8/2014 is *functus officio* in this matter. The applicant ought to have applied for review of the ruling at an appropriate time or preferred an appeal.

10. The 2nd respondent filed grounds of opposition stating that the applicant can only appeal against the ruling of 1/8/2014 instead of calling for an interpretation of a ruling that has already been implemented. The 2nd respondent argues that it should be discharged from these proceedings as the decretal sum has already been paid. It refers to this application as an appeal disguised as an application for review.

11. The applicant filed a supplementary affidavit stated that IMLU never retained him in Embu HCCC No. 21 of 2007 and that IMLU was never enjoined as a party. The applicant argued that the deponent of the replying affidavit did not demonstrate that he had the authority of the 1st and 3rd respondents to swear the affidavit. The finding by the judge that IMLU was the instructing client is unclear hence the current application. The judicial review court did not have jurisdiction to determine whether there was a retainer and by whom.

12. Parties filed written submissions.

13. The applicant submitted that IMLU is a stranger to the proceedings as they have never sought to be joined as such. The replying affidavit sworn by Peter Kiama is inadmissible as the 1st respondent is available to swear the affidavit on her own behalf. The deponent did not avail evidence that he had authority to swear the affidavit on behalf of the 1st respondent.

14. The applicant relied on the courts power to recall its ruling as contained in Section 3A and 63e of the Civil Procedure Act. The applicant contends that he has established a case to warrant the recalling of the ruling as there is no evidence that IMLU ever instructed the applicant to act on its behalf and therefore there exists no privity of contract between the applicant and IMLU.

15. The 1st and 3rd respondents submitted that IMLU is a party to the proceedings as they took over the functions and services of the Litigation Fund Against Torture herein referred to as the Fund. It is argued that it is not in dispute that there existed a legal services agreement between the applicant's firm and the fund.

16. The respondents argued that the court was clear in its ruling that the instructing client was IMLU. After the applicant refused to comply with the orders in the ruling dated 1/8/2014, the 1st and 3rd respondent filed the application dated 31/3/2015 seeking taxation of the applicants bill of cost and enforcement of the ruling dated 1/8/2014. It follows, therefore that excluding the 3rd respondent from this application would amount to infringement of its right under Article 50 of the constitution.

17. It cannot be said that the applicant has been prejudiced in any way by the respondent (IMLU) participating in the proceedings. The deponent of the affidavit of the 3rd respondent is an officer of IMLU and a witness available to testify if called upon to do so. According to the respondents, the applicant should have raised the issue of IMLU not being the instructing client and that it was not privy to the contract between the applicant and the Fund at the hearing of the application before Ong'udi J.

18. The respondents stated that the court addressed the issue of privity of contract in its ruling. This court now is *functus officio* on the issues raised by the applicant. The parties have already implemented the ruling dated 1/8/2014 by filing Judicial Review No 171 of 2015 and therefore the decision has been implemented. The applicant has not demonstrated that there was a mistake or that the court misapprehended its jurisdiction to warrant the recalling and setting aside of the judgment.

19. It was also contended that the applicant has delayed in bringing the present application. Any order varying the ruling of 1/8/2014 would embarrass the court that issued the orders in Judicial Review case No. 171 of 2014.

20. The applicant in a reply to 1st & 3rd respondent's submissions restated what was contained in his submissions.

21. The issues for determination in this application are threefold.

(i) Whether the court should recall its ruling and order dated 1/8/2014 and 10/9/2015 respectively.

(ii) Whether thi8s court should interpret the ruling delivered by Ong'udi, J. and the order issued on 10/9/2015 following the judge's ruling.

(iii) Whether Peter Kiama, the Executive Director of IMLU had authority to swear the affidavit sworn on 31st March 2015 on behalf of the 2nd respondent.

22. The applicant cited Sections 3A and 63 among others in support of this application. Section 3A empowers the court in its inherent powers to make such orders so as to meet the ends of justice or to prevent abuse fo the court process. The court may make any such orders for the purpose explained in this provision subject to it being satisfied that the application has merit.

23. Section 63 refers to a host of orders which the court may grant in supplemental proceedings to prevent the ends of justice from being defeated. None of the orders prescribed in this provision (a) to (e) is relevant to these proceedings.

24. Order 22 Rule 22 deals with stay of execution which is among the prayers sought in this application.

25. Order 45 Rules 1 and 2 provide for applications for review where one is aggrieved by an order or a decree. It provides:-

(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.

26. The Order 51 Rules 1 and 2 provides for the procedure and mode of presenting and hearing various applications. Courts have taken various approaches while dealing with the provisions of Order 45 Rules 1 and 2.

27. In the case of ***TAYLOR & ANOTHER VS LAWRENCE & ANOTHER [2002] 2 ALL ER 353*** cited above the court held that the residual jurisdiction to reopen appeals was linked to a discretion which enable the court of appeal to confine it's rules to the cases in which it was appropriate for the jurisdiction to be exercised. There was a tension between a court having such residual jurisdiction and the need to have finality in litigation. It should however be clearly established that a significant injustice had had probably occurred and that there was no alternative effective remedy.

28. In the instant case, the applicant has not demonstrated that there is significant injustice that has occurred and that there is no alternative effective remedy to warrant the recalling the ruling dated 1/8/2014 and the order issued on 10/9/2015.

29. The ruling by Ong'udi J. delivered on 1/8/2014 resulted from originating summons filed by the applicant (herein) Morris Njage seeking three prayers. The court granted the 4th prayer in the application directing the advocate *"to file his advocate/client bill of costs for taxation, if he is not paid his fees after service of the bill of costs"*.

30. It is this ruling that the applicant seeks to have the court recall, review and interpret. On perusal of the said ruling, it is apparent on the record that the arguments of the parties in the originating summons were considered by the learned judge. The result was that prayer 2 and 3 were declined while prayer 4 was allowed. The applicant did not prefer an appeal against the ruling.

31. This application was filed on 9/2/2016 which was about 1½ years after the ruling. This was quite a long time given that the applicant who is himself an advocate is aware of the provisions of the law as regards appeal and review. It appears that the applicant was provoked into action when the respondent filed the bill of costs for taxation. The advocate had failed to file the bill for taxation even after his prayer to that effect was granted by the court. The delay to file this application and the failure to comply with the ruling has not been explained by the applicant. This couple of short-comings on the part of the applicant do not work in favour.

32. In an application for review, the applicant is required to show that new and important matters or evidence have since the time of the ruling been discovered and which with due diligence could not have been available during the hearing. The applicant has not demonstrated such discovery and is relying on most of the issues he raised in the originating summons and which were determined by a court of competent jurisdiction.

33. The wording of the application seeking to have the ruling interpreted is such that it brings up the issues decided by the court in its ruling of 1/8/2014. The applicant seeks interpretation of whether the Independent Medical Legal Unit (IMLU) is a party in these proceedings and whether it is the successor of the Fund Against Torture (The Fund).

34. The court observed that the IMLU took over from The Fund after the latter closed shop. This

evidence was contained in the affidavit of Liz Catherine Wangare Mwangi the 1st respondent and in that of Peter Kiama the Chief Executive of the IMLU. Several annextures to the 1st respondent's affidavit support the averments in the affidavit that IMLU which was the network organization of the Fund took over the case from the Fund.

35. The applicant wrote a letter to IMLU dated 6/2/2009 requesting it to procure witnesses in the 1st respondent's HCCC No. 31 of 2007. This leads to the conclusion that the applicant had recognized IMLU as the successor of the Fund in the year 2009 long before the civil case was heard. He cannot therefore be heard to say that IMLU was not a party in HCCC 31 of 2007. The law of estopped is is applicable in this situation in regard to the applicant.

36. The applicant was aware of the take-over of the proceedings by IMLU and accepted it by conduct. He entered into correspondence with the organization only to question their privity to the contract many years later. There was therefore, no need of a fresh agreement between the applicant and IMLU. Neither was there any need for the applicant to give consent to the take-over. IMLU was a body dealing with many clients taken over from the Fund and individual clients consent was unnecessary.

37. The agreement signed between the applicant and the 1st respondent on payment of legal fees of 25% was questionable. The applicant said she was coerced to sign it by the applicant. It contains alterations from 20 to 25 per cent which have not been endorsed by the parties. As much as the 1st respondent had capacity to enter into a fresh agreement with the applicant, the first agreement between the applicant and the instructing client was still in existence for it had not been rescinded.

38. The applicant has not shown that any injustice was occasioned to him in the court's ruling of 1/8/2014. Neither has he demonstrated that there exists any ambiguity in the said ruling. The ruling is crystal clear on the issues determined by the court and the reasons supporting the decision and the prayer for interpretation of the ruling is not well grounded and therefore lacks merit.

39. The order dated 10/9/2014 was extracted from the ruling delivered on 1/8/2014. It reads:-

> *"The applicant do file and tax his advocates/client bill of costs, if he is not paid his fees".*

40. The order is therefore a part of the ruling and requires no interpretation for it is clear as to its content. In simple English language, this simply means that if the applicant has not been paid his fees, he should file a client/advocate bill for taxation. This issue resurfaced in the judicial review proceedings and further directions were given aimed at preserving the fees of the applicant.

41. The applicant contends that the deponent of the affidavit of the 1st and 3rd respondent did not have authority to swear the same on behalf of the respondents arguing that the 1st respondent was available to swear her own affidavit for she was alive and well.

42. In paragraph 1 and 2 of the replying affidavit the deponent states that he is the executive director of IMLU and that he has the authority of the 1st and 3rd respondent to swear the affidavit.

43. Order 19 Rules 7 provides:-

> *''The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.''*

44. In the case of ***HADSON MOFFAT KAMAU VS MAKOMBOKI TEA FACTORY LIMITED [2008] eKLR*** the court held that

> "*a replying affidavit which has been sworn in response to an application is a matter of evidence. A party if personally seized of the matter, can swear the affidavit, or otherwise authorize any person*

who is seized of the facts to swear the affidavit on its behalf''

45. In the case of ***MAKUPA TRANSIT SHADE LIMITED & ANOTHER VS KENYA PORTS AUTHORITY & ANOTHER [2015] eKLR*** the court held that

> *''we go further and state that indeed there is no legal agreement that authority to swear affidavit on behalf of a corporate need to be filed in court….In our view ,the authority,as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it .It is therefore sufficient for the deponents to state that they were duly authorized ''*

46. In the case of ***KIOKO MANG'ELI & KIMANI CHEGE VS MURAGE & MWANGI ADVOCATES [2015] eKLR*** the court held that

> *"the court in my view erred by striking out the the affidavit. Order 18 Rule 7 (now order 19 rule 6 of the Civil Procedure Rules) provides that the court may receive any affidavit sworn for the purposes of being used in any suit not withstanding any defect by misdescription in the parties of the or otherwise in the title or other irregularity in the form thereof,….Even if the deponent had no written authority from his co defendant to swear the affidavit the authority, the trial magistrates should, at worst, have found that the affidavit was only valid with respect to the 1st defendant/deponent. Paragraph 1 of the replying affidavit of the 1st appellant affirmed that he was swearing the affidavit with authority of the 2nd appellant''*

47. It is illustrated by the foregoing authorities that Peter Kiama had the authority to swear the affidavit on behalf of the 1st and 3rd respondents. This fact is strengthened by the fact that Mr. Kiama was the Chief Executive Officer of IMLU the instructing client who were funding the 1st respondent in Civil case No. 31 of 2007.

48. I have considered the submissions of both parties and the authorities relied on. The case of ***UHURU HIGHWAY DEVELOPMENT LTD & 3 OTHERS VS CENTRAL BANK OF KENYA & 4 OTHERS CIVIL APPEALS NO 286 OF 2001 & 15 OF 2002 (CONSOLIDATED)*** is distinguishable from this case in that a 3rd party IMLU took over the fees agreement between the applicant and the Fund. The fund herein became a party to the contract after taking over from the Fund. The applicant exchanged correspondence with IMLU which signified acceptance of IMLU as an interested party.

49. In the case of ***ANNA MARIE CASSIEDE & ANOTHER VS PETER KIMANI KAIRU NAIROBI CIVIL SUIT 39 OF 2007*** it was held that where it is apparent that where there is mistake or misapprehension of its jurisdiction, a court can recall its order or decree for purposes of setting it aside and upholding the rule of law.

50. In the application before me, the applicant has not demonstrated that there is a mistake or mis-apprehension of jurisdiction to justify a recall of th ruling of 1/8/2014.

51. It was held in th case of ***DHANJI JADRA RAMJI VS COMMISSIONER OF PRISONS & ANOTHER [2014] eKLR*** where there court cited the decision in ***JERSEY EVENING POST LIMITED VS A1 THANI [2002] JLR 542*** that

> *''……..once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available'' .*

52. It is my considered view that the applicant ought to have filed an appeal against the ruling of Ong'udi J instead of seeking for recall, review and interpretation. This application has not passed the test laid down under the relevant provisions of the law and the principles explicited in decided cases.

53. The application is hereby dismissed with costs to the respondents.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF AUGUST, 2016.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Gachuba for Applicant

Mr. Kathungu for Kiarie for 1st respondent