



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISCELLANEOUS (REFERENCE) APPLICATION NO. E21 OF 2020

ADVOCATES (REMUNERATION) (AMENDMENT) ORDER, 2014

ARISING FROM

THE CLIENT'S INSTRUCTIONS TO PURSUE AN OUT-OF-COURT SETTLEMENT IN A DEBT COLLECTION MATTER AND/OR TAX RETURNS DISPUTE BETWEEN THE KENYA REVENUE AUTHORITY (KRA) AND ZHONG GANG BUILDING MATERIAL COMPANY LIMITED

IN THE MATTER OF

DK LAW ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

ZHONG GANG BUILDING MATERIAL CO. LTD.....DEFENDANT/CLIENT

YUANYUAN ZHENG ZHONGLIN.....DEFENDANT/CLIENT

RULING

1. On 13th October, 2021, this Court set aside the decision of the Taxing Officer made on 31st March, 2021 and substitute therefor a sum of Kshs 375,000/=.

2. By an amended Notice of Motion dated 16th November, 2021, the Applicants herein seek the following orders:

1. **THAT** this application be certified as urgent and be heard ex parte in the first instance.
2. **THAT** the Honourable court be pleased to review and set aside the order issued on 13/10/2021.
3. **THAT** the Honourable Court be pleased to stay execution of the ruling and decree in the High Court Machakos HCCC MISC /E21/2020 pending the hearing and determination of the application herein.
4. **THAT** the Honourable Court be pleased to stay execution of the ruling and decree in the High Court Machakos HCCC MISC /E21/2020 pending the hearing and determination of the review.
5. **THAT** the application be heard inter parties on such date and time as this Honourable Court may direct.
6. **THAT** this Honourable Court be pleased to issue any other orders that it may deem fit, just and expedient in the interest of justice.
7. **THAT** the costs of this Application be in the cause.

3. The Motion was supported by the affidavit sworn by the Applicant's advocate, **Ascar Kwamboka**. According to her, upon receiving a copy of the court ruling it came to their attention that the court had not considered their submissions. She averred that she filed the Applicant's written submissions through machakoscourt@gmail.com email address. According to the deponent, she was in communication with a clerk at the registry who sent her details of payment, confirmed payment had gone through and a copy of the submissions had been placed in the court file. It was her averment that she requested for the judge's email and the email communicated to her was

machakoshccivil@gmail.com to which she sent the submissions. However, the judge did not receive the Applicant's submissions in soft since the email given by the registry staff was incorrect hence the Applicant has been disadvantaged through no fault of their own as their defence was not considered. According to her, the misfiling of submissions was an inadvertent mistake on her part hence it should not be visited upon the Applicant.

4. According to the Applicants, the delay to file the Notice of Motion dated 29th October, 2021 was occasioned by the fact that the 1st Applicant Company directors are foreigners hence it took time to get instructions from them. According to the Applicants, the application is timely made and without unnecessary delay. The Applicant assert that they are going to suffer substantial and irreparable loss and damage as there is a likelihood that the Applicants will be unable to recover the decretal amount awarded to the Respondent. The Applicants have stated that they are willing to deposit the decretal amount of Kshs. 375,000/- into a joint interest earning account of both advocates as court deems fit to enable the Applicant pursue the appeal.

5. In a further affidavit, she deposed that she wrote a letter dated 19th October, 2021 to the Deputy Registrar, Machakos requesting a copy of the court's ruling. According to the deponent, she wrote another letter on 29th October, 2021 which she delivered it personally at the civil registry. She averred that since the file had been traced, she filed the application dated 29th October, 2021 and requested for a copy of the ruling which they read and made a decision to review it. She deposed that they served the Respondent with a copy of the replying and submissions since she believed that the copies had been placed in the court file.

Applicants' submissions

6. On behalf of the Applicants, it was submitted that the Applicants have established sufficient grounds to warrant a review of the orders made on 13th October, 2021. According to the Applicants, this application was timely filed and the reason for the delay to file it has been explained by the Applicants in the affidavit. It is submitted that the period was not inordinate.

7. It is submitted that the Applicants replying affidavit and submissions in response to the Respondent's reference were not in the court file since the same were sent to a wrong email believed to be the judge's email hence the mistake should not be visited upon the Applicants since it was a miscommunication between the registry staff and the Applicants advocate. It is submitted that the Applicants advocate came to know the Applicants replying affidavit and submissions were not considered when she read the court's ruling of 13th October, 2021.

8. In support of the review, the Applicants placed reliance on the Employment and Labour Relations Court case of **Michael Munga Mahia vs. Kenya Universities & Colleges Central Placement Services [2021] eKLR**.

9. It was submitted that the issues raised in the Applicants replying affidavit and submissions were not considered. According to the Applicants, the evidence placed before the court raise sufficient grounds to warrant and order of review.

Determinations

10. I have considered the material placed before me in this matter.

11. Order 45 rule 1(b) of the ***Civil Procedure Rules***, provides as follows:

“(1) 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

12. The foregoing provisions are based on section 80 of the ***Civil Procedure Act*** Cap 21 Laws of Kenya which states as follows:

“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.”

13. In the case of **Dock Workers Union & 2 Others vs. Attorney General & Another Kenya Ports Authority & 4 Others (Interested Party) [2019] eKLR** it was therefore held that: -

“In this regard, for a Court to review its own orders, it must be demonstrated that there is discovery of new and important matter or evidence. It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay.”

14. *The Code of Civil Procedure*, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper.”

15. In Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited Nairobi (Milimani) HCCC No. 532 of 2004, Okwengu, J (as she then was) expressed herself as hereunder:

“In this case the court is being invited to review the order on the grounds that there is an error apparent on the face of the record or other sufficient reason the pleadings, in particular, the plaintiff’s reply to the amended defence in which the plaintiff is alleged to have conceded that the defendant’s fee policy was illegal and *contra statute* which was the basis of the Defendant’s application for striking out the plaint. It is the defendant’s contention that the plaintiff is bound by his pleadings and could not therefore depart from the same...It is my considered opinion that the pleadings went beyond the reply to the amended defence and to understand the matters which were in issue one has to look at the plaint *vis-à-vis* the amended defence and the reply to the amended defence. A careful reading of the ruling however, makes it clear that the court had the pleadings in mind and moreover, there is no basis for the conclusion that the court would have arrived at any different decision. The court was simply interpreting the provisions of Section 36 and 45 of the Advocates Act as read with the Advocates Remuneration Order and it was not bound by any position taken by the parties. It may well be that the court was wrong in its interpretation or in the approach it took. However, that is not a matter that can be taken up on review as it is not an error apparent on the face of the record but ought to be subject of an appeal. Moreover to invite the court to set aside the order of dismissal and substitute it with an order striking out the plaint and dismissing the plaintiff’s suit in effect is to invite the court to sit on appeal on its own ruling and make a complete turnaround which is not within the purview of Order 44 of the Civil Procedure Rules.”

16. The Court of Appeal in Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418 expressed itself as follows:

“The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made.”

17. That is my understanding of the decision in Evan Bwire vs. Andrew Aginda Civil Appeal No. 147 of 2006 cited in the case of Stephen Githua Kimani vs. Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR where the Court of Appeal held as follows:

“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”

18. In this case the application is based on the ground that due to inadvertence on the part of the Applicant’s advocates, which inadvertence was occasioned by the misleading information received from the registry, the applicants did not furnish the Court with the submissions as directed hence the same were never considered in the decision.

19. This contention calls for a determination of the role of submissions in arriving at a decision. According to Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

20. The same Judge in Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:

“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

21. Similarly, in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

22. As stated by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ *“marketing language”*, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

23. It follows that it is not enough to simply state that since there were no submissions on record, the earlier decision ought to be reviewed. The Applicant ought to go further and show that had the court considered the submissions, it would have reached a different decision other than the one that was rendered.

24. In this case, the Applicant has not shown that that is the case. I have myself considered the material now on record and I am not satisfied that I would have arrived at a decision different from the earlier one had I considered the said submissions.

25. Consequently, the Motion fails and is dismissed but with no order as to costs.

26. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 10TH DAY OF FEBRUARY, 2022.

G V ODUNGA

JUDGE

DELIVERED IN THE PRESENCE OF:

MS OOOGA FOR THE RESPONDENT

CA SUSAN