Thandi v Githinji t/a Onesmus Githinji & Company Advocates (Miscellaneous Civil Application 444 of 2018) [2025] KEHC 5090 (KLR) (Civ) (24 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5090 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS CIVIL APPLICATION 444 OF 2018

SN MUTUKU, J

APRIL 24, 2025

BETWEEN

OLIVER NJIHIA THANDI ..... CLIENT

AND

ONESMUS GACHUHI GITHINJI T/A ONESMUS GITHINJI & COMPANY ADVOCATES ..... ADVOCATE

RULING

The Notice Of Motion

1. Onesmus Gachuhi Githinji T/A Onesmus Githinji & Company Advocates (the Applicant) has filed the Notice of Motion dated 24.09.2024 (the Application) supported by the grounds found on the face of the Application and in the Supporting Affidavit sworn by the Applicant on the same date. He is seeking a substantive order for review of the ruling delivered by Honourable Lady Justice L. Njuguna on 7.03.2019 and costs of the Application.

2. The Application is anchored on sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* (CPA); Orders 45 and 51, Rule 1 of the Civil Procedure Rules (CPR); Section 45 of the *Advocates Act*, and Articles 50 and 159(2) of the *Constitution* of Kenya, 2010.

3. In support of the Application, the Applicant has stated that he previously represented Oliver Njihia Thandi (the Respondent) in various legal claims; that the Respondent later repudiated the agreed legal fees, thereby resulting in the filing of the present Miscellaneous Application; that upon considering the matter, the Court (Hon. Lady Justice Njuguna) dismissed the Application, vide the ruling delivered on 7.03.2019, with the learned Judge holding that the Advocate-Client instruction fees agreement on record was unsigned and was therefore legally unenforceable, contrary to Section 45 of the *Advocates*

Act, notwithstanding the fact that the Respondent had signed the agreement on record and dated 6.06.2014 (the Agreement).

4. The Applicant has averred that there is an error apparent on the face of the record, namely, that the learned Judge erred in finding that in order for an agreement on instruction fees to be legally binding and enforceable, it ought to be executed by both parties.

5. The Applicant averred, further, that by dismissing the Application and declining to set aside the Agreement, the court denied him an opportunity to appeal against the aforementioned ruling; adding that the Respondent has since commenced execution proceedings against him. The Applicant urged this court to allow this application and review the said ruling.

Replying Affidavit

6. The Application is opposed by the Respondent through a Replying Affidavit sworn by the Respondent on 25.02.2025 in which he has termed the Application as an abuse of the court process.

7. The Respondent has deposed that following delivery of the abovementioned Ruling, the Applicant herein lodged a Notice of Appeal dated 21.03.2019 indicating his intention to challenge the Ruling on appeal before the Court of Appeal. That, thereafter, the Respondent filed an application seeking the release of the sum of Kshs. 10,578,956.62 allegedly being illegally held by the Applicant, upon which the Court (the late Hon. Mr. Justice Majanja) directed the Applicant proceeds to tax his Bill of Costs and that the relevant monies be set off. The Applicant proceeded to tax his Bill of Costs in various causes, whilst, at the same time, lodging an appeal against the decision directing him to tax his Bill of Costs.

8. The Respondent has deposed that the instant Application is essentially an appeal camouflaged as a review and that the threshold for review has not been met.

9. The Respondent has further faulted the Applicant for bringing the Application too late and in the absence of any reasonable explanation, noting that five (5) years have since lapsed from the time the impugned Ruling was delivered. The Respondent urged the Court to dismiss the Application with costs.

Oral submissions

10. The Application was canvassed through oral arguments. Submitting on behalf of the Applicant, Mr. Kaifa, learned counsel, urged the court to allow the Application as prayed, arguing that it is properly before the court pursuant to Order 45 of the CPR. He argued that the provisions of the *Advocates Act* do not make it a mandatory requirement for an agreement for fees to be signed by both parties in order for it to be valid and that the law as is, makes no provision for the mandatory signing of such agreements. Counsel cited, inter alia, the decision in Ahmednasir, Abdikadir & Company Advocates v National Bank of Kenya Limited [2007] KEHC 3337 (KLR) where the court stated that an advocate cannot be penalized for not signing a client Bill on instructions. He maintained that the instruction agreement in question is valid.

11. Mr. Kipkorir, learned counsel for the Respondent, argued that the grounds and facts set out in the Application constitute issues for determination on appeal; that the Applicant has not established that there is any error apparent on the face of the record warranting a review of the aforesaid ruling especially in view of the legal position that such error must be self-evident, as was held by the Court of Appeal in the case of National Bank of Kenya Limited v Ndungu Njau [1997] KECA 71 (KLR). Counsel reiterated his client's earlier averments that the Application is an abuse of the court process for the

primary reason that the Applicant filed a notice of appeal against the said ruling but did not pursue an appeal. Counsel urged this court to dismiss the Application with costs.

12. In rejoinder, Mr. Kaifa submitted that the Applicant was ordered to tax the Bill of Costs on record. He maintained that the Applicant has demonstrated the grounds for review in this Application.

Analysis and Determination

13. In my determination of this matter, I will be considering whether the Applicant has met the threshold for an order of review. Before I do that, I wish to give the background of the circumstances giving rise to this application.

14. I have considered the Application and the Supporting Affidavit, the Replying Affidavit in opposition and the rival submissions. I have also read the court records. I have noted that this dispute arose as a result of an alleged failure on the part of the Applicant in accounting for funds belonging to the Respondent and/or alleged withholding of funds by the Applicant. The Applicant represented the Respondent at all material times in respect of various matters. The Respondent therefore lodged a complaint with the Advocates Disciplinary Tribunal which ultimately found the Applicant liable to pay a sum of Kshs. 1,340,000/- to the Respondent within 60 days from the date of judgment being 18.06.2018.

15. Subsequently, the Respondent filed Miscellaneous application vide a Chamber Summons dated 17.08.2018 seeking to set aside the Agreement and a further order for taxation to be done on a Bill of Costs for work done under the Agreement. The Chamber Summons was opposed by the Applicant, by way of a preliminary objection.

16. Upon hearing the parties' arguments in the Chamber Summons, the court (Hon. Lady Justice Njuguna) delivered the impugned ruling dismissing both the Preliminary Objection and the Chamber Summons on the finding that the Agreement availed in court bore the sole signature of the Respondent and did not therefore satisfy the key elements for a valid contract. The learned Judge found that the Agreement was not legally binding and was consequently unenforceable. She further found that it was not for the court to make an order for taxation of a Bill of Costs. The aforesaid ruling triggered the instant application.

17. The applicable principles for review of court orders are clearly set out under Section 80 of the *Civil Procedure Act* Cap. 21 Laws of Kenya and Order 45 of the CPR as follows:

> " Any person considering himself aggrieved—
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> (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."

18. From the above provisions, an applicant approaching the court seeking review must move the court basing on the following instances:

a. on 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

b. on account of some mistake or error apparent on the face of the record, or

c. any other sufficient reason, and,

d. expediency in filing the application.

19. These principles were enunciated by the Supreme Court of Kenya in the case of Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR whilst quoting with approval the findings of the East Africa Court of Appeal in Mbogo and Another v Shah [1968] EA in the following manner:

> " Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:
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> i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
>
> ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
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> iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
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> iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
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> v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
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> vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
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> a. as a result, a wrong decision was arrived at; or
>
> b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice."

20. It is clear from the foregoing that the exercise of the power of review is purely discretionary in nature, and the onus lies with the applying party to tender sufficient and credible evidence to persuade the court that he/she deserves the exercise of the court's discretion and order review in his or her favour.

21. In the matter under determination, I have considered the reasons upon which the Applicant is seeking an order of review. He has reasoned that, in making her ruling, the learned Judge erroneously found that an agreement on instruction fees ought to be signed by both parties in order for it to be binding and enforceable. The Applicant has therefore averred that this constitutes an error apparent on the face of the record.

22. I have also considered the opposing arguments by the Respondent that there is no error apparent on the face of the record and that the instant Application constitutes an abuse of the court process since the Applicant filed a notice of appeal in respect of the said ruling. That moreover, the grounds on which the Application stand are grounds for appeal and not review and that there has been an inordinate delay in filing the Application.

23. The record of the court shows that the ruling sought to be reviewed was delivered on 7.03.2019 whereas the instant application has been brought over five (5) years later, on 24.09.2024. The Applicant has not offered any explanation on the delay in the late filing. Five years is a long time to wait to bring an application seeking review, especially given that no reasons have been advanced as to the cause of the delay. In my considered view, this delay is both inordinate and inexcusable.

24. I have further noted from the record that following the delivery of the aforesaid ruling, the Applicant filed a Notice of Appeal dated 21.03.2019 to the Court of Appeal, indicating his intention to challenge the ruling by way of an appeal. It remains unclear whether any such appeal was pursued or abandoned. The Applicant is now seeking a review of the very ruling. In the court's view, the actions of the Applicant constitute an abuse of the court process and are frivolous and vexatious.

25. Further, this application primarily rides on the principle of 'error apparent on the face of the record.' This principle was discussed by the Court in Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243 where the Court of Appeal rendered itself thus:

> " In Nyamogo and Nyamogo v Kogo [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

26. To my mind, it is clear that an error apparent on the face of the record must be self-evident and need not require elaborate arguments to support it. Does the finding of the court (Hon. Lady Justice Njuguna) that "the purported agreement as it stand is a one-sided document and cannot therefore be termed as giving rise to an agreement between the parties" and that "the said document is not legally binding and cannot be enforced by either of the parties", fit this definition? I do not think so.

27. From a careful reading of the contents of the Application and the grounds in support thereof, it is my considered view that I am not persuaded that the Applicant has demonstrated existence of an error apparent on the face of the record in the impugned ruling within the definition offered above. If anything, the court is of the view that the grounds and facts featuring in the Application would constitute issues that are best canvassed on appeal rather than by way of a review.

28. Consequently, I hold the view that no credible or sufficient material has been placed before me to warrant an exercise of my discretion in favour of the Applicant. I lack the jurisdiction to sit on appeal in respect of the ruling of my sister judge and I have no authority to criticise the ruling on the issue of

whether the court was right or wrong in finding that the agreement between the client and his advocate is unenforceable for the reason that it does not bear signatures of both parties. The mandate to do so lies with the Court of Appeal.

29. In the end therefore, it is my finding that the instant application, dated 24.09.2024, lacks merit and ought to be dismissed, which I hereby do. Costs of this application are payable to the Client/ Respondent.

30. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF APRIL 2025.

S. N. MUTUKU

JUDGE

In the presence of:

1. Mr. Kaifa for the Applicant

2. Mr. Kipkorir for the Respondent.