



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO 344 OF 2013**

**KAWAMAMBANJO LIMITED.....PLAINTIFF**

**VERSUS**

**CHASE BANK (KENYA) LIMITED.....1<sup>ST</sup> DEFENDANT**

**REDHILL FISHERIES LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The 1<sup>st</sup> Defendant's Notice of Motion dated 7<sup>th</sup> May 2014 and filed on 8<sup>th</sup> May 2014 was brought under the provisions of Sections 1A, 1B and 80 of the Civil Procedure Act as well as Order 45 Rules 1 and 6 of the Civil Procedure Rules. It sought the following orders:-
  1. **THAT the ruling and order of this Court (Lady Justice Kamau) delivered on the 31<sup>st</sup> day March 2014 be reviewed in the following terms:**
    - a. **That the Chamber Summons dated 23<sup>rd</sup> September 2013 be and is hereby dismissed with costs to the 1<sup>st</sup> Defendant.**
  2. **THAT the costs of this application be awarded to the Defendant in any event.**

**THE 1<sup>ST</sup> DEFENDANT'S CASE**

2. The application was supported by the Affidavit of Elias Ngugi Mwenda, an Advocate of the High Court of Kenya, which was sworn on 7<sup>th</sup> May 2014. The 1<sup>st</sup> Defendant's Written Submissions were dated 11<sup>th</sup> March 2015 and filed on even date.
3. The application was based on grounds that there was an error apparent on the face of the record for the following reasons:-
  - a. **The court found that the letter of 27<sup>th</sup> July 2010 would have been admissible had it been annexed to the Replying Affidavit dated 6<sup>th</sup> September 2013.**
  - b. **The said letter of 27<sup>th</sup> July 2010 was exhibited as annexure "AK 10" of the Replying**

**Affidavit dated 6<sup>th</sup> September 2013.**

- c. **The court then proceeded to expunge “AK 10” which was the said letter of 27<sup>th</sup> July 2010 after it had found the said letter to be admissible.**
  - d. **Having established the link between “AK 8” and “AK 10” all the letters referred to are admissible as an exception to the exclusionary rule of without prejudice.**
4. In view of the above, it was the 1<sup>st</sup> Defendant’s case that the classification of the letter of 27<sup>th</sup> July 2010 “without prejudice” would prevent it from presenting in all its evidence before the court. In the circumstances, foregoing the Plaintiff implored the court to review and set aside its orders made herein on 31<sup>st</sup> March 2014.

#### **THE PLAINTIFF’S CASE**

5. In opposition to the said application, the Plaintiff filed Grounds of Opposition dated 24<sup>th</sup> June 2014 on 25<sup>th</sup> June 2014. Its Written Submissions were dated 20<sup>th</sup> March 2015 and filed on 23<sup>rd</sup> March 2015.
6. It contended was that no proper or sufficient grounds had been set to necessitate a review of the ruling of the court delivered on 31<sup>st</sup> March 2014 as per the requirements of Order 45 Rules 1 and 6 of the Civil Procedure Rules and that the application lacked merit and was an abuse of the court process.
7. In light of the foregoing, the Plaintiff urged the court to dismiss the application with costs to it.

#### **LEGAL ANALYSIS**

8. The court has power to review orders and/or judgment under Order 45 Rule 1 of the Civil Procedure Rules, 2010 where there is a mistake or error on the face of the court or where there is discovery of new and important evidence.
9. The 1<sup>st</sup> Defendant submitted that there was a clear error apparent on the face of the record as the court had found that the letter dated 27<sup>th</sup> July 2010 would have been admissible but expunged the said letter which was marked as exhibit “AK 10”.
10. On the other hand, the Plaintiff dissuaded the court from accepting the 1<sup>st</sup> Defendant’s argument that there was an apparent error when the court expunged exhibit “AK 10” from the record by referring to Paragraphs 29, 30 and 33 of the ruling to be reviewed. It was the Plaintiff’s submission that the said ruling was to be read in its entirety to avoid an absurd interpretation.
11. This court will address the paragraphs of the ruling to be reviewed as referred to by the parties herein in a chronological manner. Paragraph 29 of the said ruling states as follows:-

**“For the reason that the said Memorandum of acceptance did not flow from some of the “without prejudice” letters, this court agrees with the submissions by the Plaintiff that letters that were forwarded to the 1<sup>st</sup> Defendant’s Advocates by the Plaintiff and the 2<sup>nd</sup> Defendant prior to the execution of the memorandum of acceptance were privileged and could not be adduced as evidence without the consent of the Plaintiff and the 2<sup>nd</sup> Defendant.”**

12. Consequently, at Paragraph 30 of the said Ruling, the court went ahead and expunged copies of letters from the Plaintiff and 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant written prior to 12<sup>th</sup> August 2010. It is obvious that the letter of 21<sup>st</sup> July 2010 was written prior to 12<sup>th</sup> August 2010 and in that case one would assume the same was to be expunged.
13. However, the court qualified Paragraphs 29 and 30 at Paragraph 31 when it rendered itself thus:-

**“Indeed, the letter that would have been admissible even if the same was on a “without prejudice” basis would have been the letter of 27<sup>th</sup> July 2010 alluded to in the said letter of 12<sup>th</sup> August 2010 as it would have been admissible to give evidence of the terms of that letter.”** (Emphasis supplied)

14. The court has since noted that the said letter of 27<sup>th</sup> July 2010 was marked as exhibit “AK 10” and attached to the 1<sup>st</sup> Defendant’s Replying Affidavit sworn on 6<sup>th</sup> September 2013. In its ruling, the court had indicated that it would strike out some letters in exhibit “AK 10”. It, however, turns out that there is only one letter in the said exhibit which is the letter dated 27<sup>th</sup> July 2010.
15. From Paragraph 31 of the court’s ruling quoted above, it is plain that the court did not intend to expunge the said letter from the record. It had found that the same would be admissible even if it was on a “**without prejudice**” basis. The striking out of exhibit “AK 10” was an apparent oversight which can indeed be corrected under Order 45 of the Civil Procedure Rules by way of review.
16. Therefore this court was in agreement with the holdings in the cases of **Nancy Wanjeri & 5 others vs Michael Mungai [2014] eKLR** and **Michael Mungai vs Ford Kenya Election Board & 2 others [2013] eKLR** that were relied upon by the 1<sup>st</sup> Defendant whose common thread was that an error or omission on the face of the court had to be self evident.
17. Having considered the pleadings, the affidavit evidence and written submissions this court found that there indeed was an error apparent on the face of the record as envisaged under Order 45 Rule 1 of the Civil Procedure Rules. It was, however, worthy of note that the court only accedes to the apparent error of expunging exhibit “AK 10” being the letter dated 27<sup>th</sup> July 2010 as it had found the same to be admissible. The other annexures being “AK 6” and some letters in “AK 7” which were on a “**without prejudice**” basis remain expunged and rightfully so as has been explained in the ruling under review.
18. It was therefore not clear why the 1<sup>st</sup> Defendant couched its prayer for review in the manner that it did. It asked the court to dismiss the Plaintiff’s Chamber Summons dated 23<sup>rd</sup> September 2013 yet the court had already made a ruling on the same and allowed it partly. To dismiss the same would have amounted to an appeal and not a review. This court cannot sit on its own appeal.
19. Going further, the Plaintiff submitted that the 1<sup>st</sup> Defendant was guilty of laches, having filed the application over one (1) month after the delivery of the Ruling under review. The present application was filed on 8<sup>th</sup> May 2014, approximately twenty six (26) working days after the Ruling of 31<sup>st</sup> March 2014 was made. This court did not see any unreasonable delay in the said period and will therefore not belabor on that argument.

### **DISPOSITION**

20. For the foregoing reasons, the upshot of this court’s ruling was that the 1<sup>st</sup> Defendant’s Notice of Motion application dated 7<sup>th</sup> May 2014 and filed on 8<sup>th</sup> May 2014 was merited and the same is hereby allowed by deleting exhibit “AK 10” from Paragraphs 32 and 33 of the Ruling made on 31<sup>st</sup> March 2014. In essence exhibit “AK 10” has not been expunged from the 1<sup>st</sup> Defendant’s Replying Affidavit dated 6<sup>th</sup> March 2013.
21. The 1<sup>st</sup> Defendant partly succeeded in the current application. In view of the fact that the application for review herein was not the Plaintiff’s making each party will bear its own costs of the application.
22. It is so ordered.

**DATED and DELIVERED at NAIROBI this 23<sup>RD</sup> day of JULY 2015**

**J. KAMAU**

**JUDGE**