



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO.E136 OF 2021**

**MISTRY JADVA PARBAT & CO.....APPLICANT**

**-VERSUS-**

**KENYATTA UNIVERSITY.....RESPONDENT**

**RULING**

1. **Mistry Jadva Parbat & Company Ltd**, the Applicant herein through a **Notice of Motion** application dated **11<sup>th</sup> June, 2021** has sought only one substantive prayer, which is for an order that, *a skeleton file be opened with respect to Mombasa High Court Civil Suit No.109 of 1991; Mistry Jadva Parbat & Company Ltd –vs- Kenyatta University*, and the documents annexed to the application be deemed as the proper pleadings relating to that case.

2. The application is expressed to be brought under the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and is based on *inter alia* grounds on its face and further supported by the **affidavit** sworn on the **11<sup>th</sup> June, 2021** by the Applicant's advocate on record; **Feysal Dubow**.

3. The Plaintiff/Applicant's case is premised on among other averments that; parties herein had recorded a consent in **Mombasa HCCC No.109 of 1991** that the matter be referred to Interest Rates Advisory Centre for purposes of determining the Respondent's indebtedness to the Applicant in line with the

directions of this court vide the orders made on **29<sup>th</sup> May, 1995** and **29<sup>th</sup> June, 1995** respectively. Consequently, the Interest Rates Advisory Centre compiled a report which was filed by the Defendant/ Respondent on **12<sup>th</sup> July, 2007** and later adopted as an order of this court on **30<sup>th</sup> July, 2009**. Now, the Plaintiff/Applicant laments that the report by the Interests Rates Advisory Centre is irregular and illegal for a number of reasons including that; firstly, the report is contradictory to the Ruling of this court made on **29<sup>th</sup> May, 1995** in alleging that the outstanding amount was Kshs.3,851,242.33 when the said Ruling had indicated the outstanding amount as being Kshs.22,066,255/=. Secondly, that it has dawned upon the Plaintiff/Applicant upon reconciliation of the accounts that the Interests Rates Advisory Centre Report had added Kshs.4,546,793.10 to the payments received thus arriving at a figure of Kshs.47,000,000/= instead of a sum of Kshs.42,453,206.90 which had been agreed upon by the parties. Thirdly, that the said report failed to cover for the interest for the period after the Ruling of **29<sup>th</sup> May, 1995** to date when the report was compiled. Fourthly, that the report finally reflected the outstanding balance as Kshs.41,646,868.63 contrary to the decree issued on **30<sup>th</sup> September, 1995** which indicates the outstanding balance as Kshs.43,146,110.65. Lastly, that the said report purported to consider certificate number 15 which was not in any way a subject to the suit before the court.

4. Based on the foregoing, the Applicant opines that the Interest Rates Advisory Centre attempted to vary the court's order of **29<sup>th</sup> May, 1995** and **29<sup>th</sup> June, 1995** respectively, without the jurisdiction to do so. The applicant also avers that it has engaged the services of **Kihunyu Mungai & Associates, Certified Public Accountants (K)** who have compiled a report dated **14<sup>th</sup> April, 2021** confirming that while taking into account the orders of this court made on **29<sup>th</sup> May, 1995** and **29<sup>th</sup> June, 1995**, the Defendant/Respondent is indebted to the Plaintiff/Applicant to a tune of Kshs.5,420,325,299.23 which means that the Report by the Interests Rates Advisory Centre is irregular.

5. It is the Applicant's case that it had previously lodged an appeal vide a **Notice of Appeal** dated **6<sup>th</sup> August, 2009** against the Ruling dated **30<sup>th</sup> July, 2009** which had adopted the Interest Rates Advisory Centre's Report but copies of proceedings have never been supplied despite consistent follow up by the Applicant and as things stand, it seems that the proceedings will never be supplied at all. For that reason, the Applicant avers that it has resorted to abandon and/or withdraw the **Notice of Appeal** thus it is necessary and in the interest of justice that a skeleton file be opened so that it may proceed to file an application dated **21<sup>st</sup> May, 2021** which seeks to review the Ruling made by this court on **30<sup>th</sup> July, 2009** and set aside the report by Interest Rates Advisory Centre dated **12<sup>th</sup> July, 2007** and filed on **13<sup>th</sup> July, 2007**.

6. The Respondent opposed the application through a **Replying Affidavit** sworn by its Acting Deputy Vice-chancellor; **Professor James**

**Kungu** on 24<sup>th</sup> June, 2021. He has deponed that the present application is an invite on

an attempt to revive quite an old matter which was concluded more than

twelve (12) years ago and the court should shun away from it. While in agreement with the facts that the matter was referred to the Interest Rates Advisory Centre on consent of the parties and a report thereof adopted as an order of the court, **Professor James Kungu** lamented that the Applicant is seeking to set aside the said report without disclosing sentiments of fraud on the part of Interest Rates Advisory Centre and without an explanation on why it has taken the Applicant a period of twelve (12) years to follow up on the matter if they were indeed aggrieved by the report and the decision of the court. That, in any event, according to the Respondent, the Applicant is attempting to introduce new evidence through a report by private auditors and the same should not be permitted. It is further deponed that that the parties have been in court **since 1991** in litigation over a one building contract and besides the suit in Mombasa, a related suit was filed at the High Court in Nairobi, being **HCCC No.121 of 2008** and a Judgment delivered therein on **26<sup>th</sup> July, 2018**. That thereafter, the Applicant appealed against the High Court decision but the Appeal was dismissed vide a Judgment delivered on **20<sup>th</sup> November, 2020**. Therefore, the Respondent thinks that the instant application is a disguised attempt to controvert the execution of the decree in the Nairobi matter by misleading this court. In the end, it is averred that it would be doing injustice to the Respondent were the present application be allowed having regard to the fact that this is fairly an old matter. Thus, the court is sought to take note of the principle that litigation

should come to an end at some point and proceed to dismiss the present

application by having the matter marked as concluded.

7. When the application came up for hearing, the advocates on record for the parties opted to canvass the application orally as a significant part of the submissions reflect the averments made on the pleadings. However, for clarity, **Mr. Mwanzia** appeared for the Applicant while **M/s Kabuthi** appeared on behalf of the Respondent.

8. In buttressing the **Replying Affidavit**, as summarized above, **M/S Kabuthi** added that the matter sought to be reconstructed was settled vide a Ruling delivered by the Hon. J. Azangalala in **2009** so that it would be unjust to force the Respondents to come back and re-litigate on issues which have already been settled and the instant application should therefore be dismissed. Further, the learned counsel took issue with the instant application in that it was filed by advocates who are not properly on record.

9. **Mr. Mwanzia**, counsel for the Respondent on the other hand was of the view that the Respondent could only oppose the instant application on basis of the matters deponed to in the **Replying Affidavit**. In view of this, he submitted that the Applicant should be heard on the basis of the application for reconstruction of the lost file to avoid locking out the option for review. The other issues can be addressed later on in the review application. He also added that the issue of delay as raised by the Respondent had been addressed on the application for review as is demonstrated in the Applicant's annexures

hence can be dealt with once the application for review is filed.

#### **Analysis and Determination**

10. I have considered the application, the grounds adduced in the affidavits sworn in support and rebuttal of the application as well as the oral submissions made by counsels for the parties.

11. It is however clear from all that, that none of the parties pin pointed the guiding provision of the law applicable with regard to applications for reconstruction of lost files and the opening of skeleton files. Nonetheless, the application at hand was expressed to have been brought under the provisions with regard to the court overriding objective and the oxygen principle and especially **Section 3A** of the **Civil Procedure Act** which provides as follows:-

***“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

12. It is this provision of law that provides for the inherent powers of the courts upon which basis and in the absence of a specific law, that the courts can make necessary orders in the interest of justice so as to prevent abuse of the court process.

13. However, in my view, the reconstruction of lost files is an internal and administrative matter to be dealt with by the office of the Deputy Registrar and the official overseeing the custody of the court files. I also appreciate that

in the absence of a specific law or practice directions on the issue of reconstruction of lost files, recourse has to be had on the guidelines laid in the **High Court of Kenya, Registry Operation Manual**. The **Second Edition** thereof at **pages 33-34** the guidelines are set out as follows:-

***“If a file is missing, the Registry will take the following steps:-***

***a) The Registry Supervisor checks the file movement register to identify the person in whose possession the file was last recorded. The Supervisor instructs him/her to trace the file.***

***b) If the file is not traced, the Registry Supervisor circulates a memo to all staff in the Station/Registry asking them to check whether the file is in their possession. If the file is not found within 24 hours, the Supervisor will notify the Deputy Registrar.***

c) *The Deputy Registrar then initiates a special search.*

d) *If the file is not traced after this first search, the Registry Supervisor writes the words ‘original file missing’, in pencil, on the relevant case register.*

e) *The Registry Supervisor then enters the details of the missing file in the register of missing files which is maintained by the Registry Supervisor.*

f) *After a fruitless search of 14 days, the Deputy Registrar issues a certificate to confirm the loss and recommends the reconstruction of the file.*

g) *Parties are informed of the non-availability of the file in writing by the Deputy Registrar with a recommendation for reconstruction.*

h) *In the event that a missing file is traced, the date of recovery is recorded in the case register and its availability is communicated to the parties concerned by the Deputy Registrar within 24 hours of its tracing. A certificate confirming the recovery is issued.*

i) *The file once traced is merged with any skeleton file that may have been opened.”*

14. In the application at hand, the Applicant has not indicated whether it has

followed the above process and neither has the Applicant’s advocate who is the deponent in the affidavit sworn in support of the application, indicated whether the complaint on the inability to trace file **No.HCCC No.109 of 1991** was brought to the attention of the Registry Head/Supervisor and later to the Deputy Registrar in the event of a fruitless search for the file.

15. In the grounds in support of the application, the Applicant has merely stated that its efforts to retrieve the file from the Registry as well as the archives, has been without any success hence it has been concluded that the court file has been closed and disposed off.

16. In my view, that conclusion can only be arrived at upon a written communication by the Deputy Registrar through a certificate confirming the loss of the court file and a recommendation for reconstruction. It is only until then that the application for reconstruction may be necessary, taking into account that the guidelines on reconstruction as reproduced above have provided for the necessary timelines for completion of the process. That even if the Respondent has not rebutted the loss of the original court file, I am of the view that it is imperative before filing an application for reconstruction of a missing file, for the Applicant to adhere to the guidelines reproduced above so as to ensure certainty, conciseness and for good record keeping.

17. The upshot of that discussion is that the Applicant’s application dated **11<sup>th</sup> June, 2021** seeking for the reconstruction of the court file in **Mombasa HCCC No.109 of 1991; Mistry Jadva Parbat & Co. –vs- Kenyatta University** is premature and such an order could only have issued had the applicant undertaken the above referenced steps.

18. At the instance, the above finding is enough to dispense with the application at hand. But for completeness, I will proceed to consider whether it would have been appropriate to grant the order for reconstruction as sought.

19. As can be gleaned from the pleading filed by the applicant, the orders for reconstruction are sought mainly to enable the Applicant file an application for review as annexed to the application and marked as **“FD-1”**. More specifically, the Applicant intends to seek an order for setting aside the report by the Interest Rates Advisory Centre dated **12<sup>th</sup> July, 2007** and have the Court Order dated **30<sup>th</sup> July, 2009** adopting the said report as order of the court reviewed and in lieu thereof adopt the report by **M/S Kihunyu Muingai & Associates, Certified Public Accountants (K)** dated **14<sup>th</sup> April, 2021** adopted as the true position with respect of the decretal sum and indebtedness of the Respondent to the Applicant.

20. The above notwithstanding, the Applicant does not dispute that the matter was referred to Interest Rates Advisory Centre on basis of a consent order dated **6<sup>th</sup> July, 2007**. Further, that the subsequent report by Interest Rates Advisory Centre was adopted as an order of this court vide a Ruling dated **30<sup>th</sup> July, 2020**. There after the court ordered the file closed to end the long standing litigation between the Applicant and the Respondent.

21. I have read through the Ruling dated **30<sup>th</sup> July, 2009** and therein it is clearly observable that the core of the matter being referred to Interest Rates Advisory Centre was the Applicant’s demand of Kshs.79,000,000/= from the

Respondent while the Respondent on the other hand has alleged that it had already made prompt payments and was no longer indebted to the Applicant. The matter was therefore referred to the Interest Rates Advisory Centre for examination and audit of the accounts in respect of all the payments made by the Respondent towards satisfying the decree made in favour of the Plaintiff. In the same Ruling the court observed that the Applicant had challenged the report but had not moved the court towards setting aside of the said report. The court was also alive to the fact that the matter was referred to Interest Rates Advisory Centre on basis of a consent order, which order could only be challenged on grounds of fraud, mistake, collusion or public policy, hence the grounds advanced by the Applicant were not viable in the circumstances to

warrant the setting aside of the report.

22. In my view, and as a consequence of the foregoing, it would be an abuse of the court process for the Applicant to seek the setting aside of the report by Interest Rates Advisory Centre on grounds which were already considered in the Ruling of **30<sup>th</sup> July, 2009**. This could possibly explain why the applicant failed to include the Ruling delivered on **30<sup>th</sup> July, 2009** among its annexures as attached to the present application.

23. Be that as it may, the Applicant had only two options in challenging the Ruling dated **30<sup>th</sup> July, 2009**, which was either to appeal or seek review of the same. In the grounds adduced in support of the application, the Applicant stated that it lodged a **Notice of Appeal** dated **6<sup>th</sup> August, 2009** against the Ruling of **30<sup>th</sup> July, 2009** but has never been supplied with proceedings. It then follows that once the Applicant chose to proceed with the appeal, it automatically lost the right to ask for a review of the Ruling dated **30<sup>th</sup> July, 2009** as the matters to be remedied by a review ought to have been merged in the appeal. This was also the finding in the case of **African Airlines International Limited –vs- Eastern & Southern Africa Trade Bank Limited (2003) 1 EA 1(CAK)**, where it was held as follows: -

*“Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed, it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal. (See Kamalakshi Amma vs A Karthayani (2001) AIHC 2264. The respondent’s application for review was therefore incompetent hence the court did not have jurisdiction to grant the order sought under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. This determination is sufficient to dispose of the appeal...”*

24. Similarly, in the case of **Re: Estate of Thomas Mbui Njenge alias Thomas Nchenge (Deceased) [29021] eKLR**, the Court held thus;

*“Without delving much on the possibility that the Petitioner/Applicant may be gambling and/or forum shopping with the aim of obtaining orders by all means, this Court finds that a party who files a Notice of Appeal against a decision is barred from subsequently filing an application for review against the same decision. (Emphasis added).*

25. The facts in the above cases sit in all fours with the facts of the instant case and therefore there is no basis of departing from a similar conclusion. Even though the substantive appeal has not been filed, the Plaintiff/Applicant had filed a **Notice of Appeal**. It is therefore a bad day for the Applicant since there can be no place for review once an intention to appeal has been intimated by filing a **Notice of Appeal**.

26. Having reached the conclusion that the Applicant having opted to appeal the Ruling of **30<sup>th</sup> July 2019**, it has no option for a review and it would be unnecessary for the construction of a skeleton file to file **No.HCCC No.109 of 1991** only for purposes of filing an ousted review application.

27. The upshot of the foregoing is that the Applicant’s application dated **11<sup>th</sup> June, 2021** lacks merit and the same is dismissed with costs to the Respondent.

It is hereby so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16TH DAY OF SEPTEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the Presence of:

Mr. Mwanzia counsel for Applicant

M/S Kabuthi counsel for Respondent

Court Assistant - Winny