REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 16 OF 2011

MICHAEL JUMA OTIENO …..... PLAINTIFF/APPLICANT

VERSUS

NGOS COORDINATOR BOARD …..... 1ST DEFENDANT/RESPONDENT

MARTIN LUTHER OMONDI OCHOLLA..... 2ND DEFENDANT/RESPONDENT

CHRITINE AWUOR OTIRI …..... 3RD DEFENDANT/RESPONDENT

RULING

By a ruling dated 13th November 2014 this Court dismissed the Plaintiff/Applicant's case for being filed by an Advocate who did not have a practising certificate and awarded the costs of the suit and those of the application that culminated in the dismissal to the Defendants.

On 21st November 2014 the Plaintiff/Applicant filed the present application which seeks orders as follows:-

> ***"1. THAT this application be certified urgent and its service be dispensed with in the first instance;***
>
> ***2. THAT pending the hearing of this application interpartes there be interim order of stay of execution of the orders dated 13/11/14 and any consequential proceedings thereto;***
>
> ***3. THAT there be a stay of execution of the orders of this Court dated 13th November 2014 and any consequential proceedings thereto.***
>
> ***4. THAT the Honourable Court be pleased to review and/or vary and/or set aside the order dated 13th November 2014 particularly on the award of costs to the defendants/respondents;***
>
> ***5. THAT the Honourable Court to find that the respondents/defendants are not entitled to both the costs of the suit and the application dated 19/03/2014;***
>
> ***6. Costs of this application be provided for".***

The grounds for the application are:-

> ***"1. The Honourable Court made an Order on the 13/11/2014 allowing the first Respondent's application dated 19/03/2014 and dismissing the Plaintiff/Applicant's suit;***

2. That one of the issues for determination was whether the application dated 19/03/2014 could stand in law and the flowing consequence if the answer was negative;

3. That there is an error apparent on the face of the record in that no determination was made on the issue particularized in paragraph 2 of the grounds of our application;

4. The act of the firm of OTIENO YOGO OJURO AND CO. ADVOCATES of withdrawing from acting for the 1st defendant on whose behalf it filed the application dated 19/3/2014 as well as lack of supporting affidavits by the 2nd and 3rd defendants/respondents to the application dated 19/03/2014 or giving their consent to the 1st defendant/respondent's officer to file the same on their behalf implied the application dated 19/03/2014 could not stand and ought to be expunged from the record;

5. That the respondents are likely to move the court to initiate execution proceedings pursuant to the orders of the court dated 13/11/14".

The application is supported by the affidavit of Michael Juma Otieno whose main contention is that the application dated 19th March 2014 which culminated in the order sought to be reviewed was filed by the 1st Defendant only but argued by an Advocate who was on record only for the 2nd and 3rd Defendants. That the said firm of Advocates had withdrawn from acting for the 1st Defendant and the said1st Defendant did not have authority to swear the affidavit on behalf of the 2nd and 3rd Defendants which meant there was no application competently on record for the 2nd and 3rd Defendants and as such costs could not have been awarded to all three defendants. He prayed that the ruling and particularly the award for costs to the Defendants/Respondents be awarded.

The application was opposed on grounds that, first, the threshold for review was not met; secondly, that the application is misconceived as it seeks to have this Court sit on appeal on its own decision and thirdly that it is an abuse of the Court process for seeking to reward an illegality.

The application was canvassed by way of written submissions with Counsel for the applicant urging the Court to find an error on the face of the record first for not determining the status of the 2nd and 3rd Respondents in the application dated 19th March 2014 and secondly for not considering that the firm of Otieno Yogo Ojuro & Company Advocates were not properly on record for the 1st Respondent who was the applicant. Thirdly, the applicant urged that the Supreme Court has now set a precedent in matters such as these. In so submitting Counsel was referring to the decision of the Supreme Court delivered on 2nd December 2015 in ***National Bank of Kenya Limited V. Anaj Warehousing Limited [2015]eKLR.*** He also relied on numerous other authorities.

On the part of the Respondent it was submitted that the applicant has not satisfied the requirements of Order 45 of the Civil Procedure Rules in that he has not only failed to annex the order for which he seeks review but also that he has not shown discovery of any new and important matter or evidence which was not within his knowledge or could not have been produced by him at the time when the order was made; that he has not shown any mistake or error apparent on the face of the ruling and neither has he shown any other sufficient reason for review. Counsel for the Respondent cited various authorities.

A reading of the application dated 21st November 2016 discloses that initially what was contested was not the merit of the decision of this Court in dismissing the suit but the award of costs to the Respondents and more so to the 2nd and 3rd Respondents.

Counsel for the applicant in his submissions expanded the application to include the merits and relied heavily on the decision of the Supreme Court in ***National Bank of Kenya Limited V. Anaj Warehousing Limited (suppra)*** where the Court in departing from the decision of the Court of Appeal in the same matter makes distinction between an Advocate who is unqualified by virtue of not having a practising certificate and a non advocate and comes to the conclusion that on the facts of that case "no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the Advocates Act only by dint of its having been prepared by an Advocate who at the time was not holding a current practising certificate".

Counsel for the Respondent did not address himself on this issue and the authority cited probably because submissions were not exchanged. Suffice it to state however that here the relevant section would be Section 31(1) of the Advocates Act but not Section 34(1) which the Supreme Court was considered.

Be that as it may having painstakingly perused the record I am persuaded that there is sufficient reason to warrant a review of the ruling dated 13th November 2014.

Before giving my reasons I must state that the order should have been one for striking out the suit but not for dismissal the difference being that in the former the Plaintiff could file another suit. Now to my reasons. Whereas the application dated 19th March 2014 was drawn and filed by Otieno, Yogo, Ojuro and Company Advocates, the supporting affidavit was sworn by Serene Awino Obuya who at paragraph 1 describes herself as an Advocate of the High Court engaged as a Legal Officer with the 1st Defendant. The 1st Defendant is as described in paragraph 2 a creature of statute and is sued in its own name. It entered appearance on 9th March 2011 through one Henry Otieno Ochido (Head of Operations Compliance & Research). The legality or otherwise of this was not raised here. Its statement of defence filed herein on 10th March 2011 is drawn and filed by itself and appears to be signed by the same person who has signed the Memorandum of Appearance. As for the 2nd and 3rd Defendants I could not find the Memorandum of Appearance on the record but there is a written statement of defence drawn and filed on their behalf by the firm of Otieno, Yogo, Ojuro & Company Advocates. There is nothing on record to show that the aforestated firm was instructed by the 1st Defendant. Indeed there is neither a Notice of Appointment of Advocate nor a Notice of Change of Advocate in that respect and the submissions filed by Counsel in respect of that application though indicated as being for the 1st Defendant are signed off for the the 2nd and 3rd Defendants. I therefore agree with Counsel for the applicant that the firm of Otieno, Yogo, Ojuro & Company Advocates could not properly represent the 1st Defendant on whose behalf the application dated 19th March 2011 was brought. Much as it is correct that the Counsel appearing at the hearing of the application withdrew the main limb of the application and proceeded on the alternative limb does not cure the fact that the application was on the main filed by a party for who the Advocate was not acting and as such the Advocate had no instructions. The consequential orders ought therefore not to have affected that party either negatively or positively. There is therefore an error apparent on the face of the record in the order of dismissal of the case and the award of costs to the 1st Defendant because in so far as the 1st Defendant was concerned it did not instruct the firm of Otieno Yogo Ojuro & Company Advocates to file that application.

As for the 2nd and 3rd Defendants the application is defective for not being supported by an affidavit. As I have stated the affidavit was sworn by a person acting on behalf of the 1st Defendant and who does not even claim to have had the authority of the 2nd and 3rd Defendants and for all intents and purposes it was the 1st Defendant's application. The order emanating from that application cannot therefore be allowed to stand.

It has been argued that as the decree or order sought to be reviewed is not annexed this application cannot stand. As correctly submitted by Counsel for the 2nd and 3rd Defendants this point has been the subject of important judicial consideration and Courts have always held that failure to annex the order or decree sought to be reviewed renders an application for review fatally defective – see **Wilson Saiha V. Joshua Cherutich T/a Chirutich Company Limited [2003] eKLR, Belgo Holdings**

Limited V. Robert Kotich Otach & Another [2009] eKLR and **Suleiman Murugu V. Nilestar Holdings Limited [2015] eKLR.** Much as these cases are merely persuasive the argument by Counsel brings to mind the holding by the Supreme Court in **National Bank of Kenya Limited V. Anaj Warehousing Limited** (Suppra) that:-

> ***"60. All through from the trial Court to the Appellate Court, the respondent was the beneficiary of one pillar of the common law tradition: <u>the doctrine of stare decisis</u>. The picture unfolding from the submissions and analysis in this case, is that there was an inapposite application of that doctrine. Even as stare decisis assures orderly and systematic approaches to dispute resolution, the common law retains its inherent flexibility, which empowers the Courts, as the custodians of justice under the Constitution, to proceed on a case-by-case basis, invoking and***

applying equitable principles in relation to every dispute coming up. This principle is typically expressed by Sir Thomas Bingham, MR in the United Kingdom's Appellate Court, in M. v. Newham London Borough Council and X. v. Bedfordshire County Council [1994] 2WLR 554 at p. 572:

"If [the claimant] can make good her complaints …..., it would require very potent considerations of public policy …. to override the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied".

61. Precedent (such as that in Ndolo Ayah), as we have clarified in the foregoing paragraph, is to be perceived, in general, as the ''announced rule'', but in the quest for justice in the context of a particular case such as the final appeal now before this Court there is a basis for departing therefrom. This principle of judicialism, in common law practice, is well depicted by Professor Melvin Aron Eisenberg in his scholarly work, The Nature of the Common Law (Cambridge, Mass: Havard University Press, 1988) [at p.63]:

"Because the courts normally use announced rules as their staring points, as a practical matter the deciding court is likely to have a limited number of salient choices in dealing with a precedent. It can accept and apply the announced rule; it can determine that on close inspection the announced rule is not relevant; or it can use a minimalist or result-centred technique to reformulate or radically reconstruct the announced rule, and then apply or distinguish the rule it so establishes".

Moreover I am more persuaded by the decision of my brother Mabeya J **in Eustate Mutegi Murungi & Another V. Agrivine Kabiru Njoka [2016]eKLR** where he held that:-

"13. Although neither the judgment nor the extracted order was annexed to the application, a copy of the judgment and extracted order were readily available in the Court file.... In this regard since the Court could readily ascertain from page 2 of the judgment of Makau J of 6th May 2015 the order complained of and for the reason that no prejudice was shown to have been suffered by the respondent for the applicant's failure to annex the said documents, I hold that the application was not fatally defective".

I hold therefore that this application is not rendered fatally defective by the omission to annex the order or decree sought to be reviewed. In summary I have shown that not only was there an error or mistake apparent on the face of the ruling but that there is sufficient reason to review the ruling. Accordingly the application is allowed and the impugned order is set aside but with an order that costs shall be in the cause. It is so ordered.

Signed, dated and delivered at Kisumu this 29th day of September 2016

E. N. MAINA

JUDGE

<u>In the presence of</u>:-

Mr. Ochura for the Plaintiff/Applicant

N/A for 1st Defendant/Respondent

Mr. Yogo for 2nd Defendant/Respondent & 3rd Respondent

CC: Moses