REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

MISC CIVIL CASE NO 52 OF 2012

M/S LUBULELLAH & ASSOCIATES ADVOCATES..... APPLICANT VERSUS

N.K BROTHERS LIMITED..... RESPONDENT

RULING

1. The Respondent's Notice of Motion application dated and filed on 5th August 2014 was brought pursuant to the provisions of Order 45 Rule 1 of the Civil Procedure Rules, Section 1A and 3A of the Civil Procedure Act and the inherent jurisdiction of the court. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

1. **Spent.**
2. **Spent.**
3. **THAT the warrants issued herein on 25th July 2014 be cancelled and/or quashed.**
4. **THAT the decision of this Honourable Court dated 31st July 2014 together with the one of 10th July 2014 be reviewed.**
5. **THAT there be an order for reconciliation of accounts to verify the sums which have been paid by the Respondent/Applicant and the verification to be done either by the parties themselves or an audit firm to be agreed upon or appointed by the Court.**
6. **THAT the costs of this Application be awarded to the Respondent/Applicant.**

2. When advocates for the parties appeared before this court on 21st October 2014, counsel for the Respondent indicated that the order seeking review of the order issued by the court on 31st July 2014 was no longer urgent and they were therefore only interested in the court reviewing its Ruling of 10th July 2014.
3. Although this was an application by N.K Brothers Limited, the Respondent herein, the court deemed it fit to refer to the parties in the same manner they were described in the heading herein to avoid confusion whether the Applicant would be referring to the said Respondent or M/S Lubullelah & Associates Advocates, the actual Applicant herein.

THE RESPONDENT'S CASE

4. The application was supported by the Affidavit of Rajesh Dayaram Rathod, the Respondent's Manager Finance and Administration that was sworn on 5th August 2014. From the affidavit evidence, it did appear to the court that the Respondent had sought a review of the court's Ruling

delivered on 10th July 2014 on the following grounds:-

a. **the Affidavit of Rustam Hira, its advocate and sums it had paid to the Applicant herein were not considered by the court when it rendered its Ruling of 10th July 2014.**
b. **the Applicant did not follow the procedure of extracting the Decree herein as its approval was not sought and obtained.**
c. **It had now annexed copies of cheques to prove payments that it had made to the Applicant herein.**

5. Its written submissions were dated and filed on 28th August 2014.

THE APPLICANT'S CASE

6. In opposition to the said application, on 12th August 2014,Anthony Milimu Lubullelah, the Applicant's Advocate swore a Replying affidavit on behalf of the Applicant. The same was filed on even date. The Applicant also filed a Notice of Preliminary Objection that was also dated 12th August 2014, on the same date.
7. The Applicant objected to the filing of the present application on the ground that the Respondent had already preferred an appeal at the Court of Appeal which was likely to be struck out for having been filed without leave of this court, that the said application was raising matters that were determined by the court in its Ruling of 10th July 2014, that this court was *functus officio* and that the processes under the Advocates Act and Advocates Remuneration Order had already been exhausted.
8. It was its contention that the Respondent had not provided any evidence to show that it had been unable to raise the issues in the present application at the time the court delivered its Ruling of 10th July 2014. It therefore urged the court to dismiss the application herein.
9. It filed its List of Authorities dated 13th August 2014 on the same date. Subsequently, it filed its written submissions and Supplementary List of Authorities dated 11th September 2014 on 12th September 2014.

LEGAL ANALYSIS

10. It is not in dispute that the court can review its own orders as has been stipulated in Section 80 of the Civil Procedure Act Cap 21 (Laws of Kenya) and Order 45 Rule 1 of the Civil Procedure Rules, 2010. Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 provides as follows:-

"Any person considering himself aggrieved-

a. **by a decree of 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 exercise of due diligence, was not within his knowledge or could not be procured 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."

11. Indeed, the court was in agreement with the position that was taken in **Nyayo Bus Services Corporation vs Firestone EA (1969) [1998] eKLR**, **Wakahiha vs Thiongo (1982-88) 1 KAR 1028** and **Wangechi Kimita vs Wahibiru (1982-88) I KAR 977** relied upon by the Respondent regarding the circumstances under which such a review can be undertaken.
12. Notably, the cases were distinguishable from the facts of this case which relates to taxation of costs. The Advocates Remuneration Order is a complete code that would render certain provisions of the Civil Procedure Act and Civil Procedure Rules, inapplicable. Appreciably, Order 52 of the Civil Procedure Rules only applications under Section 26 (2) and (6), Section 28(2), Section 45,

Section 45 (2), (4) and (5), Section 50 (1), Section 52, Section 62 (1), Section 73 (1) all of the Advocates Act Cap 16 (Laws of Kenya) are governed by the Civil Procedure Rules.

13. The rest of the Sections of the said Advocate Act would not come within the ambit of Order 45 Rule of the Civil Procedure Rules as Section 51 (2) of the Advocates Act implies finality once the court enters judgment on a Certificate of Costs.
14. However, assuming the court could invoke its inherent jurisdiction to review its decision under Section 51 (2) of the Advocates Act, the pertinent question here would be to establish whether or not the Respondent had met the threshold of review of orders, if at all, the grounds which the court shall assume are those under Order 45 of the Civil Procedure Rules, 2010 and if the court indeed can review its decision delivered pursuant to Section 51 (2) of the Advocates Act.
15. The Respondent argued that the Decree was not sent to it for approval. It referred the court to the case of **Carlos Santos vs Ndamper Enterprises & 3 Others [1998] eKLR** wherein the Court of Appeal held that a party in a suit had to send a decree approval to the other party (ies) whereupon it would be signed and sealed. In the said case, the officer who purported to have issued the decree disowned the same raising the question of how the Decree- Holder therein obtained the same.
16. Notably, the Client did not raise the issue of the decree in its application dated 30th July 2014, an application this court declined to certify as urgent. Once the court entered judgment in favour of the Applicant herein, it became *functus officio* and any other action was merely administrative in nature.
17. It therefore follows that the failure by the Applicant to have forwarded to it a draft of the decree was not a ground under which the court could possibly review its Ruling of 10th July 2014 as the court was for all purposes and intent *functus officio* in respect of its judicial functions relating to the delivery of the said Ruling. Failure of administrative duties could not amount to an error apparent on the face of the court record. The client would therefore not succeed on this ground. In any event, the Respondent did not appear to suggest that the failure of the Applicant to have forwarded to it a draft decree for its approval would have come under the ambit of Order 45 of the Civil Procedure Rules that it was relying upon.
18. As regards the payment that the Respondent alleged it had made to the Applicant herein and were not factored at the time of the taxation of the Applicant's Bill of Cost. In Paragraph 26 its Ruling of 10th July 2014, this court had the following to say:-

"The Respondent did not file a reference. In fact it was the Applicant that filed a reference after the costs were taxed. The Respondent cannot therefore approbate and reprobate. Having admitted that the decision that had been given by the taxing master was final, the Respondent cannot therefore be heard to say that amounts it had paid had not been credited. Once a reference had been determined, the court can do nothing more than to enter judgment as indicated in the Certificate of Costs. The matters raised by the Respondent herein do not obtain in this case and were for all purposes and intent, *res judicata.* The court cannot re-open the arguments of what or was not paid at this stage."

19. The court entirely concurred with the submissions by the Applicant that the issue of what the Respondent had and had not been paid to it were issues that could not be re-opened as the matters were *res judicata*. The matter was dealt with by the Taxing Master. Indeed, the Respondent could not purport to argue that it had now enclosed copies of cheques with a view to the court re-opening the proceedings that were before the Taxing Master or matters that could have been determined at the stage of filing of the reference and which this court noted the Respondent failed to do.
20. Similarly, the court would have no reason or legal basis to re-open the proceedings to allow for reconciliation of accounts either by a person mutually agreed upon by the parties or appointed by the court as had been contended by the Respondent. The Respondent was not able to demonstrate which provision of the law would empower the court to do so. Indeed, the court was not aware of any such provision.
21. The court was therefore in agreement with the holding of Kasango J in the case of **Nyamogo vs Nyamogo Advocates vs Mwangi [2008] eKLR** that was relied upon by the Applicant in which she stated as follows:-

"The Advocates Remuneration Order has elaborate procedure laid out for objecting to taxed costs. The application…are incompetent for seeking to rely on the Civil Procedure Act."

22. In view of the fact that the facts raised by the Respondent were *res judicata*, its submissions about annexing of cheques and reconciliation of accounts were not grounds under which the court could review its said Ruling as the court was very clear in its mind at the time of what the correct position of the matter was.
23. For the reason that the procedure of assessment and recovery advocates costs is well set out in the Advocates Act and the Advocates Remuneration Order, which are a complete codes in themselves and the Civil Procedure Rules would not be applicable unless as had been provided therein including procedures for enforcement of judgment, the provisions of Order 21 Rule 17 of the Civil Procedure Rules relating to taking of accounts as had been argued by the Client would not arise at all.
24. The court does not have any jurisdiction to order a reconciliation of accounts after it entered judgment under Section 51 (2) of the Advocates Act. In fact, as was rightly submitted by the Applicant, the assessment of quantum of its costs could not be transferred to a third party who was not a Taxing Master and more so because that Taxing Master had already made her finding on the issue of payments that had been made by the Respondent.
25. The Respondent also referred the court to the caseof **John Mark Nyaga Kamunyori t/a Kamunyori & Co Advocates vs Development Bank of Kenya (2007) eKLR** where Khamoni J (as he then was) held that upon procuring a taxation of a bill of costs and certificate of costs, an advocate should make a demand of the same and if the client fails to pay up, an advocate should file a substantial suit through a plaint and apply for summary judgment as provided for in the Civil Procedure Rules. It also placed reliance on the case of **Maina Murage t/a Maina Murage & Co Advocates vs MAE Properties Limited (2012) eKLR** in which Waweru J observed that the taxation of an advocate's bill of costs is a process of ascertaining the quantum of such costs.
26. The Respondent pointed out that it had erroneously previously referred to the case of **HC Misc App No 81 of 1999 M.G Sharma vs Uhuru Highway Development Ltd** which was overruled by the Court of Appeal in **Sharma vs Uhuru Highway Development Ltd [2001] KLR** where it was held that Paragraph 13 of the Advocates Remuneration Order was not in conflict with Sections 48 and 49 of the Advocates Act.
27. Appreciably, the aforesaid cases had addressed themselves to Sections 48 and 49 of the Advocates Act and Paragraph 13 of the Advocates Remuneration Order. The Applicant herein filed its application pursuant to the provisions of Section 51 (2) of the Advocates Act which was not the subject matter of the **Sharma vs Uhuru Highway Development Ltd** case (Supra). It would therefore not resolve the question of the entry of judgment under Section 51(2) of the Advocates Act vis – a – vis the filing of a suit for recovery of costs by an advocate.
28. A reading of the Advocates Act provides for two (2) ways in which an applicant may recover its costs. These are under Section 48 and Section 51 (1) of the Advocates Act which the court found necessary to reproduce to show the different approaches of recovery of costs by an advocate against his client.
29. Section 48 of the Advocates Act provides as follows:-

"(1) Subject to this Act no suit shall be brought for the recovery of any costs due to an advocates or his firm until after the expiry of one month after a bill of such costs, which may be in summarised form, signed by the advocate or partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to leave Kenya or abscond from the local limits of the Court's jurisdiction, in which event any action may be commenced before the expiry of the period of one month.

30. Under Section 49 of the said Act, it is provided as follows:-

"**Where in the absence of an agreement for remuneration made by Section 45, a suit has been brought by an advocate for the recovery of any costs and a defence is filed disputing the reasonableness or quantum thereof, no judgment shall be entered for the plaintiff,**

except by consent, until the costs have been taxed and certified by the taxing officer."

31. It appears to the court that if an applicant opts to proceed under Section 48 of the Advocates Act, he is required to proceed as follows:-

a. **Deliver or send by registered post to his client, a Bill of Costs.**
b. **Prepare the said Bill of costs which may be in a summarised form.**
c. **The advocate or a partner in the firm must sign the Bill of Costs.**
d. **Advocate or partner in the firm may bring suit for recovery of any costs after expiry of one (1) month after service of such Bill of costs**
e. **Where the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, the plaint should be accompanied by an affidavit verifying that, in which event action may be commenced before the expiry of the period of one (1) month.**
f. **If there is no defence filed by a Respondent, the taxing master will tax the bill of costs and issue a Certificate of Costs.**
g. **If there is a Defence, judgment can be entered by consent.**
h. **If there is no such consent, the taxing master will tax the bill of costs and issue a Certificate of costs.**

32. On the other hand, Section 51 (2) of the Advocates Act provides as follows:-

"**The certificate of the taxing officer by whom any bill has been taxed, shall unless it is set aside or altered by the Court, be final as to the taxed amount of the costs recovered thereby, and the Court may make such order in relation thereto as it thinks fit, including in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."** (emphasis court)

33. The Applicant herein opted not to file a suit for recovery of its costs as provided for under Section 48 of the Advocates Act. It applied for taxation of its Bill of Costs in accordance with Section 51(2) of the said Act. The Applicant was therefore under no obligation to comply with the provisions of Section 48 of the Act by filing a suit for the recovery of its costs against the Respondent herein.
34. The Respondent's counsel appears to have misinterpreted the full purport of Section 48 of the Advocates Act and the holdings of the Court of Appeal in the **Sharma vs Uhuru Highway Development Ltd** (Supra) **case.** The Court of Appeal was clear that an advocate who files a Bill of Costs for taxation need not file suit for the recovery of its costs against its client.
35. Once judgment is entered in favour of the advocate under Section 51 (2) of the Advocates Act, the court is unable to see what other judgment should be re-entered upon filing of a suit by such an advocate. The interpretation that suit would again require to be filed for recovery of the advocates costs' would appear superfluous bearing in mind that judgment would already have been entered under Section 51 (2) of the Advocates Act.
36. It is for that reason that the court rejected the Respondent's arguments that the Applicant herein was obliged to file suit for recovery of costs after the court delivered its Ruling on 10th July 2014 as the next course of action for the Applicant was to proceed with execution proceedings in the normal manner in the event the Respondent failed to settle the same as judgment would have been entered under Section 51 (2) of the Advocates Act.
37. The Respondent participated in all stages of the assessment of the advocates' costs and entry of judgment. It did not file a reference to demonstrate how the Taxing Master erred in principle and law thereby arriving at an erroneous decision. The horse bolted from the stable once judgment was entered and the court cannot re-open the proceedings as had been proposed by the Respondent. Litigation has to come to an end for the reason that the court can only do what it is permitted to be done under the provisions of the law.
38. Finally, the court wishes to address itself to the question of competency of the present application bearing in mind that on 16th July 2014, the Respondent lodged a Notice of Appeal dated 14th July 2014 to have this court's Ruling of 10th July 2014 overturned and/or set aside.

39. Order 45 of the Civil Procedure Rules provides as follows:-

"1.(1) Any person considering himself aggrieved-

a. **by a decree or order form which an appeal is allowed, but from which no appeal has been preferred; or**
b. **by a decree or order form which no appeal is hereby allowed,**

and who from the discovery of new and important matter or evidence which, after the exercise o 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 reasonable delay".

40. The Applicant referred the court to the case of **Republic vs Clerk County Council of Meru (2012) eKLR** where Makau J stated as follows:-

"In the instant application, the applicant seeks the review of this Court's decision and at the same time has lodged a notice of Appeal dated 30th December 2011 and served it on 5th January 2012. The right of review given by Section 80 of the Civil Procedure Act and Section (Order) 45 of the Civil Procedure Rules requires the Court to consider review application where an appeal lies but where no appeal was filed. In this case ex-parte applicant has a right of appeal as of right from judicial order and has already filed a notice of Appeal and served the same. It is trite law that a party who has filed a notice of Appeal cannot apply for review… I therefore agree with the respondent's counsel contention that by virtue of the applicant having filed and served a notice of Appeal this Court lacks jurisdiction to entertain the present ex-parte Applicant's application". (emphasis added).

41. Their argument was that an application for review would not be applicable where an appeal had been commenced by way of Notice of Appeal. This was also one (1) of its grounds in the Notice of Preliminary Objection.
42. On the other hand, the Respondent argued that no appeal had been filed yet and that the only document they had filed was a Notice of Appeal. It placed reliance on the case of **African Airlines International Limited vs Eastern & Southern African Trade & Development Bank (2003)** 1 EA page 1 where the Court of Appeal cited with approval a passage in Sarkar's Law of Civil Procedure 8th Edition Volume 2 at 1592 as follows:-

"Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of a court to hear review is not taken away if after the review petition, an appeal is filed by a by party. An appeal may be filed after an application for review, but once the appeal is heard the review cannot be proceeded with".

43. It was, however, the view of the court that the question of whether or not the Respondent could file an application for review after lodging a Notice of Appeal was really not a pertinent issue herein bearing in mind that the court found hereinabove that it did not have any jurisdiction to review its decision pursuant to Section 51 (2) of the Advocates Act as it was *functus officio* at that stage. This would be merely an academic exercise.
44. Accordingly, having looked at the pleadings, the affidavit evidence, the oral and written submissions and case law in support of the respective parties' case, this court came to the conclusion that the Respondent's present application was clearly misconceived and had no legal basis as was ably submitted by the Applicant.

DISPOSITION

45. Accordingly, the upshot of this court's ruling is that the Respondent's Notice of Motion application dated and filed on 5th August 2014 was not merited and the same is hereby dismissed with costs to the Applicant herein. The Applicant's Preliminary Objection dated and filed on 12th August 2014 is hereby upheld.
46. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 28th day of January 2015

J. KAMAU

JUDGE