REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.E419 OF 2018

LABAN GATHUNGU.....PLAINTIFF

VERSUS

ERNST & YOUNG LLP.....DEFENDANT

RULING

(1) Before Court is the Notice of Motion dated **5th February 2020** by which the Defendant **ERNST & YOUNG LLP** seeks the following Orders:-

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. The order issued on 16th December 2019 restraining the Defendant/ Respondent by itself, its agents and/or assignees from proceeding with the process of termination of the Plaintiff's membership of the Defendants council of Partners be reviewed and set aside.**
>
> **4. The Order issued on 16th December 2019 directing that the Plaintiff be paid one half of the salary and emoluments due to him as a partner pending the hearing and determination of the suit and that if the Defendants prove their case at the conclusion of the hearing then the amount so paid can be recovered from the final dues to be paid to the Plaintiff be reviewed and set aside.**
>
> **5. The costs of this application be provided for.'**

(2) The application was premised upon **Section 80 of the Civil Procedure Act, Order 42 Rule 6 and Order 45 Rule 1 of the Civil Procedure Rules 2010** and the inherent power of the Court. It was supported by the Affidavit of even date sworn by **ANTHONY MAKENZI MUTHUSI** the Defendant Chief Operations Officer as well as the Further Affidavit dated **21st February 2020** sworn by the same deponent.

(3) The Plaintiff/Respondent **LABAN GATHUNGU** opposed the application for review and relied on his Replying Affidavit dated **10th February 2010**.

(4) The application was canvassed by way of written submissions. The Defendant/Applicant filed its Written Submissions on **27th February 2020** whilst the Plaintiff/Respondent filed its submissions on **28th February 2020**.

BACKGROUND

(5) Vide a Ruling delivered on **13th December 2019** this Court made the following Orders:-

> (i) That the Defendant be restrained by itself, its agents and/or assignees from proceeding with the process of termination of the Plaintiff's membership of the Defendants Council of Partners.
>
> (ii) That the Plaintiff be paid one half of the salary and emoluments due to him as a partner pending the hearing and determination of the main suit.

It is the above two orders that the Defendant now seeks to have reviewed.

ANALYSIS AND DETERMINATION

(6) **Section 80 of the Civil Procedure Act, Cap 21, Laws of Kenya** provides as follows:-

> **"80 Any person who considers himself aggrieved-**
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> **(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.**

(7) **Order 45 Rule (1) of the Civil Procedure Rules** provide that:-

> **"(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 an 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."**

(8) **Order 45 Rule 1** is very explicit that a court may only review its orders on the following grounds:-

> (a) There must be discovery of new and important evidence which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
>
> (b) There was a mistake or error apparent on the face of the record; or
>
> (c) There were other sufficient reasons; and
>
> (d) The application must have been made without undue delay.

(9) On ground (d) I am satisfied that the present application was filed in a timely manner. The court delivered its Ruling on **13th December 2019** and this Notice of Motion was filed on **5th February 2020**. Given the intervening Christmas Holidays and the High Court Vacation I find that the two (2) month period cannot be said to amount to inordinate delay.

(a) ERROR ON THE FACE OF THE RECORD

(10) In **NYAMOGO and NYAMOGO –VS- KOGO [2001]E.A** the Court of Appeal gave its definition of what constitutes an error apparent on the face of the record in the following terms:-

> **"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness 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**."[own emphasis]

(11) The Defendant argues that the orders made to stay the process of removal of the Plaintiff as a partner we are made in error by on the date of the Court's Ruling the Plaintiff was **not** a member of the Defendant Counsel of Partners a fact which it is submitted had already been acknowledged by the Court in that same Ruling. The Defendants submits that this is an error which is self –evident and warrants a review of the court orders in that regard.

(12) The Plaintiff counters by alleging that he is still a Partner with the Defendant and submits that the official records held in the Registrar of limited liability Partnerships at the Office of the Attorney General (annexture **"LG7"** to Replying Affidavit dated **10th February**

2020)still reflects the name of the Plaintiff as a Partner. Therefore on the face of it as at **22nd January 2020** (almost a month after this Court delivered its Ruling) the Plaintiff was still reflected as a partner in the official records relating to the Defendant.

(13) An error apparent or the face of the record refers to that error which is clearly discernible and does not require any further elucidation. In **NATIONAL BANK OF KENYA LIMITED –VS- NDUNGU NJAU [1997] eKLR** the Court of Appeal held thus:-

> **"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…"**

(14) Likewise **Mativo J. in REPUBLIC VS ADVOCATES DISCIPLINARY TRIBUNAL EX PARTE APOLLO MBOYA [2019]** also held as follows:-

> **"The term "*mistake or error apparent*" by its very connotation signified an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. <u>If an error is not self-evident and detection thereof required long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and section 80 of the Act</u>. To put it differently an order, decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision**."[Own emphasis]

(15) The question of whether or not the Plaintiff is a Partner is not one which is easily discernible. The question of the validity and/or authenticity of the records held at the Hon Attorney General's office the question of delay in updating records at the relevant registry are all matters which require examination and argument. In my view this is a matter that can only be interrogated during the hearing of the suit and not at this interim stage. Accordingly I find that there exists no error apparent on the face of the record on this point which warrants a review.

<u>NEW AND IMPORTANT EVIDENCE</u>

(16) In discussing this aspect of discovery of new and important evidence the Supreme Court of India observed as follows in the case of **AJIT KUMAR RATH –VS- STATE OF ORISA & others:-**

> **"The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. <u>A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier</u>, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason"…means a reason sufficiently analogous to those specified in the rule."** [own emphasis]

(17) In arguments in respect of the earlier Notice of Motion dated **5th December 2018** the Defendant told the court that it had completed all terminal payments due to the Plaintiff. Now the Defendants annex as new and important evidence allegedly prepared on **27th June 2019**. If this was the case then this evidence was available before the Notice of Motion dated **5th December 2019** was argued. It cannot therefore be said to be "**new evidence**". The Defendant claims to have paid the Plaintiff all its dues but is not able to adduce documentary evidence to prove such payments. To qualify as new and important evidence, the evidence must be of such nature that could not have been discovered had the Defendant exercised due diligence. Evidence relating to the Plaintiffs terminal dues and any amounts due to him cannot be determined at this interlocutory stage. The same must be subjected to interrogation at the full hearing of the suit. I find that this ground has not been proved to warrant a review.

(18) In **EVAN BWIRE –VS- ANDREW NGINDA KISUMU Civil Appeal No.103 of 2000** it was held:-

> **"An application for review will only be allowed on every strong grounds particularly if its effect will amount to re-opening the application or case a fresh."**

I find that no valid or sufficient reasons exist to review the courts orders made on **13th December 2019**. The present application therefore found to be without merit and the same is dismissed in its entirety with costs to the Plaintiff/Respondent. It is so ordered.

Dated in Nairobi this 15th day of April 2020.

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Justice Maureen A. Odero