



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**MISC. CIVIL SUIT NO. 206 OF 2003**

**NYAMOGO & NYAMOGO ADV.....APPLICANT**

**VERSUS**

**KENYA BUS SERVICES LTD.....RESPONDENT**

**RULING**

The Applicant, the firm of Nyamogo & Nyamogo Advocates, have made an application under the provisions of Order XLIV Rule 1 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act seeking the following orders;

- (i) There be a stay of the hearing of the reference set for the 25th of March 2004.***
- (ii) The Ruling of H on. Mr Justice Daniel K. Musinga dated the 21st of January 2004 be reviewed.***
- (iii) There are errors apparent on the face of the record on matters of law and sufficient reason for review.***
- (iv) The Notice of Motion dated the 7 th of May 2003 be placed before another Judge for a re -hearing.***

The Application is based on the grounds that the ruling delivered by the said Court was in conflict with rule 11 (2) of the Advocates Remuneration Order; that there was no proper reference filed before this Court and therefore the setting of a hearing date was improper; that the ruling dated the 21st of January 2004 was in conflict with other rulings of other Courts of the same jurisdiction; that the decision as to whether the Applicants were the Advocates of the Respondent did not take into account the evidence of John Oloo who stated that they appointed the Applicants from the panel of lawyers provided by Kenya Bus Services Ltd; that the Respondent's Advocates (Mr Onyancha Bw'omote & Company ) were appointed in the same manner this fact having been stated clearly at page 5 (paragraph 1) of the ruling dated the 21st of January 2004; that the issue of the final fee note could be settled by taxing master after the bill of costs has been filed and taxed in accordance with Sections 36, 45, and 46 of the Advocates Act and the relevant provisions of the Advocates Remuneration Order and finally that the Ruling dated the 21st of January 2004 is a final order in an interlocutory application which is illegal. The Application is supported by the annexed affidavit of Nyamodi Ochieng-Nyamogo.

This Application is opposed. The Respondent has filed a replying affidavit in opposition to the Applicant's application. The said replying affidavit is sworn by Onyancha Bw'omote. This application was listed for hearing before Justice Musinga who however disqualified himself from hearing the Application on account of the issues raised by the Applicant touching on the impartiality of the said Judge. The parties agreed by consent to have this application heard by this Court. At the hearing of the Application Mr Nyamogo, Learned Counsel for the Applicant argued the application basically reiterating

the contents of the application and the affidavit in support of the Application.

The Applicant submitted that the said ruling was full of errors on the face of the record. The Applicant submitted that the Application before the Court was for leave to file a reference and instead of deciding on the issues in the application the said Court made a determination on the reference itself, which reference had been filed in the first place without leave. It was the Applicants submission that there was no competent reference before the Court. The Applicant further submitted that it discovered the fact that the Honourable Judge was still acting for the Respondent. It was the Applicants submission that the said Court ought not have heard an application involving his client. The Applicant submitted that the issue of who was a client was not a matter in issue before the said Court. The Applicant was aggrieved that the Court made a ruling on the said point yet the parties had not been given an opportunity to canvass the same. The Applicant submitted that the said Court was in error as it gave a decision that was contrary to the decisions of Courts of similar or concurrent jurisdiction. The Applicant further submitted that its right to a fair hearing in the reference was therefore prejudiced by the said decision. The Applicant prayed that the Application be allowed as prayed and an order be made that the reference be heard by another Judge other than the Honourable Justice Musinga.

Mr Nyawancha, Learned Counsel for the Applicant opposed the Application. He relied on the replying affidavit filed by the Respondent. He submitted that on the face of it the application was similar to an appeal. It was his submission that the Applicant ought to have filed an appeal and not make an application for review under the provisions of **Order XLIV of the Civil Procedure Rules**. The Respondent submitted that the issue as to who was a client had not been canvassed before any other Judge other than the Judge who heard the application. The Respondent further submitted that all the issues which the said Court delivered its ruling on were canvassed before the said Court by the parties herein. The Respondent submitted that if the Applicant was aggrieved he ought to have filed an appeal. Mr Nyawancha further submitted that the Respondent had never at any time been a client of the Honourable Judge when he was in private practice. It was the Respondent's submission that the Application was brought in bad faith as no document was annexed to prove the allegations made by the Applicants. The Respondent submitted that the Application was filed purposely to circumvent the ends of justice and to forestal the hearing of the reference filed.

I have considered the rival arguments made by Counsel for the Applicant and Counsel for the Respondent. I have also read the pleadings filed in Court by the parties to this application. The issue for determination is whether the application for review is properly before this Court. If the answer to the above question is positive, then the other issue for determination is whether the Applicant has established a case as to entitle this Court to grant them the orders sought. From the submission made by the Applicant, it is evident that the Applicant was aggrieved by the ruling of the Learned Judge. The Applicant was aggrieved that the Learned Judge delivered a ruling, which in their opinion, was contrary to the law and further was against decided cases by other Courts of similar or concurrent jurisdiction. To further throw spanners in the works, the Applicant has alleged bias on the part of the Learned Judge. The Applicant has sworn an affidavit to the effect that the Learned Judge was an Advocate for the Respondent prior to his appointment to the bench. This is a serious allegation which I will address later in this ruling.

The powers of this Court to review its **decree or order is provided for under Order XLIV Rule 1 of the Civil Procedure Rules**. This Court can review its decision when it is proved by the Applicant that he has discovered a new or 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 the decree was passed or the order made. Review can be ordered where it is proved that there was some mistake or error apparent on the face of the record or for other sufficient reason. Review can only be ordered with certain parameters of the law.

In Abasi Balinda –versus- Frederick Kagwamu & Anor [1963] E A 557 it was held by a Court of concurrent jurisdiction that, (at page 558 paragraph E)

***“It is plain from paragraphs 4 and 5 of the affidavit in support of this application and from the contentions of Counsel that this Court is being asked to review its***

*order for costs on the ground that the Court is said to have taken an erroneous view of the evidence and the law relating to the question whether the returning officer was a necessary party to the Petition.... Section 83 of the Civil Procedure ordinance (similar to Section 80 of our Civil Procedure Act) confers upon this Court jurisdiction to review its own decision in certain circumstances and order 42 ( similar to our Order XLIV of the Civil Procedure Rules ) prescribes conditions subject to which and the manner in which that jurisdiction shall be exercised. Order 42 rule 1 ( similar to our order XLIV Rule 1 Civil Procedure Rules ) of the Uganda Civil Procedure Rules is identical with order 47 rule 1 of the Indian Procedure Rules. In the A.I.R. COMMENTARIES ON THE CODE OF CIVIL PROCEDURE by CHITALEY & RAO (4 th Edition), Vol 3, P. 3227, the learned authors, in explaining the distinction between a review and an Appeal have this to say;*

*“A point which may be a good ground of Appeal may not be a good ground for the application for review. Thus, erroneous view of evidence or of law is no ground for a review though it may be a good ground of an Appeal.”*

*In the circumstances I do not consider that this would be a proper case for the Court to exercise the jurisdiction conferred by it by Section 83 of the Civil Procedure Ordinance.” In Nagabugo –versus - The Attorney -General of Uganda [1967] E A. 60 the then Chief Justice of Uganda, Sir Udo Udoma held at page 62 paragraph I; -*

*“As already stated, according to Counsel this application is brought under Order 42 Rule 1 (similar to our Order XLIV Rule 1 Civil Procedure Rules). This Court is called upon to review its decree on the ground that the decree was ultra vires the powers of the Court. I do not think there is substance in this submission...*

*As pointed out to Counsel for the Applicant, if the order was ultra vires , surely that should be a good ground to take this matter to the Court of Appeal; as it is doubtful whether this Court would be competent to sit as a Court of Appeal on its own order and decree. It is doubtful whether the provisions of O. 42, r. 1 were ever intended to deal with a matter where a Court had made an order which was ultra- vires its power. It seems to me that the provisions of the order aforesaid would apply only where there has been discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by the Applicant at the time when the order or decree complained of was made; or on account of some mistake or error of fact apparent on the face of the record.”*

From the aforesaid decisions it is clear that an application for review under **Order XLIV of the Civil Procedure Rules** cannot be made on the ground that the Court took an erroneous view of the evidence or of the law. An application for review cannot be made where the order complained of is that it was ultra- vires. I would add that an application for review cannot be made where the order or decree to be challenged was allegedly made by the Judge wrongly interpreting the applicable provisions of the law. All the above grounds are good grounds for Appeal. They cannot constitute grounds for an application for review.

In the instant Application, the Applicant is seeking the review of the said ruling delivered on the 20th of January 2004 basically on the ground that the Learned Judge took a wrong view of the law and further that the Learned Judge made a ruling contrary to the decisions made by Courts of similar jurisdiction on the matters in issue. That may well be so. The Applicant ought to have filed an Appeal instead of applying to review the said ruling. This Court cannot be expected to hear an appeal against its decision disguised as an application for review. It is the finding of this Court that the Application for review on the grounds stated by the Applicant is not envisaged under the provisions of **Section 80 of the Civil Procedure Act and Order XLIV Rule 1 of the Civil Procedure Rules**. The Applicant ought to have filed an Appeal. For the above reasons the application for review lacks merit.

Before concluding this ruling, I would revert back to the allegations made by the Applicant concerning the Honourable Justice Musinga who heard the application that is sought to be reviewed. The Applicant did not disclose the source of his information. Neither did the Applicant disclose how it came to conveniently “stumble” upon the information that the Learned Judge prior to his appointment acted for the Respondent. The Respondent has submitted that it never had the occasion to instruct the Learned Judge before his appointment as a Judicial Officer. The Applicant has not annexed any document to support his averment that the Learned Judge had acted for the Respondent prior to his appointment as a Judicial Officer. To my mind the said allegations were made not only to cast aspersions on the impartiality of the said Learned Judge but also to question the integrity of the Learned Judge when he heard the Application. The Respondent has stated categorically that the Learned Judge never at any time acted for it.

The Applicant made the Application for review a whole two months after the delivery of the ruling by the said Court. The said application was made two days before the reference was scheduled to be heard by the Court.

The Applicant made the said allegations to achieve his aim to have the said Court disqualify itself from further hearing this case. It is the considered view of this Court that the making of the said unfounded allegations by the Applicant is a classic example where unsuccessful contestant blames the referee when he cannot come to terms with the fact that he has failed in the contest. In the instant case, the Applicant’s allegations were not only spurious but an attempt to bolster an otherwise incompetent application for review. I wish to add that if the Applicant genuinely had any evidence that the Learned Judge acted with impropriety, he was at liberty to raise the said issue before the Learned Judge before the application was heard and a ruling delivered. For the Applicant to purport to raise the issue after the ruling was delivered is a case of sour grapes and is evidence of a litigant who expects to have his way in the Courts of Justice, no matter the incompetence of his case.

The anchor of any Judicial system is the faith that litigants have that the judicial officer to whom a dispute is referred to will deliver an impartial decision, having no interest in the matter in disputes. In the instant case, the Applicant presented its case before the Learned Judge. From the content and the tone of the affidavit in support of the application, the Applicant did not expect that the said Court would give a decision other than what the Applicant expected. The Applicant was within its rights to have the said expectations. When the Ruling was delivered instead of following the prescribed procedure by filing an Appeal, being aggrieved by the decision of the Learned Judge, the Applicant launched in a diatribe that did not have any factual basis. The Applicant being a firm of Advocates should have known better than to make such scurrilous allegations which has no factual basis. This Court deprecates the Applicant’s spurious averment against the said Learned Judge. It is the hope of this Court that such unethical and unprofessional conduct of the Applicant is a rare exception rather than the rule in an otherwise honourable profession.

In the premises therefore the Application filed by the Applicant for review is hereby dismissed. The Respondent shall have the costs of the Application.

**DATED at NAKURU this 1st day of October 2004.**

**L. KIMARU**

**AG. JUDGE**