



**Titus Makhanu & Associates Advocates v Southern Shield
Holdings Limited (Miscellaneous Civil Application E141 of 2021)
[2023] KEHC 20664 (KLR) (Commercial and Tax) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CIVIL APPLICATION E141 OF 2021
DAS MAJANJA, J
JULY 25, 2023**

BETWEEN

TITUS MAKHANU & ASSOCIATES ADVOCATES APPLICANT

AND

SOUTHERN SHIELD HOLDINGS LIMITED RESPONDENT

RULING

1. The application before the court has been filed by the Client and it seeks an order that the ruling of the court delivered on March 17, 2023 (“the Ruling”) in respect of the Client’s application dated 01.04.2023 be set aside. The application is supported by the affidavit of the Client’s director, Abdulali Kurji sworn on May 18, 2023. It is opposed by the Advocates through the replying of one its advocates, Titus Makhanu, sworn on June 2, 2023 and Grounds of Opposition of the same date.
2. The Ruling, which was delivered by Chepkwony J., dealt with two applications and a preliminary objection. The first was the Client’s application dated January 24, 2023 brought under Paragraph 11 of the *Advocates Remuneration Order* seeking to set aside the decision of the Deputy Registrar dated 29.11.2023 taxing the Advocate/Client Bill of Costs (“the Reference”). The second application was the Advocates’ Application dated 01.04.2023 made under section 51(2) of the *Advocates Act* (Chapter 16 of the Laws of Kenya) seeking to judgment for Kshs. 3,801,856.50, costs and interest based on costs taxed and certified in favour of the Advocates. Last was the Notice of Preliminary Objection dated 25.02.2023 raised by the Advocates against the Reference. After considering the application alongside the Preliminary Objection, the court struck out the Reference and entered judgment in favour of the Advocates as prayed for in its application.
3. The Client argues that it had filed the Reference and while it was pending, the Advocates filed the application for judgment and another application dated 01.04.2023 seeking an order for security. That



the parties agreed that the Advocates' two applications; the one for judgment and the one for security, be withdrawn to pave way for the hearing of the Reference and the Preliminary Objection and the same be dealt with by written submissions. The Client complains that instead of proceeding as agreed, the Judge proceeded to deal with the application for judgment despite the parties not being given an opportunity to oppose and make submissions on it. That in the circumstances, the judgment was irregular and ought to be set aside given that the Client disputes the retainer.

4. The Advocates oppose the application on the ground that it did not withdraw the application for judgment and security as submitted by the Client. It contends that after the court struck out the Reference, the only logical course for the court was to proceed with the application for judgment based on a certificate of taxation that had neither been varied or set aside. In the circumstances, they aver that judgment was not irregular. The Advocates further point out that the Client has already filed an appeal against the Ruling hence it cannot pursue this application at the same time as the intended appeal.
5. I have considered the application and in my view, the issue can be resolved by looking at the proceedings in the matter. On 21.09.2022, the court issued the following directions:

The matter is for mention for parties to file directions with regard to hearing of a Notice of Motion application dated 1st April 2022. Upon listening to both counsels, hearing is adjourned with directions that:

- a. For purposes of expeditious disposal of the matter the parties to canvass the notice of motion application dated 24.1.2022 and the notice of preliminary objection dated 25.2.2022 simultaneously by written submissions.
 - b. The application to file and serve their written submissions in respect of both the application and notice of objection within 14 days from today.
 - c. The Respondent is equally granted 14 days corresponding leave to file and serve their written submissions.
 - d. Mention on 1.11.2022 for parties to confirm compliance and for further directions.
6. While it is correct to state that the Advocates did not withdraw their application for judgment and for security, the aforesaid directions are clear that the court intended to determine the Reference and Preliminary Objection. Subsequent proceedings show that the parties appeared before the Judge to confirm compliance with the directions on filing written submissions. It is therefore clear that the judge erred in considering the application that was not before the court for hearing.
 7. It is beyond doubt that the determination of the application for judgment was irregular as the court had not issued directions on its hearing. The Client was denied the opportunity to respond and be heard on it. It does not matter that the court had struck out the Reference, the Client still had a right to respond to the Advocates application for judgment. In light of the breach of the fundamental rules of natural justice, the court is entitled to set aside judgment *ex-debito jositiciae*, as a matter of right. Once the court is satisfied that there has been a breach of natural justice, it is entitled to set aside its own orders without more. For all intents and purposes, the judgment entered against the Client was an *ex-parte* judgment which the court is entitled to set aside to avoid hardship or injustice and which was entered through no fault of the party (see *James Kanyिता Nderitu and another v Marios Philotas Ghikes and another* [2016] eKLR and *Shanzu Investments Ltd v Commissioner of Lands* NRB CA Civil Appeal No. 100 of 1993 [1993]eKLR).



8. As to whether the court lacks jurisdiction on account of the fact that the Client has preferred an appeal to the Court of Appeal, the general principle is that the court is not divested of jurisdiction merely because a party has evinced its intention to exercise its right of appeal. There is a distinction between an intention to appeal and an appeal as was held in *Multichoice (Kenya) Limited v Wananchi Group (Kenya) Ltd and 2 others* [2020] eKLR. In that case the Court of Appeal put to rest the argument that the court cannot entertain an application for review once a notice of appeal as opposed to the appeal has been filed. Ouko P., observed as follows:

In concluding this limb of the judgment, it has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the *Civil Procedure Rules* and the *Court of Appeal Rules* did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal.

9. As I have stated the court acted in error by allowing the Advocates application for Judgment without giving the Client an opportunity to present its defence to it. The order for directions was clear that the matter for determination was the Reference and the Notice of Preliminary Objection.
10. For avoidance of doubt, the decision on the Reference remains in force. It is for this reason that I now make the following dispositive orders:
- a. The Client's application dated May 18, 2023 is allowed on terms that the Ruling Dated March 17, 2023 is varied on terms that the judgment entered for the Advocates against the Client be and is hereby set aside.
 - b. The Advocates application dated April 1, 2023 shall now be fixed for hearing.
 - c. The costs of the application shall abide by the final decision.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2023.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Makhanu instructed by Titus Makhanu and Associates Advocates for the Applicant/Advocates.

Mr Wainaina instructed by Kinyua Mwaniki and Wainaina Advocates for the Respondent/Client.

