



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 544 OF 2013**

**IN THE MATTER OF: SECTION 58 OF THE CIVIL PROCEDURE**

**ACT, CAP 21 LAWS OF KENYA**

**IN THE MATTER OF: INTERPLEADER FOR A DECISION ON**

**WHO IS ENTITLED TO THE SUBJECT AMOUNT AND HOW MUCH IF AT ALL AND INDEMNITY TO THE APPLICANT**

**BETWEEN**

**GIKERA & VADGAMA ADVOCATES .....PLAINTIFF/APPLICANT**

**AND**

**ALBINO MATHOM ABUONG.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**GARAND DENG AGUER ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

(1) Before this Court is the Notice of Motion dated 9<sup>th</sup> July 2020 by which **GIKERA & VADGAMA ADVOCATES LIMITED** (the Applicants) seek the following orders:-

“(a) SPENT.

(b) **THAT this Honourable Court be pleased to review and set aside its Ruling and Order made on 14<sup>th</sup> February 2020 dismissing the Originating Summons filed herein and the order for release of the sum of USD \$350,000 to the 1<sup>st</sup> Respondent together with interest from 11<sup>th</sup> December 2013.**

(c) **THAT the Applicant be at liberty to apply for any such further order and/or directions that this Honourable Court may deem fit to grant.**

(d) **THAT the costs of this application be provided for.”**

(2) The application was premised upon **Section 80 and 3A** of the **Civil Procedure Rules 2019 Order 45 Rule 1 & 3** of the **Civil Procedure Rules, 2010** and all enabling provisions of law.

(3) The Respondents did not file any reply to the application. The application was canvassed by way of written submissions. The Applicant filed its written submissions on **22<sup>nd</sup> September 2020** whilst the 1<sup>st</sup> Respondent **ALBINO MATHOM ABUONG** filed the written submissions dated **5<sup>th</sup> October 2020**.

**BACKGROUND**

(4) This application arises out of a Ruling which was delivered by this Court on **14<sup>th</sup> February 2020**. In that Ruling the Court made the following orders:-

**“(i) The suit filed on 11<sup>th</sup> December 2013 is hereby dismissed with costs to the 1<sup>st</sup> Defendant.**

**(ii) The sum of USD 350,000.00 plus interest thereon at Court rates from 11<sup>th</sup> December 2013 until payment in full be released forthwith to the 1<sup>st</sup> Defendant.**

**(iii) Costs of this application are awarded to the 1<sup>st</sup> Defendant/Applicant.”**

(5) The Applicant submits that whereas the Court in its Ruling of **4<sup>th</sup> February 2020** directed that the Applicant pay to the 1<sup>st</sup> Respondent the sum of **USD 350,000** the figure as stated in said Ruling was erroneous. That the correct figure ought to have been **USD 50,000** since in the Originating Summons dated **10<sup>th</sup> December 2013**, the Applicant had expressly pleaded that it held the sum of **USD 50,000** for which it sought a determination of who between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent was entitled to this amount. Therefore according to the Applicant since the 1<sup>st</sup> Respondent did not file any counter claim in the matter the figure granted in the Ruling of **4<sup>th</sup> February 2020** was an error on the face of the record.

(6) On its part the 1<sup>st</sup> Respondent submitted that the present application was misconceived as the Applicant had failed to comprehend the import of interpleader proceedings. The 1<sup>st</sup> Respondent submitted that the Court had power and jurisdiction to decide on that value of the subject matter was **USD 350,000** based on the pleadings, and Affidavits placed before it including previous decisions made by other Courts and/or Tribunals over the subject matter of the suit.

#### **ANALYSIS AND DETERMINATION**

(7) I have carefully considered the instant application, the Affidavit in support as well as the written submissions filed by both parties. The only issues for determination in this application is whether there exists an error apparent on the face of the record.

(8) The power of review is granted to Court through **Section 80** of the **Civil Procedure Act, Cap 21, Laws of Kenya**, which provides as follows:-

**“80. 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.”**

(9) **Order 45, Rule 1** of the **Civil Procedure Rules, 2010** sets out the rules under which the Power of Review may be exercised as follows:-

**“45 Rule 1 (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 review of judgment to the Court which passed the decree or made the order without unreasonable delay.”**

(10) In **REPUBLIC –VS- CABINET SECRETARY FOR INTERIOR AND CO-ORDINATION OF NATIONAL GOVERNMENT EXPARTE ABDULLAHI SAID SALAD [2019]eKLR**, Hon Justice John Mativo expounded upon the jurisdiction and scope of review in the following terms:-

**“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 a ground for review.”**

(11) The Applicant contends that the direction by the Court that the sum of **USD 350,000** be released to the 1<sup>st</sup> Respondent was erroneous as in the Originating Summons dated **10<sup>th</sup> December 2013** the amount in issue was only **USD 50,000**. Therefore according to the Applicant the Court ought only to have made orders in respect of **USD 50,000**.

(12) In the Ruling of **4<sup>th</sup> February 2020** this Court held as follows:-

**“The Ruling of 26<sup>th</sup> September 2018 did not deliver a final and conclusive decision on the matter – that final and conclusive decision as delivered by the High Court on 9<sup>th</sup> December 2016 in JR No. 349 of 2016 which upheld and validated the proceedings before the Disciplinary Tribunal. This Court being a Court of concurrent jurisdiction has no jurisdiction to review or re-open that decision.**

**I am mindful of the fact that dismissal of a suit is an extreme measure but I am satisfied that there no longer exists an issue for determination in the interpleader. The issue of the ownership of the monies held by the Applicant has been determined. Following a full hearing attended by both parties before a competent Tribunal it was determined that the funds in question belonged to the 1<sup>st</sup> Defendant. An attempt to quash the decision of the Tribunal Vide JR No. 349 of 2019 was unsuccessful. No further appeal and/or review has been filed in the matter. Accordingly I am satisfied that the question of ownership of the funds being held by the Plaintiffs has already been determined ...”**

(13) It is manifest that the **Advocates Disciplinary Tribunal**, in their determination found that the Applicant was holding the sum of **USD 350,000** which it had declined and/or refused to surrender to the 1<sup>st</sup> Respondent after recovering this amount from the 2<sup>nd</sup> Respondent. The Tribunal found that the Applicant owed the 1<sup>st</sup> Respondent this full amount of **USD 350,000**.

(14) It is also manifest that this decision of the **Advocates Disciplinary Tribunal** was upheld by the High Court in **JR No. 349 of 2016**. In that case the High Court upheld the finding of the Tribunal that the Applicant law firm were guilty of professional misconduct and found further that the Applicant owed the 1<sup>st</sup> Respondent this sum of **USD 350,000**.

(15) Therefore I find that there is no new evidence that has been discovered in this matter. The issue was dealt with conclusively by the **Advocates Disciplinary Tribunal** where the Applicant/Plaintiff was found guilty and the same decision was upheld by the **High Court JR No. 349 of 2016**. The issue the Applicant has raised in this application is that the Court was to determine the question of **USD 50,000** and not the **USD 350,000**. This is a matter which was already determined and settled by the decision of the Tribunal which found that the Applicant should release the **USD 350,000** to the 1<sup>st</sup> Respondent.

(16) In the case of **TOKESI MAMBILI AND OTHERS –VS- SIMINON LITSANGA [2004]eKLR** where the Court held as follows:-

**“(i) In order to obtain a review an Applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An Applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.**

**(ii) Where the application is based on sufficient reason it is for the Court to exercise its discretion.”**

(17) In **NYAMOGO & NYAMOGO –VS- KOGO [2001]EA 170** discussing what constitutes an error on the face of the record, the Court rendered itself as follows:-

**“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 determined judicially on the facts of each case. There is a 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”**

(18) As such I find that there is no error on the face of the record. The Plaintiff/Applicant had sought a determination from the Court the issue of **USD 50,000** which was unclaimed by the parties to the suit. Following on the material availed in this suit ie the decision of the Advocates Tribunal and the High Court this Court found and held that the Applicant was infact holding **USD 350,000** (inclusive of the **USD 50,000**) for and on behalf of the 1<sup>st</sup> Respondent. The issue of the **USD 50,000** was determined by the Court in its Ruling of **14<sup>th</sup> February 2020**. Accordingly I find no merit in this application for review. The same is hereby dismissed in its entirety. Costs are awarded to the 1<sup>st</sup> Respondent.

Dated in **Nairobi** this **12<sup>th</sup>** day of **March, 2021**.

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**MAUREEN A. ODERO**

**JUDGE**