



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 273 OF 2018

MANASE CALLEB ANANDA

T/A M. ANANDA & CO. ADVOCATES.....DECREE-HOLDER

VERSUS

BANDARI SAVINGS & CREDIT

CO-OPERATIVE SOCIETY.....JUDGMENT DEBTOR

RULING

1. Before the court for determination is a Notice of Motion application dated 10/8/2020 taken out by the Judgment Debtor (hereinafter the Applicant) seeking for the following orders: -

a) Spent

b) Spent

c) That this Honourable Court be pleased to review the orders given on 24th of February, 2020 and have the same set aside.

d) That costs be provided for

2. The Application is premised on eleven (11) grounds on the face of the application which are further explicated on the supporting affidavit sworn by the Applicant's Advocate Mr. William O. Wameyo on 10/8/2020.

3. The Applicant's case is not complex to apprehend. It is averred that the Applicant instructed the Respondent/Advocate to pursue its loan defaulters. Consequently, the Respondent's advocate filed suits in the subordinate court against the Applicant's members in claim for unpaid loans and default judgment was entered against the defaulters.

4. According to the Applicant, by dint of Section 76(1) (2) of the Co-operative Societies Act Cap 490 Laws of Kenya, the subordinate court lacked jurisdiction to entertain the suit and the claims ought to have been filed before the Co-operative Tribunal. As such, the proceedings and the Judgment entered by the subordinate court is a nullity because it was granted by a court without authority. The advocate further adds that the Judgment has been set aside by consent.

5. Further, the Applicant contends that the Respondent/Advocate has proceeded with taxation based on the impugned Judgment and the consequent orders by the Deputy Registrar on taxation should be set aside. It is also deponed that the Applicant is willing to deposit security if ordered by the court.

6. The Respondent/Advocate in opposing the application, filed a Notice of Preliminary Objection dated 20/8/2020 and a Replying Affidavit dated and sworn on 2/9/2020. The grounds on the face of the Preliminary Objection are: -

a) That this Honourable Court has no jurisdiction to review the Decision of the Deputy Registrar dated 24/2/2020 in the manner sought and on the grounds set out in the Respondent's Application aforesaid.

b) That the decision of the Deputy Registrar is not subject to review by this Honourable Court.

c) That the firm of Wameyo Onyango & Associates has no audience before this Honourable court and the application is filed contrary to mandatory provisions of order 9 of the Civil Procedure Rules.

d) That irrespective of the outcome in the primary suit, the Applicant is entitled to be paid his full professional fees as taxed by the Deputy Registrar.

7. In the Replying Affidavit sworn and filed on 2/9/2020, the Advocate avers that he was instructed by the Applicant to act on its behalf in claim for recovery of loan arrears against **Erick Ojuang Onnyango** and subsequently filed a claim vide **Mombasa CMCC No. 1490 of 2016**. That Judgment was entered in favour of the Applicant but it failed to pay the professional fees. Consequently, the advocate filed taxation proceedings and proceeded to execute the sums awarded in the certificate of costs against the Applicant.

8. It is averred that the Applicant did not file a reference within the required time to challenge the taxation and the orders of the taxing officer cannot be challenged through an application for review. As such the advocate avers that the Applicant lost the chance to challenge the decision of the taxing officer when it failed to file a reference within the prescribed period.

9. The advocate is also of the view that the Applicant has colluded with the Defendant in the primary suit as well as their advocate to frustrate him from being paid his legal fees. According to Mr. Ananda, at no point did the Defendant in the trial court object to the Judgment and the efforts to set the Judgment aside are tainted with *mala fides*.

10. Further, on 7/12/2020 the Applicant further filed a Supplementary Affidavit in response of the averment raised by the Respondents. It is averred that the firm of M/S Wameyo, Onyango & Associates was granted leave to come on record in place of the Applicant vide an application dated 19/2/2020 and subsequently a Notice of Change of Advocates filed. Further, that it has not been disputed that the subordinate court had no jurisdiction and in any event no particulars of collusion have been provided by the Advocate.

11. Directions were taken that the application be canvassed by way of written submissions. Both parties have complied with the Applicant having filed its submissions on 7/12/2020 while the Respondent filed his on 23/9/2020.

The Applicant's Submissions

12. In its submissions the Applicant identified 3 issues for determination namely:-

- a. *Whether it was the duty of the Applicants to draft the pleadings and direct the Respondent on to where to institute the suit.*
- b. *Whether the court had jurisdiction to entertain the suit*
- c. *Whether the Judgment and all the consequential orders and proceedings therefrom are null and void*

13. As regards the first issue, it is submitted that the Applicant relied on the judgment and guidance of the Respondent/Advocate, and having filed the suit in a court without jurisdiction, then the advocate should not be allowed to benefit from his own mischief.

14. On the second issue, it is argued that the claim of a debt by the society from its member falls squarely within Section 76 of the Co-operative Societies Act and therefore the suit ought to have been filed before the Co-operative Tribunal. To buttress these submissions the Applicant relied on the cases of **Kipkoech Rotich –vs- Skyline Sacco Society Ltd and Another** and **Kinogerana Farmers' Co-operative Society Ltd –vs- Murata Farmers Sacco Ltd [2006] eKLR**.

15. Lastly, the Applicant submits that the Judgment was rendered by a court without jurisdiction and it is therefore null and void *ab initio* since the Respondent/Advocate ought to have known that the suit had to be filed before the tribunal. The Applicant further argues that the Deputy Registrar has no supervisory jurisdiction over the Chief Magistrate's Court and it is only this court that can address the issue relating to the trial court's lack of jurisdiction.

Respondent/Decree-Holder's Submissions

16. On his part, the Respondent submitted that during taxation of the bill of costs dated 26/10/2018 the Applicant appointed the firm of M/S Wameyo, Onyango & Associates who accordingly participated in the taxation until a ruling was delivered on the 14/10/2019. A certificate of costs was then issued on 25/10/2019 and subsequently adopted as decree of this court on 24/2/2020. The advocate vehemently objects the assertions that the Judgment by the trial court was ever set aside and in his view it is surprising for a Plaintiff to agitate the interests of the Defendant.

17. The Respondent further states that his consent was set by the firm of M/S Wameyo, Onyango & Associates before coming on record and as such the firm contravened the Sections of Order 9 Rule 9 of the Civil Procedure Rules, 2010.

18. On whether Review can be issued, the Respondent argued that the Applicant has not demonstrated grounds upon which a review can be granted as provided for under Order 45 Rule (1) (b) of the Civil Procedure Rules.

Analysis and Determination

19. From the pleadings, the written submissions of the Advocates, and oral submissions, the issues for consideration can be summed up as follows: -

- a. **Whether this court has jurisdiction to review the orders made on 24/2/2020;**

b. Whether the firm of M/s Wameyo Onyango Advocate is properly on record;

c. Whether the Applicant has established grounds to warrant the review of the orders issued by this court on 24/2/2020;

d. Whether the advocate is entitled to professional fees as sought.

Whether this Court has jurisdiction to review the orders made on 24/2/2020

20. For any Court to entertain any matter it must have jurisdiction to do so, as jurisdiction is everything and without it, the Court has no power to make one more step but to down its tools. See the case of **Carriers of the Motor Vessel "Lilians" Vs. Caltex Oil Kenya Ltd [1989] KLR 1.**

21. The Respondent in this case contends that the court has no jurisdiction to review the decision of the Deputy Registrar made on 24/2/2020 in the manner sought. He argued that the decision of a Taxing Officer can only be challenged through a reference and not by an application for review.

22. I have considered the court record and I have seen no order issued by the Deputy Registrar on 24/2/2020. The record shows that on 24/2/2020, the matter came up for hearing of an application dated 17/12/2019 and the same was allowed on its entirety on grounds that it was not opposed. Put in other words, on 24/2/2020, this court adopted the certificate of costs dated 14/10/2019 for the amount of Kshs. 162,443.24 as a decree of this Court. The court also issued an order that interest shall accrue at the rate of 14% from the date of issuance of the Certificate of Costs until payment in full. These orders were not issued by the Deputy Registrar and in my view it not correct to state that the orders issued on 24/2/2020 can only be challenged through a reference.

23. The position in law as per Section 80 of the Civil Procedure Act is that this Court has the power to review its orders within the purview of the rules set out under Order 45 of the Civil Procedure Rules. In the end result, I am of the view that this issue was wrongly taken out as a point of law and in its place find that the court is correctly versed with jurisdiction to review the orders made on 24/2/2020.

Whether the firm of M/S Wameyo Onyango Advocate is properly on record.

24. The Respondent submitted that the firm of M/S Ananda & Co. Advocate never gave consent to the firm of M/S Wameyo, Onyango & Associates to come on record and as such it was in contravention of Order 9 Rule 9 of the Civil Procedure Rules. On the other hand, the Applicant submitted that the firm of M/S Wameyo, Onyango & Associates sought and was granted leave to come on record vide an application dated 19/2/2020. That being the case, there was no need of seeking consent from the firm of M/S Ananda and Company Advocates.

25. Order 9 Rule 9 of the Civil Procedure Rules provide as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

26. The provision envisages two different scenarios and the only commonalities are that there has been a Judgment and previously, there was advocate on record. In first scenario under rule 9(a), the new advocate or the party in person makes a formal application to the court with a notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but what a party must do is give notice to the other parties and then satisfy the Court to grant it leave for another advocate to come on record or to act in person. In the second scenario under Rule 9(b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the second scenario under Rule 9(b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court.

27. In the Present case, it is not in dispute that the first scenario as provided for under Order 9 Rule 9(a) was fulfilled. The Record reflects that the firm of M/S Wameyo, Onyango & Associates sought leave to come on record vide an application dated 19/2/2020. It has not been shown that the said firm of advocates was denied the leave to come on record. That being the case, the consent of the firm of M/S Ananda & Company Advocates was not necessary. It is therefore my conclusion that the firm of M/S Wameyo, Onyango & Associates is properly on record.

Whether the Applicant has established grounds to warrant the review of the orders issued by this court on 24/2/2020

28. The Substantive prayer in the application under consideration is that this Honourable Court be pleased to review the orders given on 24/2/2020 and have the same set aside. It has been argued that the taxation proceeded on basis of a null and void Judgment and consequently the certificate of cost is a nullity. It is averred that parties entered into a consent for the Judgment to be set aside on basis that it was granted by a court without jurisdiction.

29. In response to those assertions Mr. Ananda argued that there is no Court order nullifying the Judgment and parties cannot consent to

have the same nullified. He also argued that the effort by the Plaintiff agitating the Defendant's interests is a connotation of collusion between the Applicant, the Defendant and the current advocate to frustrate the payment of his legal fees.

30. I have stated herein above that the orders of 24/2/2020 were issued by this court and not the Deputy Registrar. I have also stated that the orders were to the effect that the Certificate of costs was granted to enforce a decree of this court. To be Successful in an application for review, the Applicant has to satisfy the restricted grounds as set out under **Order 45 of the Civil Procedure Rules**. Order 45 lays down the jurisdiction and scope of review limiting it to the following grounds: -

a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant 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) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.

31. I have considered the Orders issued on 24/2/2020 and it has not been alluded that there is a mistake on face of those orders. The Applicant has also not shown that there has been a discovery of any new important evidence which was not within the reach of the Applicant. What appears to be the reason for seeking the review is that the advocate filed a suit in the wrong court and obtained a Judgment which in the Applicant's view is a nullity and therefore the advocate is not entitled to a penny and ought not to have taxed his bill.

32. In my view and at the same time in answer to fourth issue for determination, the advocate was at all material times acting under the instructions of the Applicant. This court has not been supplied with the instruction note to identify the nature of the instructions given to the advocate. Be that as it may, the Applicant has not adduced any evidence that it has suffered loss based on what I can call erroneous advice by his former advocate. If so, then the Applicant is at liberty to pursue a legal remedy for the award of damages.

33. This Court has also not been supplied with an order of the trial Court setting aside the Judgment. What has been supplied to this court is a consent order in **CMCC No. 1555 of 2016** which is different from **CMCC No. 1490 of 2016**; the suit subject to the present taxation suit.

34. In conclusion, the reasons advanced by the Applicant are not sufficient to warrant the grant of orders for review. Consequently, the application dated 10/8/2020 is without merit and is hereby dismissed with costs to the Respondent/Advocate.

35. These orders to apply *mutatis mutandis* to Misc. Application No. 274 of 2018, with similar parties and facts.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 8th day of February, 2021.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O. CHEPKWONY