REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Suit 10 of 2010 & 119 OF 2002

DUNCAN NDERITU NDEGWA ……………………...….......………….……………1ST PLAINTIFF

KEREMARA HOLDINGS LIMITED…..…………...…........…...…………………2ND PLAINTIFF

VERSUS

INDUSTRIAL DEVELOPMENT BANK LIMITED…........…………………........1ST DEFENDANT

MARIO JULIENNE……………….........………………………..………………2ND DEFENDANT

BETWEEN

DUNCAN NDERITU NDEGWA KEREMARA HOLDINGS LIMITED….CLIENTS/APPLICANTS

AND

GATHENJI & COMPANY…………………............……………...ADVOCATES/RESPONDENTS

R U L I N G

1. By a Chamber Summons brought under the provisions of Order 45 Rule 1 of the Civil Procedure Rules, Sections 1A and 3A of the Civil Procedure Act, the Clients/Applicants (hereinafter “the Applicants”) sought the review of the orders made on 9th November, 2011. The Applicants relied on the grounds on the body of the motion and the Supporting Affidavit of Duncan Nderitu Ndegwa and the Supplementary Affidavit of Robin Muriuki Ndegwa sworn on 23rd November, 2011 and 13th March, 2012, respectively.

2. The Applicants contended that unless the order of 9th November, 2011 is reviewed, the same would cause an injustice to the Applicants and unjustly enrich the Respondent, that the court had erroneously granted the order on 9th November, 2011 allowing the Respondent’s to have the Bill of Costs re-assessed. It was submitted on their behalf that the taxing master was right the first time round and that the subject matter of the suit had been valued at a much lower value of Kshs. 265,000,000/- as assessed by the government valuer, that the value of Kshs. 800,000.000/- that the Respondent relied on was a ***guesstimate*** and the perception of a layperson. It was further submitted that even though the Advocates (Remuneration) Order, 2009 did not govern issues as pertaining to review of Advocates remuneration, the Civil Procedure Act provided for review of the same. Reliance was placed on H.C.C.C 416 of 2004 **Nyakundi & Company Advocates v Kenyatta National Hospital Board (2005) eKLR** where the court

held that under its inherent jurisdiction it could apply the normal rules of Civil Procedure in matters of taxation and **Kenya Pipeline Company Limited v Nyamongo & Nyamongo Advocates (2006) eKLR** wherein the court was of the view that the Advocates Remuneration Order was a complete legal regime by itself. Also Counsel for the Applicants relied on the case of **Lubullellah & Associates v Kenyatta National Hospital (2010) eKLR** where the court was of the view that Sections 1A, 1B and 3A of the Civil Procedure Act, would entitle the court to intervene in any matter under the Advocate Remuneration Order.

3. In opposition, the Respondent filed a Replying Affidavit sworn on 30th November, 2011. The Respondent contended that the application was incompetent, bad in law and otherwise an abuse of the Court process, that Order 45 did not apply to an objection or reference under the Advocates (Remuneration) Order nor did Sections 1A and 3A of the Civil Procedure Act. He contended that during the reference of the matter, the Applicant did not refer the court to the issue of the value of Kshs. 265,000,000/- now being raised, that the Applicant had averred under oath in two affidavits sworn on 4th February, 2002 that the value of the subject matter was Kshs. 800,000,000/-, that in those affidavits the Applicants did not indicate that the said value of the property was speculative. The Respondent further submitted that the value of the subject matter was discernible from the pleadings and that the figures of Kshs. 265,000,000/- now being alluded to were not before the court before the ruling of 9th November, 2011.

4. I have carefully considered the application, the affidavits on record, the written submissions, the oral highlights by counsel as well as the authorities referred to. Order 45 of the Civil Procedure Act provides that;

"1.1 Any person considering himself aggrieved-

(a) ***By a decree or 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 at 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 the judgment to the court that passed the decree or made the order without unreasonable delay."

The proviso to Order 45 Rule 3 provides:-

"Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation." (Emphasis added)

In the **Mulla on the Code of Civil Procedure, 16th Edition** at page 1191, the learned authors state that:-

"…..the scope of the power of review envisaged under Order 47 Rule 1 of the CPC is very limited and the review must be confirmed strictly only to the errors apparent on the face of the record. Re-appraisal of the evidence on record for finding out the error would amount to exercise of appellate jurisdiction which is not permissible by the statute."

In **Kithoi v Kioko (1982) KLR 177**, page 181, the Court of Appeal held that;

"The Civil Procedure Rules Order XLIV demands inter alia, that an application for review must be

based in the discovery of new of new and important evidence which was not within the applicant's 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 on the face of the record or for any other sufficient reason. The application for review must strictly prove the grounds for review, except for review on the ground of mistake or error apparent on the record, falling which the application will not be granted."

5. From the foregoing, it is clear that for an application for review to succeed, the applicant must show that there was an error or mistake apparent on the face of the record or that there is new evidence that is material to the matter that was not available to the Applicant at the time the orders were issued or the decree was passed or for any sufficient reason. Although the Applicants did not precisely state under which limb of Order 45 Rule 1 of the Civil Procedure Rules they were making the Application, the reading of the Affidavits and submissions would show that the application is made on the basis of discovery of new evidence and any other sufficient reason. The Applicants contend that the value of the subject matter was Kshs. 265,000,000/- and annexed a valuation report from the government valuer to support their claim, they also contended that the value given to the court in the pleadings of Kshs. 800,000,000/- was speculative and the Applicants not being valuers could not be held liable for guessing that value of the property. The question therefore that arises for consideration is, was the value of Kshs. 265,000,000/- new evidence and, is the fact that the property the subject matter of the suit was sold at Kshs. 265,000,000/- sufficient reason under Order 45 Rule 1 to warrant a review of the orders of 9th November, 2011?

6. Before addressing the merit of the Application, I need to address the issue as to whether there is jurisdiction to review an order made under the Advocates Remuneration Order. It has been contended that the issue of costs is fully addressed by the Advocates Remuneration Order as a complete legal regime by itself. I have considered the decisions which are to the effect that the provisions of the Civil Procedure Act and the rules made thereunder are not applicable to matters governed by the Advocates Remuneration Order. Some of these are **First American Bank of Kenya v Gulab P. Shah & Others H.C.C.C No. 2255 of 2000 (UR),** Kenya Pipeline Company Ltd v Nyamogo & Nyamogo Advocates **(2006) eKLR,** **Sharma v Uhuru Highway Development Ltd C.A No. 133 of 2000 (UR) and Machira & Company Advocates v Magugu (2002) 2 E.A 428**. In those decisions, the central issues were the issue of assessment or taxation of costs. I do agree with them to the extent that taxation of costs and matters related thereto are the preserve of the taxing master. However, once a reference is made to the High Court, my view is that the judge cannot be hamstrung by the said complete legal regime that is the Advocates Remuneration Order. I believe the court may, in appropriate cases, resort to the provisions of the Civil Procedure Act and Rules that give the court liberty to take any action and/or course for the ends of justice. This I believe is the purpose for which Section 1A and 1B of the Civil Procedure Act were enacted by our legislature to enable courts to mete out substantive justice. I believe that were these decisions made after the coming into force of Sections 1A and 1B of the Civil Procedure Act, those decisions would have probably been different. They would have allowed the application of the Civil Procedure Act and Rules in appropriate cases for matters under the Advocates Remuneration Order for the ends of justice. Accordingly, I believe and so hold that a judge who has heard a reference under Rule 11 of the Advocates Remuneration Order has the jurisdiction to re-look at his decision by way of review. Holding otherwise, will in my view, be a travesty of justice. Courts are not to interpret statutes so narrowly as to limit the citizen's rights or restrict the citizen's right to seek and/or approach the seat of justice but broadly enough to protect those rights. Accordingly, the Applicants' application is properly before me for consideration.

7. Turning to the merits of the application, the Applicants contention is that there is a government valuation which valued the property, the subject matter of the suit at Kshs. 265,000,000/- for which the property was eventually transferred, that allowing the costs to be taxed at Kshs. 800,000,000/- will be wrongly enriching the Respondent that this was sufficient reason to review the orders of 9th November, 2011. The Respondent submitted that the documents being relied on were present at the time the court made its decision of 9th November, 2011 but were never availed to the court.

8. I have seen the Exhibit 'DNN 1' produced by the Applicant. It is a transfer dated 8th August, 2007 by IDB Capital Limited to Equatorial Hotels Ltd. The same is for the property known as L.R MN/1/4178 for

Kshs.265,000,000/-. Two issues arise. Firstly, that transfer document was available at the time the court heard the parties and delivered the ruling of 9th November, 2011. It cannot be said to be new evidence that has been discovered that was not available at the time of making the order. Secondly, although that transfer is in respect of the property known as L.R No. MN/1/4178, the suit was in respect of the assets of the Applicants including the hotel erected on that property. My view is, the hotel must have included moveable assets which were secured by a Debenture dated 14th September, 1983 which was both before me and the court that dealt with the suit wherefrom these proceedings arise. The transfer exhibited is only on the land and the improvements. We are not told of the other moveable assets for which the 2nd Applicant swore to be valued at Kshs.800,000,000/-! To my mind, I see no sufficient reason here to upset the order of 9th November, 2011.

9. The other issue is, since there was no compromise in this suit and since the sale was not recorded in court as a settlement of the parties, I still believe that the court cannot receive any extraneous evidence to prove the value of the subject matter of the suit other than to go by the pleadings. Indeed this is what I understand the Court of Appeal to have said in the case of **Joreth Ltd v Muturi Kigano & Associates C.A No. Nai 166 of 1999** where it was held that the taxing master was right to ignore the valuations that were placed before him in arriving at his decision on the value of the subject matter.

10. On the issue that the 2nd Defendant was not a professional valuer when he placed the value of the subject matter at Kshs.800,000,000/-, a simple answer to that is, by having made such a wild allegation that a property of such a colossal sum was about to be sold at an undervalue, the court believed him and hurriedly granted him an injunction. How can the Applicants now turn around and seek to rescile from that position. Can they be allowed to tell the same court, **"well, we think we lied to you about the value of the property. Actually, the value was so little and we should be held by that and not what we told you on oath"** I do not think any court of equity or even law should or can allow them that opportunity.

In the premises, I hold the view that the application is without merit and I decline to allow it.

Orders accordingly.

DATED and DELIVERED in NAIROBI this 28th day of September, 2012

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A. MABEYA

JUDGE