



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AT KAJIADO

MISCELLANEOUS CIVIL APPLICATION NO. 14 OF 2020

MUTURI S. K & CO. ADVOCATES.....APPLICANT/ ADVOCATES

VERSUS

MAZINGIRA WELFARE AND SPORTS ASSOCIATION.... RESPONDENT/CLIENT

IN THE MATTER OF KAJIADO ELC CASE NO. 40 OF 2018 (Formerly Nairobi ELC Case No. 261 of 2016) KAJIADO LAW COURTS, ENVIRONMENT AND LAND DIVISION.

BETWEEN

MAZINGIRA WELFARE AND SPORTS ASSOCIATION..... PLAINTIFF

VERSUS

JULIUS LUKA NANTEYA.....1ST DEFENDANT

JOHN NANTEYA.....2ND DEFENDANT

WILLIAM NANTEYA.....3RD DEFENDANT

RULING

By a Notice of Motion dated the 27th October, 2020, brought pursuant to Order 51 Rule 1, Order 45 Rule 1, 2 and 3 (2), Order 49 Rule 6 of the Civil Procedure Rules as well as Sections 1A, 1B, 3A of the Civil Procedure Act, the Respondent/ Applicant, (hereinafter referred to as Applicant), seeks for the following orders:

1. Spent
2. That this Honourable Court be pleased to review and or set aside its Ruling dated 19th October, 2020 together with all consequential orders emanating thereof.
3. That there be a stay of execution on the aforementioned Ruling pending the hearing and determination of this application.
4. That cost of this application be in the cause.

The application is premised on the grounds on the face of it and the supporting affidavit of SIMON NGARA W Advocate where he deposes that on 12th June, 2020, the Applicant/ Advocate filed an Advocate/ Client Bill of Costs dated the 11th June, 2020. He avers that in opposition to the said Bill of Costs, the Applicant filed a Preliminary Objection dated the 23rd June, 2020 via the online platform on 25th June, 2020. He proceeded to highlight the proceedings that transpired in court before the impugned Ruling was delivered. He contends that he personally filed written submissions, supporting documents including List of Authorities on 9th July, 2020. Further, on 9th July, 2020, they served their submissions on the Advocate/ Applicant who acknowledged receipt by stamping on their copy. He claims in the Ruling, it indicated they did not file written submissions and could not comprehend how the same was missing from the court files. He reiterates that there is an error apparent on the face of the Ruling. Further, that it would be unjust for the Applicant to be slapped with costs amounting to nearly four million without submissions. He insists failure to file submissions cannot be attributed to the Applicant as it took all the necessary steps as directed by the Court.

The Respondent /Advocates, (hereinafter referred to as Respondents), opposed the application and filed Grounds of Opposition and

contended that the taxation sought to be challenged is reasonable, fair and justified. Further, that the Applicant should have lodged a reference under Rule 11 of the Advocates (Remuneration) Order. It insists the Application as filed is fatal. Further, that the Applicant failed to give Notice required to the Taxing Master. It reiterates that the Applicant has not satisfied the conditions set to warrant a review and stay of execution.

The Application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the instant Notice of Motion Application including the supporting affidavit, Grounds of Opposition and rivaling Submissions, the only issue for determination is whether the Court should review and or set aside the Ruling dated the 19th October, 2020 together with all consequential orders emanating therefrom.

The Applicant has sought for review of the Ruling dated the 19th October, 2020. The Applicant is aggrieved with the said Ruling contending that their submissions including List of Documents were not considered therein. In their submissions, they have reiterated their claim and insists they have met the threshold set for review. They have relied on several court decisions including **Grace Akinyi Vs Gladys Obiri & Another (2016) eKLR; Bernard Gichobi Njira V Kanini Njira Kathendu & Another (2015) eKLR; and Richard Nchapai Leiyangu Vs IEBC & 2 others Civil Appeal No. 18 of 2013** to buttress their averments. The Respondent in its submissions insist the Applicant has not satisfied the grounds to warrant a review of the Court's Ruling and contends that the Applicant is not entitled to orders of stay of execution. To buttress its averments, it has relied on several court decisions including **Francis Njoroge V Stephen Maina Kamore (2018) eKLR; Executive Committee Plot Owners Welfare Group & 288 Others V Langat Joel & 4 others (sued as management Committee of Chelimo Squatters Group) (2018) eKLR; Republic V Advocates Disciplinary Tribunal Ex parte Apollo Mboya (2019) eKLR; KTK Advocates V CPF Financial Services Limited (2018) eKLR; and Luka Wagana & 2 others V Charles Alexander Kiai & Another (2020) eKLR**. It further submitted that there was a valid agreement between the Advocate and Client on the legal fees to be paid and relied on the case of **Kakuta Maimai Hamise V Peris Pesí Tobiko, Independent Electoral and Boundaries Commission & Returning Officer Kajiado East Constituency (2017) eKLR; Otieno Ragot & Company Advocates V National Bank of Kenya Limited (2016) eKLR; and Green Hills Investments Vs China National Complete Plant Export Corporation (2004) eKLR** to support these arguments.

Section 80 of the Civil Procedure Act and Order 45 Rule 1 (1) of the Civil Procedure Rules makes provisions on review of Court Orders.

Section 80 of the Civil Procedure Act provides that: - **“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

While Order 45, rule 1 (1) of the Civil Procedure Rules stipulates thus: **‘ 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 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.’**

Further, Clause 11 of the Advocates (Remuneration) Order outlines the procedure a party should adhere to, in case they intend to object to the Taxing Master's decision and stipulates that: ‘

‘(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.’

In the current scenario, I note the impugned decision sought to be reviewed was a Ruling dated the 19th October, 2020 by the Taxing Master in respect to the Advocate/ Client Bill of Costs dated the 11th June, 2020 emanating from the Kajiado ELC Case No. 40 of 2018. The Applicant avers that the said Bill of Costs is exorbitant and the Respondent insists the same is reasonable. From a reading of Order 45 of the Civil Procedure Rules as cited above, it provides instances when an aggrieved party can seek for review of a court order or judgement to include whenever there is an error apparent on the face of record. In this instance, the Applicant contends that there was an error apparent on the face of record as the Taxing Master failed to consider their submissions and documents whilst delivering its Ruling on the aforementioned Advocate/ Client Bill of Costs. In the case of **Muyodi V Industrial and Commercial Development Corporation and**

Another EALR (2006) EA 243, the Court of Appeal while dealing with issues of review held as follows: -

“For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. ‘

Further, in the case of *Executive Committee Plot Owners Welfare Group & 288 Others V Langat Joel & 4 others (sued as management Committee of Chelimo Squatters Group) (2018) eKLR*, Justice J M Onyango cited favourably the case of *Origo & Another V Mungala (2005) 2KLR* where it was observed that an erroneous conclusion of law or evidence is not a good ground for review but may be a good ground for appeal.

While in the case of *Grace Akinyi Vs Gladys Obiri & Another (2016) eKLR* which favourably cited the case of *National Bank of Kenya Vs Ndungu Njau* wherein the Court of Appeal stated that a court can grant a review to correct an apparent error or omission which is self-evident and should not require elaborate argument.

I note there is already an existing legal framework under Rule 11 of the Advocates (Remuneration) Order guiding an aggrieved party in instances it intends to challenge any decision of the Taxing Master. In the current scenario, the Applicant chose to ignore this avenue and resorted to seek for review of the Taxing Master’s decision in this Court. They insist they seek a review of the Taxing Master’s Ruling as there is an error apparent on the face of record. They have relied on section 12 of the Environment and Land Court Act and contend that he violated an administrative function by failing to have documents they had filed placed in the Court file. I note the administrative functions envisaged in section 12 of the Environment and Land Court Act are clearly outlined at section 11 of the said Act and include: **the establishment and maintenance of the Registry of the Court; b) the acceptance, transmission, service and custody of documents in accordance with the Rules; (c) facilitating the enforcement of decisions of the Court; (d)certifying that any order, direction or decision is an order, direction or decision of the Court, the Chief justice or a Judge, as the case may be; (e) the maintenance of the Register of the Court;(f)causing to be kept records of the proceedings and minutes of the meetings of the Court and such other records as the Court may direct; (g) managing and supervising the staff of the Court;(h)the day to day administration of the Court; (i) managing the library of the Court; (j) facilitating access to judgments and records of the Court; (k) undertaking any other duties assigned by Chief Registrar.’**

It is quite evident from the said excerpt that the said administrative functions do not include delivery of a Ruling or Judgement from the said Court. Insofar as the Applicant raises pertinent issues in the instant application, I opine that this is not the right forum for it as it involves reviewing of a Ruling and not an administrative function. It is my considered view that it ought to have filed a Reference as stipulated in Rule 11 of the Advocates (Remuneration) Order instead of seeking for review of the Taxing Master’s decision under Order 45 of the Civil Procedure Rules. To my mind the Application as it is, is defective. I find that the Applicant has not met the threshold set for review by this Court. In the circumstance, I will decline to review the Order emanating from the Ruling of the Taxing Master dated the 19th October, 2020.

Since I have declined to review the said Ruling and order emanating therefrom, I will not proceed to handle the issue of stay of execution of the said Ruling.

It is against the foregoing that I find the Notice of Motion application dated the 27th October, 2020 unmerited and will proceed to dismiss it with costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 2ND DAY OF MARCH, 2021.

CHRISTINE OCHIENG

JUDGE