Kitiku v Obaga t/a Obaga & Company Advocates (Miscellaneous Application E065 of 2018) [2024] KEHC 11860 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11860 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E065 OF 2018

FG MUGAMBI, J

OCTOBER 4, 2024

BETWEEN

JOSEPHAT SAMMY KITIKU ..... APPLICANT

AND

ROSE OBAGA T/A OBAGA & COMPANY ADVOCATES ..... RESPONDENT

RULING

Introduction and Background

1. There are two applications for the court's determination; the applicant's Notice of Motion dated 14/9/2018 brought under sections 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 51 Rule 1 of the *Civil Procedure Rules* and sections 40, 46, 46(d) and 47 of the *Advocates Act* (Chapter 16 of the Laws of Kenya). It seeks to have the respondent ("the advocate") ordered to file in this cause a copy of an impugned legal fees agreement signed by the parties and in the absence of the same, an itemized bill of costs for taxation.

2. The other application is the advocate's Notice of Motion dated 30/11/2023 brought under Order 45 Rule 1 of the *Civil Procedure Rules* and sections 1A & B, 3A, 80 & 99 of the *Civil Procedure Act*. It seeks to review and set aside the Ruling and Order of this court of 29/4/2020 ("the Ruling") and that the court proceeds to decide and give directions on whether the Notice of Motion dated 5/2/2019 is properly on record.

3. The applicant's application is grounded on the facts set out on its face and his supporting affidavit sworn on 14/9/2018. It is opposed by the advocate through the Grounds of Opposition and Preliminary Objection all dated 20/5/2024. The advocate's application is also grounded on the facts set out on its face and her affidavit sworn on 30/11/2023. It is opposed by the applicant through

the Grounds of Opposition dated 24/1/2024. The applications were disposed by way of written submissions which were briefly highlighted by the parties' respective counsel.

4. The facts giving rise to the instant applications are common ground. The advocate represented the applicant at the lower court in Josephat Sammy Kituku V Skybird Services Company Limited & Another, Milimani CMCC No. 2937 of 2013. Judgment was delivered on 17/4/2017 where the applicant was awarded a sum of Kshs. 1,500,276/= plus costs of the suit and interest. The party and party costs were assessed leading to the defendants therein paying a total decretal sum of Kshs. 1,842,971/= to the applicant, which sum was paid through the advocate.

5. The applicant claims that the advocate has not released the decretal sum to him hence the present suit which was filed on 14/9/2018. On 27/9/2018, the parties entered into and recorded a consent in court to the effect that: "...the amount due to the applicant is agreed at Kshs. 700,684/=. The respondent shall issue two cheques, one for Kshs, 200,000/= dated 2nd October 2018 and the other of Kshs. 500,684/= postdated to 5th November 2018. That the mater be mentioned on 18th November 2018 to confirm compliance and mark it as settled".

6. Pursuant to the consent, the advocate wrote to the applicant a letter dated 2/10/2018 forwarding two cheques as follows; Cheque No. 3783 dated 2/10/2018 for Kshs. 200,000/= and Cheque No. 3784 postdated to 5/11/2018 for Kshs. 500,684/=. The copies of these cheques were attached to that letter and the matter was thus marked as settled.

7. On 5/2/2019, the applicant challenged the consent by filing an application that sought to review the court's order of 27/9/2018 that adopted the consent and instead declare a legal fees agreement dated 15/1/2013 between the parties invalid. He further urged the court to order the scale fees of the advocate client fees of 25% to wit Kshs. 382,452.80 plus VAT of Kshs. 61,192.45 totaling to Kshs. 443,654.25 as the total advocate client legal fees due to the advocate.

8. This meant that the applicant was entitled to Kshs. 1,086,166.05 so that the advocate would pay him an additional Kshs. 385,482.05.

9. In a ruling delivered on 29/4/2020, the court (Nzioka J.,) held that she could not review a consent suo moto. The court also declined to invalidate the impugned legal agreement. The Learned Judge noted that this was a contested issue and the court would have to establish first which of the two legal fees agreements was valid.

10. The court set aside the consent noting that the application was not opposed. Consequently, as noted, the parties reverted back to the position they were in before the consent was recorded and they were left to canvass the application dated 14/9/2018. The court stated that in the meantime, the status quo prevailing would remain which is that each party would keep the funds in their possession.

11. With this rendition of the background in mind, I will now determine the applications before the court.

The application dated 14th September 2018:

12. The applicant contends that the advocate has for unknown reasons failed to release the decretal amount awarded to him in Milimani CMCC No. 2937 of 2013. He submits that the monies already paid out were on account of the alleged contentious legal fees agreement. That the applicant was in hospital at that particular time and when his lawyer on record presented the legal fees agreement to him, he disputed its authenticity and stated that the fees agreement he had signed was handwritten yet the one counsel supplied to his counsel was typed. This is what forced his counsel to move court to set aside the consent which the court did.

13. The applicant avers that his counsel assured the advocate that she was free to deduct her fees from the decretal amount and release the applicant's money but she adamantly declined. That the legal fees agreement signed between the parties is contested and he thus urges the court to allow the application which as stated, principally seeks the availing of the contentious legal fees agreement or in the absence, her itemized Bill of Costs.

The advocate's response:

14. The advocate assails the application on technical grounds. She argues that it is against the procedure provided for by Order 52 Rule 4 and 5 of the *Civil Procedure Rules* on advocate-client disputes and that this court is not properly with seized with jurisdiction to make the orders sought in the application. That the application and deposition are not oppressive and made with ill intent to injure the person and repute of the advocate which should not be a purview of the court's mandate.

15. She contends that the application is a veiled attempt at a short cut with the sole intent of bypassing the well laid out law and procedure on issues of accounts between advocates and clients and is intended to deny the advocate due process and her right to a fair and just process as per the law.

16. She further contends that she stands to suffer prejudice if this application is granted as she has already disbursed funds which have been received and utilized by the applicant as per the court records. That the application is not merited and is made in bad faith and only meant to embarrass her and for these reasons, she urges the court to dismiss the same.

The advocate's application dated 30th November 2023:

17. The advocate contends that there is an error and/or mistake apparent on the face of the court record. She contends that she has never been heard or given a chance to respond to the application of 5/2/2019. It is her case that the matter was pending directions on whether the said application was properly on record, in view of the court orders of 10/12/2018 and 5/2/2019. Further, she submits that the application was neither given a hearing date nor heard by the court and if it was, she was never notified of the same.

18. She contends that she only became aware of the Ruling on 6/1/11/2023 when this matter came up for mention and that the Ruling is prejudicial and has caused her injustice. She further claims that the error arises out of an honest mistake by the court. She states that she applied for the typed proceedings and paid for the same on 28/3/2022 but that the same were supplied to the her on 30/11/2023 at 4.45pm together with the Ruling.

19. The advocate states that she is aggrieved by the Ruling and that this application has been made expeditiously in the prevailing circumstances seeking to review the Ruling. The advocate states that she has a good defence to the application and it is only fair and just that if the application is found to be properly on record, the same be heard on merit in any event. She contends that this application needs to be disposed of first in the interest of justice and that the error should be corrected first to safeguard her constitutional rights.

The applicant's response:

20. The applicant opposes the advocate's application on grounds that it is meant to cause delay to the conclusion of this matter. He asserts that the advocate is meanwhile illegally holding part of the decretal monies belonging to the applicant. It is his case that the application is brought after unreasonable delay in light of the Ruling sought to be reviewed having been delivered on 29/4/2020. No plausible reason

has been tendered to justify why the advocate did not take any action from 29/4/2020 to March or November 2022.

21. The applicant urges the court to take judicial notice that during the onset of the Covid-19 pandemic on 5/3/2020, the commercial division would issue an advance list of rulings and judgments for delivery. No such notices would be sent to individual law firms. That it is therefore the advocate's mistake that she did not follow up to know when the Ruling was to be delivered.

22. The applicant further posits that it is a settled principle in law that a sitting judge cannot review or set aside a discretionary order or ruling passed by another judge unless the same was outrightly illegal. That it is an abuse of the law and to ask of this court to review a previous judge's exercise of her discretion.

23. The applicant states that the Ruling is clear at paragraph 9 that the application dated 5/2/2019 was determined based on both oral submissions of 5/12/2018 and 5/2/2019 together with the applicants' written submissions dated 15/2/2019. That the advocate had tried to hold the court at ransom by declining to file a formal response to the application and instead trying to get the court to strike out the application of 5/2/2019 summarily.

24. The applicant notes that the court opted to go for substantive justice at the expense of procedural technicality. As such, the applicant contends that in totality, the parties are still in the same position they were in prior to the application of 5/2/2019 and the appropriate thing to do is to have the court determine the application dated 14/9/2018 once and for all.

Analysis and determination:

25. I have considered the parties' respective pleadings and submissions. I propose to first deal with the preliminary issue raised by the advocate in her Preliminary Objection. She is in effect challenging the manner in which the applicant's Notice of Motion was filed by stating that it should not have been by way of a miscellaneous Notice of Motion application but by way of an Originating Summons as provided for by Order 52 Rules 4 & 5 of the *Civil Procedure Rules*.

26. The advocate may be correct in her assertion. In the past, such an error could have led to the application being struck out. However, the law and judicial approach to striking out pleadings solely for non-compliance with procedural rules has evolved. A suit or application brought in the wrong format is no longer considered fatal, as it pertains to procedure and form rather than substance.

27. The Court of Appeal (Nambuye JA) in *Njoroge & Another V Njoroge & Another*, [2021] KECA 258 (KLR) clarified that such a procedural error can be remedied. The court's inherent powers, the overriding objective principle, and the now well-established non-technicality principle in the administration of justice, as outlined in Article 159(2)(d) of the *Constitution*, allow the court to correct the title and procedural aspects of the pleadings and be properly seized of the matter and thus go ahead and pronounce itself on the merits.

28. In any event, I do not believe the advocate will suffer any prejudice, as she has already engaged with the substantive issues of these proceedings. It is my finding that the said error does not go to the root of the cause. As such, the advocate's objection lacks merit and is dismissed.

29. I now turn to the advocate's application that seeks to review and set aside the Ruling of 29/4/2020. In order to succeed in such an application under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, the advocate is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important evidence which was not available despite the exercise of due diligence or for any other sufficient reason for the court to review.

30. The advocate's application is anchored on the ground that there is an apparent error on the face of the record. The Court of Appeal in *National Bank of Kenya Limited V Ndungu Njau*, [1996] KLR 469 explained what constitutes an error of law apparent on the face of the record and the scope of review as follows:

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review." (emphasis added)

31. The advocate contends that she was never accorded an opportunity to respond to the application of 5/2/2019. However, upon reviewing the record, I note that the advocate was well aware of the application. On 10/12/2018 she was present when the applicant indicated to court that he wished to file the subject application, to set aside the consent. The court directed the applicant to: file and serve the same within 5 days as requested. The respondent to file a response within 15 days of service.

32. When parties next appeared before the judge on 5/2/2019, the applicant had not complied with the directions of the court. The advocate protested to the applicant being given more time. In the end the court directed that: the parties strictly comply with the directions and timelines given by the court in the last appearance...if the applicant will not have filed the application, they will be deemed to have dispensed with the need for the same.

33. Fast forward to 5/3/2020, where in the presence of the advocate and upon confirmation by the applicant that he had filed his submissions, the court reserved the ruling for 17/3/2020. It is clear to me that the advocate was aware of the application but she chose not to respond. The averment that the court was meant to confirm whether the application was properly on record is not supported by the court proceedings. There is no evidence on record that the advocate asked the court to be allowed to respond or file submissions. At paragraph 9 of the Ruling the court confirms that there was no response or submissions filed by the advocate.

34. In my view, there is no error apparent on the face of the record based on these proceedings. It seems that the advocate is dissatisfied with the merits of the Ruling. Such a grievance can only be addressed through an appeal, not a review, as this court lacks the jurisdiction to hear an appeal against its own decision.

35. Another reason that the court would decline to allow the application for review is the significant delay of three years by the advocate in filing the same. While she attributes part of the delay to the court's alleged delay in availing the certified proceedings requested for on 28/3/2022, she fails to account for the lull between 29/4/2020 when the Ruling was delivered and the said 28/3/2022 when she requested for the proceedings. This unexplained gap of nearly two years is substantial.

36. The Court of Appeal addressed a similar issue in *Afapack Enterprises Limited V Punita Jayant Acharya (Suing as the Administrator of the Estate of the Late Suchila Anantrai Raval)*, [2018] eKLR. The court upheld a decision to dismiss an application for review that had been filed nine months after the original decision, emphasizing the importance of timely action in such matters in the following words:

> " It is also an important requirement that the application for review should be made without unreasonable delay. Although the appellant attributed his predicament to mistake of his

> counsel, what militated, against the exercise of discretion by the Judge in the appellant's favour was clearly the appellant's own conduct. The Judge found that the appellant "has not been diligent enough in pursuing its rights;" and that the appellant was guilty of inordinate delay in making the application for review. In the words of the Judge:
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> An application for review ought to be made without unreasonable delay. Here the delay is spanning a period of nine months. Ordinarily nine months' delay in an application for review, if no reasonable explanation is offered is inordinate.
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> The appellant did not offer a reasonable explanation for the delay. Furthermore, the Judge also found that the appellant was guilty of non-disclosure of all material facts and had deliberately attempted to mislead the court and was therefore undeserving of favourable exercise of discretion. Those matters, taken into consideration by the Judge in rejecting the application, are undoubtedly relevant considerations when the court is called upon to exercise its discretion.
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> With particular reference to an application for review and the need for an applicant to demonstrate exercise of due diligence, this Court in Francis Origo & Another V Jacob Kumali Mungala, (2005) 2 KLR 307 stated that:

... it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And importantly, the applicant must make the application for review without unreasonable delay."

37. For these reasons I am not convinced that the advocate is deserving of the orders sought.

38. Turning to the applicant's application that seeks to have the contentious legal fees agreement or the advocate's itemized bill of costs filed in this court, I note that in her application of 5/2/2019, the applicant in fact annexed a letter written by the advocate on a "without prejudice" basis. The said letter had annexed an agreement and an undated bill of costs. Since the contents of that letter was on a "without prejudice" basis, the same is not admissible herein as there is no binding agreement between the parties arising out of it.

39. The court in *Coretec Systems & Solutions Ltd V Digital Divide Data Kenya Ltd*, [2020] eKLR cited with approval from the Halsbury's Laws of England Vol 17 at para. 213 as follows:

> " the contents of a communication made "without prejudice" are admissible when there has been a binding agreement (emphasis court) between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible. ..."

40. Guided by the said decision I am convinced that there is no prejudice to be suffered by having the advocate file the said documents in court. In any case, the advocate has not raised any substantive arguments against the prayer by the applicant.

Disposition

41. Accordingly,

    a. The advocate's Notice of Motion dated 30/11/2023 is dismissed;

b. The applicant's Notice of Motion dated 14/9/2018 is allowed. Consequently, the advocate be and is hereby ordered to file in this cause a copy of the contentious legal fees agreement signed by herself and the applicant or in the absence of the same, her itemized bill of costs within 30 days of the date of this ruling; and

c. The applicant is awarded costs of both applications.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 4TH DAY OF OCTOBER 2024.

F. MUGAMBI

JUDGE