EQUITY BANK LIMITED.....PLAINTIFF

VERSUS

CAPITAL CONSTRUCTION LIMITED.....1ST DEFENDANT

VENKATA CHAILULU GANTI..... 2ND DEFENDANT

PRASAD GANTI.....3RD DEFENDANT

AL KARIM BADRUDIN SUNDERJI.....4TH DEFENDANT

RULING

1. This ruling is in respect of two applications for review. The first one is dated 13th January, 2012 and was by the plaintiff/applicant seeking:

"That this honourable court be pleased to review and set aside the order of the Hon. Justice Musinga issued on 22nd November, 2011 directing the plaintiff/applicant to bear the defendants' costs for the struck out suit."

2. The second application is dated 23rd February, 2012 and was filed by **Ochieng' Opiyo & Company Advocates** for and on behalf of the estate of **Kenneth Omondi Watta** (deceased) who was an advocate previously acting for the plaintiff. Mr. Opiyo had been instructed by the Law Society of Kenya to manage and complete all pending briefs in the firm of Kenneth Watta, Watta & Associates. The application seeks:

"That this honourable court be pleased to review and set aside the order of Hon. Justice Musinga issued on 22.11.2011 directing that Mr. Kenneth Omondi Watta had not complied with Section 32 of the Advocates Act and further striking out the pleadings and bill of costs herein."

3. The genesis of the two applications is that on 20th April, 2010 the plaintiff filed an application seeking orders to strike out its own suit on the basis that it was filed by an incompetent firm of advocates and in contravention of **Sections 32** and **34** of the **Advocates Act**. The plaintiff had earlier filed another application seeking the same relief on the ground that it had not instructed Kenneth Omondi Watta to file the suit.

4. On 22nd November, 2011 the court delivered a ruling declaring that the pleadings filed by Watta & Associates as null and void, having established that Mr. Watta had contravened **Section 32** of the **Advocates Act** by engaging in practice on his own prematurely and thus struck out the entire suit including a bill of costs which he had filed in respect of services rendered to the plaintiff.

5. The court however established that the said advocate had been lawfully instructed by the plaintiff through one **Mr. Joseph Kamau,** who was the plaintiff's Fraud and Investigation Manager at the material time. The defendants, through **Messrs Otieno Ragot & Company Advocates** had entered appearance and filed a defence and therefore the court directed that the plaintiff do bear the costs of the suit since the defendants were not to blame for the institution of the suit by the plaintiff through Messrs Watta & Associates. The defendants had indeed incurred considerable expense in retaining advocates to defend the suit.

6. The plaintiff now contends that the order that it bears the defendants' costs for the struck out suit is contrary to the provisions of **Section 40** of the **Advocates Act** which states as follows:

"No costs in respect of anything done by an unqualified person in contravention of this part shall be recoverable in any suit or matter by any person."

7. The second application was filed on the basis that there is new and important discovery of facts that were not in the knowledge of the applicant when the application dated 20th April, 2010 was being argued. The new and important discovery was made by **Ochieng' Opiyo, Advocate**.

8. The application was supported by affidavits sworn by **Nesbit O. Ojwang Advocate** and **Alfred Ochieng' Advocate.**

9. Nesbit O. Ojwang practices in the name and style of O.N. Ojwang & Company Advocates. He stated that it was within his knowledge that the late Kenneth Omondi Watta, hereinafter referred to as "**Watta**", upon his admission to the Roll of Advocates, was employed as an advocate by his firm, O.N. Ojwang & Company Advocates from **1st July, 2005 until 14th December, 2007**. He annexed to his affidavit a copy of his own letter dated 5th July, 2005 addressed to the Secretary, Council of Legal Education, Kenya School of Law, which reads as follows:

"Dear Sir

REF: NOTICE PURSUANT TO SECTION 32 OF ADVOCATES ACT (LEGAL NOTICE NO. 94 OF 1999) KENNETH OMONDI WATTA ADVOCATE

The above matter refers.

We wish to inform you that the above named Kenneth Omondi Watta will be under my instruction commencing 1.7.2005, wherein he will be undertaking duties as an advocate under the direction and supervision of the undersigned.

Thanks in advance.

Yours faithfully,

O.N. Ojwang & Co. Advocates

(Signed)

Nesbit Ojwang

c.c. The Registrar

High Court Of Kenya

Nairobi."

10. Mr. Ojwang also annexed to his affidavit a copy of his letter dated 17th December, 2007 addressed to the Secretary, Council of Legal Education as hereunder:

"Dear Sir

REF: NOTICE PURSUANT TO SECTION 32 OF ADVOCATES ACT (LEGAL NOTICE NO. 94 OF 1999) – KENNETH OMONDI WATTA ADVOCATE

The above matter refers.

We wish to inform you that the above named Kenneth Omondi Watta has ceased being under my instructions with effect from 14.12.2007.

Thanks in advance.

Yours faithfully,

O.N. Ojwang & Co. Advocates

(Signed)

Nesbit Ojwang

c.c. The Registrar

High Court of Kenya

Nairobi."

11. Mr. Alfred Ochieng' in his affidavit stated that when Watta passed away he took over his law firm to preserve and secure his clients' interests.

12. Mr. Ochieng stated that he did not have access to any of Watta's personal documents since they had been taken away by his family members. When he was served with the plaintiff's application dated 20th April, 2010 he was unable to respond to the said application as he did not have any information pertaining to the matter in issue.

13. After delivery of this court's ruling on 22nd November, 2011 Mr. Ochieng alleged that he stumbled upon one **Zachary Mchapo Mkoba** who used to be the office court clerk of the late Watta. Mkoba informed Ochieng' that Watta had been employed by the firm of O.N. Ojwang before he established his firm. Thereafter Mr. Ochieng' met Mr. Nesbit Ojwang who confirmed that his firm had indeed employed Mr. Watta from 1st July, 2005 to 14th December, 2007.

14. In view of that fact counsel urged the court to review its ruling to the effect that Watta had violated the provisions of **Section 32 (1)** of the **Advocates Act** which states as follows:

"(1) Notwithstanding that an advocate has been issued with a practicing certificate under this Act, he shall not engage in practice on his own behalf either full-time or part time unless he has practiced in Kenya continuously on a full-time basis for a period of not less than two years after obtaining the first practicing certificate in a salaried post either as an employee in the office of the Attorney-General or an organization approved by the Council of Legal Education or of an advocate who has been engaged in continuous full-time private practice on his own behalf in Kenya for a period of not less than five years."

15. Since the determination of the question as to whether Mr. Watta was qualified to practice on his own when he was instructed by the plaintiff is central in the two applications, I will start by determining the second application whose findings shall affect the outcome of the first application.

16. The defendants responded to the second application through an affidavit filed by **Pauline N. Sewe**, an advocate practicing in the firm of **Otieno, Ragot & Company Advocates** who are on record for the defendants. She opposed the application saying that the defendants were entitled to their costs. She added that the defendants had all along opposed the plaintiff's peculiar applications seeking to strike out their own pleadings instead of simply withdrawing the suit with costs to the defendants.

17. The plaintiff opposed the second application through an affidavit sworn by **Daniel Muiruri,** its Credit, Legal Services Manager. He stated that Watta took out his practicing certificate for the years 2005, 2007 and 2008 on 30th June, 2005, 11th October, 2007 and 26th March, 2008 respectively. That was confirmed by the Law Society of Kenya through its letter of 4th March, 2010. That means that the advocate never took out practicing certificate for the year 2006, a fact confirmed by the Law Society of Kenya on 4th April 2007.

18. Watta had stated that he did not take out his practicing certificate for the year 2006 because he was in the United States of America and came back on **19th April, 2007**. In his letter dated 24th April, 2007 addressed to the Secretary, Law Society of Kenya, and which was annexed to Mr. Muiruri's affidavit, Watta stated, *inter alia*:

"I am an advocate of the High Court of Kenya admitted to the Roll of Advocates on 23rd June, 2005. I have been living overseas for some time and last took out a practicing certificate in 2005. I am in the process of applying for admission to the New York Bar."

On 19th June, 2007 in his statutory declaration forwarded to the Law Society of Kenya, in response to the question relating to his work/employment from 1st January, 2006, Watta stated as follows:

"As of January 1st 2006 I was preparing to leave the country, and did infact leave the country to join my spouse in the USA on January 18th 2006. Subsequent to that I was gainfully employed in the USA until March 30th 2007. I returned to Kenya to resume residence on April 19th 2007."

19. In a further letter dated 30th June, 2007 Watta informed the Council of Legal Education that:

"I did not take out a practicing certificate for 2006 because I moved overseas to join my family in the USA. Please find copies of the relevant pages of my passport attached in evidence of that fact. In further evidence I am also attaching a copy of a letter of attestation in respect of my employment from July 2006. I have recently moved back to Kenya and wish to take out a practicing certificate for 2007. I wish to request the Council for an exemption from the Continuous Legal Education (CLE) requirements for 2006 so as to enable me to take out the practicing certificate for 2007. I can confirm that during the period of my absence from Kenya I did not practice on my own, alone, or in partnership, nor did I hold or receive any client's money."

20. All the above documents bear the stamp of the Law Society of Kenya. In his declaration to accompany his application for practicing certificate for the year 2008 dated 25th March, 2008 Watta did not name his employer or the firm he was practicing in. He simply stated "N/A".

21. These averments by Watta are in sharp contrast with the contents of Mr. Ojwang's affidavit that the said Watta was in his employment from 1st July, 2005 to 14th December, 2007.

22. Under **Section 32 (1)** of the **Advocates Act,** an advocate is required not to engage in practice on his own unless he has practiced in Kenya continuously on a full-time basis for a period of not less than two years after obtaining the first practicing certificate in full-time employment either in the office of the

Attorney General or an organization approved by the Council of Legal Education or by an advocate who has been in continuous full time practice on his own in Kenya for a period of not less than five years.

23. In the statutory declarations that accompany an application for a practicing certificate an advocate is required to indicate where he was gainfully employed in the previous year. In the declaration that was attached to Watta's letter of 30th June, 2007 he indicated that from 1st January, 2006 to 30th March, 2007 he was gainfully employed in the United States of America. He returned to the country on 19th April, 2007. That being the case, Watta cannot have been in the employment of O.N. Ojwang & Company advocates from 1st July, 2005 to 14th December, 2007. If that was so Watta would have made such a declaration in his lifetime.

24. Being so persuaded, I reiterate that Watta opened up his firm on 29th April, 2008 in contravention of **Section 32 (1)** of the **Advocates Act** and consequently the second application for review must fail.

25. Turning to the first application, Ms. Sewe contended that no possible reasons and/or new discovery have been advanced to warrant a review of the orders. She further stated that the application does not meet the threshold for grant of orders under the provisions of **Order 45 rule 1** of the **Civil Procedure Rules.** She added that there had been unreasonable delay in bringing the application in that the orders sought to be reviewed were made on 22nd November, 2011 and the application for review was filed on 13th January, 2012.

26. The plaintiff's application does not precisely state the reason for seeking a review of the order directing it to bear the costs of the struck out suit. An application for review must be premised on at least one of the grounds set out under **Order 45 rule 1** of the **Civil Procedure Rules.** The rule states as follows:

'1 (1) Any person considering himself aggrieved –

(a) by a decree or order for 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, is 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 unreasonable delay."

27. The plaintiff contended that there is sufficient reason to warrant a review of the ruling. The plaintiff was merely dissatisfied with the order for payment of costs which it states is contrary to the provisions of **Section 40** of the **Advocates Act.**

28. The question as to who was to pay the costs was hotly contested by parties. The plaintiff never contended that costs of the suit were not payable. The issue was whether the costs were to be paid by itself or by Watta. The court gave its decision on the issue. The court was well aware of the provisions of **Section 40** of the **Advocates Act.** It cannot therefore be said that there was an error apparent on the face of the record in the court's ruling in respect of payment of costs. If the plaintiff was not satisfied with the said decision the right thing to do was to file an appeal against the same. In **NYAMOGO & NYAMOGO ADVOCATES v KOGO [2001] 1 E.A. 153**, the Court of Appeal held that a mere error or wrong view of evidence or law is not a ground for a review although it may be a ground for an appeal.

29. As regards the provisions of **Section 40** of the **Advocates Act,** the court stated that Watta was qualified to act as an advocate in terms of **Section 34** of the **Advocates Act** but he was not qualified to practice on his own. There is a difference between the two. **Section 40** falls under **Part VIII** of the **Act**

which relates to provisions with respect to unqualified persons acting as advocates. If Watta had not taken out a practicing certificate for the year 2009 he would not have been qualified to practice as an advocate but that is not the case here. If it was Watta who was seeking to recover costs of the suit the plaintiff would be justified in opposing that attempt but not when the costs sought to be recovered are payable to defendants who were dragged to court by the plaintiff.

30. **Section 40** should be read together with **Section 34** of the **Act** which prohibits an unqualified person from taking instructions or drawing any document or instrument. An unqualified person is defined by the Act to mean a **"person not qualified under Section 9 to act as an advocate"**. **Section 9** states as follows:

"Subject to this Act, no person shall be qualified to act as an advocate unless –

(a) he has been admitted as an advocate; and

(b) his name is for the time being on the Roll; and

(c) he has in force a practicing certificate."

No costs in respect of anything done by such an unqualified person can be recoverable in any suit by any person. The law is silent as regards costs payable to a third party on account of work done by a duly qualified advocate who chooses to open up a law firm contrary to the provisions of **Section 32** of the **Advocates Act**.

31. In dismissing the plaintiff's contention that the costs of the suit ought to be paid by Watta, the court stated the reasons why that was improper in law and as earlier stated, whether the court's findings are right or not is an issue for an appeal rather than review.

32. Regarding the defendants' contention that there was inordinate delay in filing the application, I do not agree because the period between 22nd November, 2011 when the ruling was delivered and 13th January, 2012 when the application was filed is less than two months. There was Christmas and New Year vacation in between.

33. Lastly, the defendants contended that the plaintiff's application was bad in law since the orders sought to be reviewed had not been extracted and annexed to the affidavit. The defendants cited, *inter alia,* **KENFREIGHT E.A. LIMITED v STAR EAST AFRICA COMPANY LIMITED [2002] 2 KLR 783,** where it was held that a party who seeks to apply for review of an order must extract the order sought to be reviewed and annexe it to the affidavit in support of the application. That requirement dates back to 1929/1930 when the Court of Appeal so held in **G.N. JIWAJI vs JIWAJI & ANOTHER (1929-30) 12 KLR 44**.

34. While the above submission may be right in law, I do not think that in the new constitutional dispensation it can be a ground for dismissing an application for review that is otherwise merited. I say so because **Article 159 (2) (d)** of the **Constitution of Kenya, 2010** requires the court to administer justice without undue regard to procedural technicalities. The defendants were not prejudiced in any way by the plaintiff's failure to extract the orders following delivery of the ruling of 22nd November, 2011.

35. The provisions of **Article 159 (2) (d)** of the **Constitution of Kenya, 2010** are very important in dispensation of justice. The inclusion of such a provision was very deliberate and I believe it was informed by public outcry regarding serious injustices that were occasioned to litigants due to the judiciary's rigid observance of procedural technicalities. **Article 159 (1)** states that judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under this Constitution, and I may add, in accordance with the provisions of the Constitution. If courts continue to accord procedural technicalities undue prominence in administration of justice they will be negating an important constitutional requirement.

36. All the authorities that were cited by the plaintiff in support of that submission were decided before promulgation of the **Constitution of Kenya, 2010** which brought in a different dimension in administration of justice in so far as reliance on procedural technicalities is concerned. The authorities are therefore distinguishable on that basis.

37. In view of the court's finding that the applications for review do not lie, the two applications are dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE, 2012.

D. MUSINGA

JUDGE

In the presence of:

Muriithi – Court Clerk

Mr. Anam for the Plaintiff

Miss Sewe for the Defendants and holding brief for Mr. Opiyo

Miss Kareithi for Mr. Wandabwa for the Defendants in HCCC 559/09