



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 624 OF 2009

**GICHUKI KING'ARA & COMPANY ADVOC.....
APPLICANT**

VERSUS

**MUGOYA CONSTRUCTION & ENGINEERING LIMITED
RESPONDENT**

R U L I N G

1. The Respondent herein filed a Notice of Motion dated 7th August 2012 seeking to review the decision of Musinga J. (as he then was) delivered on the 14th June 2012. Further, the Application sought an Order that this Court be pleased to substitute its Order entering judgement for the Applicant in terms of the Notice of Motion dated 23rd February 2012 with an Order requiring that the Respondent's Chamber Summons dated 30th April 2012 (which was part-heard) be heard to completion and a Ruling be given thereon. The Application was brought under the provisions of **section 80** of the *Civil Procedure Act*, **Order 45 Rule 1** of the *Civil Procedure Rules, 2010* as well as the inherent power of the Court. The Grounds upon which the Application was brought by the Respondent included the fact that it was aggrieved by the decision of Musinga J. as aforesaid, as it had been made on the basis of material nondisclosure. Further and in the alternative, it had been decided on the basis of an issue which had not been detailed in the Plaintiff's Notice of Motion dated 23rd February 2012 or the Supporting Affidavit in respect thereof.
2. The said Notice of Motion was supported by the Affidavit of the Managing Director of the Respondent company Mr. James Abiam Mugoya Isabirye sworn on 7th August 2012. The deponent noted that judgement had been entered against the Respondent by Musinga J. on 14th June 2012 when the learned Judge allowed the Application dated 23rd February 2012. He surmised that the Judge had considered that the Respondent had taken no steps to have its pending Application dated 30th April 2010 heard and finalised. He had been informed by the Respondent's advocates on record that such was not an issue that had been raised in the said Application dated 23rd February 2012. Invitations had been sent out to the Plaintiff to fix a date for the hearing of the said Application dated 30th April 2010 both on 24th January 2012 and 7th February 2012. Unfortunately, as he had been informed by the Respondent's said advocates, the court file could not be traced at the Registry. As a result the learned Judge seemed to have concluded that the court file was available all along.
3. The Plaintiff responded to the said Notice of Motion dated 7th August 2012 with a Replying Affidavit sworn by **Maureen Muthoni Mithamo** on 3rd October 2012. The deponent stated that she was an advocate of this Court practicing with the Plaintiff's advocates' firm. In her opinion, the Respondent had not demonstrated any grounds to warrant a review of the learned Judge's decision of 14th June 2012. The grounds supporting the Application for review had been within

the Respondent's knowledge and were dealt with at paragraphs 24 to 27 of the Judge's Ruling. She emphasised that the onus had been upon the Respondent all along to diligently prosecute its Application dated 30th April 2010. As a result, she felt that the Application was brought in bad faith and intended to obstruct and frustrate the Plaintiff's efforts to successfully execute its Judgement. Further, the Application had not demonstrated that there was any apparent error on the face of the record nor that there was discovery of such new evidence which would affect the outcome of the Court's said Ruling.

4. Much later on 18th September 2013, the Plaintiff filed a Notice of Preliminary Objection as regards the said Application before this Court. The same was raised on 4 grounds as follows:

“1. The provisions cited in support of the application do not confer on the court jurisdiction to issue the orders sought.

2. That the decision that the Respondent/Applicant seeks to review was issue in accordance to the Advocates Act and not under the Civil Procedure Rules and therefore this court has no jurisdiction to hear it.

3. **That the Respondent/Applicant is guilty of laches.**

4. The application is an abuse of the court process and thus ought to be dismissed with costs”.

It was these grounds upon which counsel for the Plaintiff submitted before Court on 8th January 2014.

5. The first point raised was that this Court has no jurisdiction to entertain the Application. The proceedings had been instituted under the provisions of the Advocates Act more specifically the Advocates Remuneration Order. That Order was a complete code in itself in relation to procedure before Court. However, the Respondent had brought its Application under the provisions of **Order 45** of the *Civil Procedure Rules, 2010*. Counsel pointed to **section 51 (2)** of the *Advocates Act* which provided that no application could be made once the Certificate of Taxation had been issued by the taxing officer unless the same had been set aside or altered by the Court. Secondly, the Applicant/Defendant had been guilty of laches for the reason that the Ruling of the Court, in which Judgement was entered in favour of the Plaintiff, had been delivered on 14th June 2012 and the application had been filed on the 7th August 2012. In counsel's view, the Application should have been brought before Court as soon as possible and there was no explanation as to why it was brought almost 2 months down the line. Thirdly, the Applicant was guilty of abuse of the Court process. There had been very clear directions given by the Court earlier in the proceedings with which the Applicant had not complied. Later, counsel for the Plaintiff submitted that such non-compliance involved the deposit of the entire suit amount of Shs. 29 million within seven days, which the Defendant/ Applicant had failed to do. Finally, counsel submitted that in the Application before Court, the Applicant had not demonstrated any grounds to support its review. In any event, the issues being raised by the Applicant had already been dealt with at paragraphs 24 - 27 of the Judge's Ruling. There was no error apparent on the face the record and there was no discovery of any new evidence. As a result, the application did not merit the threshold for the grant of review Orders. Counsel asked the Court to take into consideration the authorities that it had submitted under its list dated 11th November 2013.
6. Mr. Ohaga appearing for the Defendant/Applicant responded to the effect that the Application before Court had been brought not only under the Civil Procedure Act and Rules but also under the inherent power of the Court. He noted that that **section 2** of the *Advocates Act* defined “court” as the High Court so that if the application had been before a Magistrate's court or the Industrial Court, for example, there would have been no jurisdiction. However as the Application was before the High Court, **section 1 (2)** of the Act provided that when a party was before the High Court it was competent to invoke the provisions of the Act. **Section 5** of the Act provided that the Court had jurisdiction to try all suits of a civil nature. Counsel maintained that what is before this Court was a suit in terms of **section 2** of the Act and **section 5** of the same clearly conferred jurisdiction on the Court. Counsel went on to remind the Court that the Ruling of Musinga J. had arisen out of

the Plaintiff's Application dated 23rd February 2012. He maintained that counsel for the Plaintiff was contradicting himself by stating that the Civil Procedure Rules did not apply as that Application had been brought under **Order 23 rules 1 and 3, Order 51** of the *Civil Procedure Rules* as well as under **section 51** of the *Advocates Act*. Further, what flowed from that Application was the extraction of the Decree by the Plaintiff as there was no provision under the *Advocates Act* for such extraction.

7. As regards Mr. Ndegwa's submission that the Application had been brought in relation to **Rule 11** of the *Advocates Remuneration Order*, Mr. Ohaga submitted that the Defendant/Applicant was not challenging the decision of the Taxing Officer as to the quantum of the Bill of Costs but the decision of the Judge. The Defendant/Applicant had moved beyond **Rule 11** and counsel noted that an application had been filed under that Rule which was still awaiting determination. Counsel was of the opinion that the first limb of the Preliminary Objection was without foundation and he could also not see the objection raised in relation to **section 51 (2)** of the *Advocates Act* which referred to the review of a decision of a taxing officer. As regards the Defendant/Applicant being guilty of laches, counsel did not consider that a period of less than two months from the delivery of the said Ruling on 14th June 2012 until the filing of this Application on 7th August 2012 was an inordinate period of delay. In this case, it had been the extraction of the Decree on 24th July 2012 that had delayed the filing of the Application until 12 days later. In conclusion, Mr. Ohaga submitted that there had been no abuse of process as counsel for the Plaintiff had struggled to identify which direction of the Court had been breached by the Defendant/Applicant. As regards the Plaintiff's authorities, Mr. Ohaga could see no relevance in any of them so far as the Preliminary Objection was concerned. In a brief response, Mr. Ndegwa pointed out the fact that the authorities as submitted by the Plaintiff in some instances had been highlighted and, in his opinion, were relevant to the Preliminary Objection.
8. A Preliminary Objection is raised purely on a point of law or procedure. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A 696** Law, J.A (as he then was) held at page 700 *inter alia*;

"...so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..."

9. In the matter before this Court, the Plaintiff's objection to the Defendant's said Notice of Motion dated 7th August 2012 revolves primarily around the proposition that this Court has no jurisdiction to issue the Orders sought. It is the Plaintiff's counsel's submission that the Defendant's said Application is wrongly brought under the Civil Procedure Rules as opposed to the *Advocates Act*. With due respect and as pointed out by learned counsel for the Defendant, what is before Court by way of that Application is a review of the Ruling of Musinga J. dated 24th June 2012. In his said Ruling, the learned Judge enter judgement in favour of the Plaintiff in the amount of Shs. 29,497,765 .55 which was the amount of the Certificate of Taxation issued as a result of the taxation of the Plaintiff's Bill of Costs as regards **HCCC No. 671 of 2005**. As is obvious from the Court record, the Ruling emanated from the Plaintiff's Application dated 23rd February 2012 which, in no way, amounted to a reference from the finding of the taxing officer in relation to the said Bill of Costs. If that had been the case, then the provisions of the *Advocates Act* would have applied to the procedure to be adopted as before this Court. However, in the circumstances, the Defendant's said Application seeking a review is, in my view, perfectly properly before this Court not only under the provisions of **Order 45** of the *Civil Procedure Rules* as well as the inherent jurisdiction of this Court under the provisions of the *Civil Procedure Act*. I would endorse Mr. Ohaga's submission that **section 5** of the *Civil Procedure Act* clearly confers jurisdiction on this Court. I see no relevance in an application of this nature of the applicability of **section 51 (2)** of the *Advocates Act*.
10. As regards, the Plaintiff's counsel's submission that the Defendant is guilty of laches, I note that after the date of the delivery of Musinga J's Ruling on 14th June 2012, the Plaintiff went about extracting the Decree arising therefrom. That process took some time and the Decree herein was

eventually issued on 24th July 2012 and the Defendant's Application before Court was filed 12 days later. I do not consider such to be an inordinate delay and do not find the Defendant guilty of laches. Finally, the Plaintiff's Preliminary Objection touched on the abuse of the Court process. Mr. Ndegwa submitted that the Defendant had failed to comply with a direction of this Court but in his initial address to Court, he was unable to put his finger on the area of failure to comply. It was only when he replied to the submissions of Mr. Ohaga, that counsel was able to point to the Order made by Musinga J. on 14th June 2012, after he had delivered his said Ruling as aforesaid. On an oral application by Mr. Mwindi holding brief for Mr. Ohaga, the learned Judge in his direction no.2 detailed:

“Stay of execution is granted on condition that the respondent deposits in court a sum of KShs. 30 million within the next 7 days from the date hereof, failing which the order of stay shall automatically lapse and the applicant shall be at liberty to process a decree and thereafter do execution.”

It seems that the Defendant herein failed to abide by that condition but is that an abuse of the court process? In view of the fact that the learned Judge expressed his direction in the alternative, I do not see that the failure of the Defendant to deposit the Shs. 30 million as directed was an abuse of the Court process. The Judge gave the Plaintiff a remedy in the event that the said monies were not deposited in Court. Further, I see no relevance in the authorities quoted to this Court by the Plaintiff in respect of its Preliminary Objection.

11. As a result, I do not see any merit in the Preliminary Objection raised by the Plaintiff dated 18th September 2013 and I dismiss the same. Indeed at the hearing of the same, I expressed the opinion that the delay was inordinate in that the Plaintiff had taken over 13 months from the filing of the Defendant's said Application before Court to file its Preliminary Objection. The Defendant is now directed to set down its Application dated 7th August 2012 for hearing within 14 days from today. In default, the same will stand dismissed. In all the circumstances, I make no order as to costs of the Preliminary Objection.

DATED and delivered at Nairobi this 13th day of January, 2014.

J. B. HAVELOCK

JUDGE