



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL SUIT NO. 329 OF 2011**

**MEREKA & CO. ADVOCATE.....PLAINTIFF**

**VERSUS**

**ENG.A S. KITOLOLO.....DEFENDANT**

**RULING**

**PRELIMINARY.**

This Ruling should have been delivered on 23<sup>rd</sup> April 2015. However, it was delayed by my invitation to the Judicial Training Institute and my annual leave thereafter. On return to duty I found my secretary and court clerk were on transfer from Mombasa law courts. The delay is indeed regretted

**INTRODUCTION**

1. I have had occasion to rule on this matter by my Ruling dated 20<sup>th</sup> November 2014 wherein I set out the background of this matter. I will borrow from that outline in order to elucidate on the background of this matter.
2. Mereka & Co. Advocate (the advocate) represented Eng S K Kitololo T/A Kitololo Consultants Engineers (the client) in Mombasa HCCC No. 40 of 2006. The advocate had his advocate/client bill of costs, in respect to that representation, taxed on 7<sup>th</sup> October 2011 for Kshs 9,199,868/-
3. The advocate filed a Notice of Motion dated 4<sup>th</sup> November 2011 and although he stated it was brought under section 52(2) of the Advocates Act Cap 16, it really ought to have been under section 51 of the Act. This is because it sought judgment to be entered in respect of the taxed amount and such judgment can only be entered under section 51. That Notice of Motion, as far as I can tell, is still pending determination.
4. The client filed a reference against the Taxation of 7<sup>th</sup> October 2011 under paragraph 11(1) and (2) of the Advocates (Remuneration) order. That reference was by way of Chamber Summons dated 28<sup>th</sup> February 2012. It was heard and determined by judgment of R M Mwongo, J dated 11<sup>th</sup> April 2014. By that judgment the client's reference was dismissed. The client filed a Notice of Appeal against that judgment on 15<sup>th</sup> April 2014.
5. The client filed an application for stay pending appeal by Notice of Motion dated 6<sup>th</sup> August 2014 which was the subject of this court's Ruling of 20<sup>th</sup> November 2014.
6. By that Ruling the court gave conditional stay of execution that the client do within 21 days from the date of Ruling deposit into joint account of the advocates Ksh 9,199,868.
7. By the replying affidavit of the advocate sworn on 4<sup>th</sup> March 2015 which is not controverted, the advocate deponed that the client had failed to abide by the orders of that conditional stay of execution.

8. It is deponed by the client in its affidavit sworn on 16<sup>th</sup> December 2014, in support of the Notice of Motion dated the same date, that the client withdrew the Notice of appeal, filed on 15<sup>th</sup> April 2014, against the judgment of Mwongo J, of 11<sup>th</sup> April 2014. It is on the basis of that withdrawal that the client has filed the Notice of Motion dated 16<sup>th</sup> December 2014 which is for consideration in this Ruling.

### **NOTICE OF MOTION**

9. The notice of motion dated 16<sup>th</sup> December 2014 is for the following orders:

- a. ***That this hounourable court be and is hereby pleased to issue an order reviewing its judgment and/or ruling dated 31<sup>st</sup> March, 2014 by setting aside the same and in its place an order be made declaring the reference dated 28<sup>th</sup> February 2012 a nullity in law and an order striking out the chamber summons dated 28<sup>th</sup> February, 2012 be made.***
- b. ***That this honourable court be and is hereby pleased to enlarge time within which to file a reference and the applicant be granted leave to file a competent reference within a time to be fixed by the honourable court.***
- c. ***That the costs of this application be provided for.***

10. Prayer (a) above is directed at the judgment delivered by Mwongo J, on 31st March 2014. The main grounds for seeking that prayer are in the affidavit of the client sworn on 16<sup>th</sup> December 2014 as follows:

- a. ***That the reference giving rise to the judgment and/or ruling dated 31<sup>st</sup> March, 2014 and read in court on 11<sup>th</sup> April, 2014 was filed out of time without first obtaining the leave of the court and consequently the entire reference was a nullity ab initio and ought to have been struck out and not dismissed.***
- b. ***That the court lacked jurisdiction to entertain the reference as filed and consequently ought to have struck out the reference instead of dismissing the same as the application was on the face of it incompetent.***

11. The judgment of Mwongo J, of 31<sup>st</sup> March 2014 in part found that the reference against taxation was filed out of time as provided under paragraph 11 of the Advocates (Remuneration) Order of the Advocates Act, Cap 16. That paragraph requires a reference to be filed within fourteen days from the date the taxing master gives reasons for his taxation. It is that time limit that the client failed to abide with when they filed their reference. Further Justice Mwongo did find in his said judgment that the client's reference lacked merit. The learned judge considered previous decisions and also the basis of the taxing masters decision on taxation then stated:

***“In my view, the taxing master’s reasoning is elaborate, appropriate and valid and cannot be faulted.”***

12. That prayer of the Notice of Motion is premised on Order 45 of the Civil Procedure Rules. Rule 1(1) (a) and (b) of that order provides:

***“Any person considering himself aggrieved-***

- a. ***By a decree 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 sufficing 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”.***

13. An applicant to succeed in seeking review needs to come within the above Rule.

14. Learned counsel for the client in his written submissions submitted there was an error apparent on the face of the record justifying this court to review the judgment of 31<sup>st</sup> March 2014. This how he submitted on that error.

***“There is no dispute that the reference) (by chamber summons dated 28<sup>th</sup> February 2012) which was filed by the client/applicant herein was incompetent as the same was filed out of time without first seeking the court’s leave. It is our submissions that the court (Mwongo J,) having made that finding, the court ought to have struck out the application and not dismissed it.”***

The learned counsel proceeded to submit that Mwongo J, lacked jurisdiction to entertain the reference as drawn for want of leave.

15. Learned counsel for the client also highlighted another error on the face of the record which can be seen from the taxation of the taxing master. Learned counsel faulted the learned taxing master for having assessed the instructions fees on Ksh 640 million which according to counsel was not reflected in the plaint.

16. Counsel on this finally submitted that the mistake of the client’s previous counsel, presumably in filing the reference out of time, should not be visited on the client.

17. I have considered the replying affidavit of the advocate and his written submissions.

18. What is the client asking the court to determine by the first prayer? The client is in my view asking this court to determine that Mwongo J erred in having dismissed the Chamber Summons dated 28<sup>th</sup> February 2012 by his considered judgment of 31<sup>st</sup> March 2014. Secondly the client is asking this court to determine that the taxing master erred to have taken the value of Ksh 640 million to determine instruction fees.

19. In respect to that prayer the short answer I would give is that what the client seeks is an appeal disguised as an application for review and if I would entertain that prayer I would be going beyond the provisions of Order 45. The court of appeal in the case **DUBAI BANK KENYA LIMITED -V- KWANZA ESTATE LIMITED (2015) e KLR** dealt with this scenario and referred to the decision in JOHN PETER KAMAU RUHANGI -V- KENYA REINSURANCE CORPORATION ( 2012) e KLR as follows:

***“It is also not in dispute that Justice Aluoch had jurisdiction to hear the respondent’s review application, Justice Aganyanya having declined to hear it. What is in issue is whether or not, in hearing the application, Justice Aluoch, a judge of coordinate jurisdiction with Justice Aganyanya, went beyond the purview of review jurisdiction and in effect sat on appeal on Justice Aganyanya’s decision.”***

The Court of Appeal also in the case LIVINGSTONE KUNININ NTUTU –VS- COUNTY COUNCI OF MAROK & 2 OTHES (2015) e KLR deal with a similar case and stated:

***“If any of the parties was of the view that Khamoni, J. had erred in law in reaching the aforesaid conclusion; it was at liberty to appeal against that decision but not to seek a review. Mulla: the code of Civil Procedure, volume iii pages 3653-3653 states as follows:***

***The power of review can be exercised for correction of a mistake and not to substitute a view.***

***Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 rule 1 Code of Civil Procedure....***

***The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper”.***

21. In respect to the allegation that there should be review on the ground the taxing master allegedly misapprehended the value in the suit similarly cannot be the subject of a review because Mwongo J. by his judgment found as stated before that the taxing master’s reasoning in the taxation were valid and could not be faulted. For this court to allow a review on the ground that the taxing master erred would be to seat in an appeal against Mwongo J’s judgment. This court is of concurrent jurisdiction with Mwongo J’s court and an appeal before me is untenable. This court is functus officio on that issue.

This was so stated in the case:

**DICKSON MURICHO MURIUKI –VS- TIMOTHY KAGONDU MURIUKI & 6 OTHERS (2013)e KLR. The court of appeal in that case stated thus-**

**“In the absence of statutory authority, the principle of functus officio prevents this court from re-opening a case where a final decision and judgment has been made... We remind ourselves that the principle of functus officio is grounded on public policy which favours finality of proceedings. If a court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the supreme court or the court may change its mind or wishes to continue exercising jurisdiction over a matter, there would never be finality to a proceedings...Upon delivery of judgment, the rights of the parties have been determined and it is a legal requirement that the decree emanating from the judgment should be executed....If there are new points of law or circumstances that arise after judgment, this court is functus officio and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this court to the supreme court.”**

22. It is obvious from my above discussion that I find no error apparent on the record in the judgment of Mwongo J of 31<sup>st</sup> March 2014. The first prayer then fails.

23. That prayer having failed the second prayer must also fail because there cannot be an enlargement of time to file a reference since the reference was dismissed by Mwongo J’s judgment. Having been dismissed that prayer is resjudicata and contrary to provisions of section 7 of the Civil Procedure Act.

24. I have also noted that there is a pending Chamber Summons dated 16<sup>th</sup> July 2012 seeking similar prayer, that is, that the time of filing a reference be enlarged. For the client to again seek similar prayer by the Notice of Motion dated 16<sup>th</sup> December 2014 is abusing the process of the court.

On the whole the clients Notice of Motion dated 16<sup>th</sup> December 2014 is without merit and is misconceived.

## **CONCLUSION**

**25. The orders of this court are:**

**a) That the Notice of Motion dated 16<sup>th</sup> December 2014 is dismissed with costs to the advocate.**

**b) The advocates Notice of Motion dated 4<sup>th</sup> November 2011 has been outstanding for far too long. At the reading of this Ruling it shall be fixed for hearing.**

Dated at Mombasa this 25<sup>th</sup> day of June 2015.

**MARY KASANGO**

**JUDGE**

25.6.2015

Coram

Before Justice Mary Kasango

C/Assistant –Kavuku

For the Advocate:

For the client:

**Court**

Ruling delivered in their presence/absence in open court.

**MARY KASANGO**

**JUDGE**