REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

Coram: D. K. Kemei - J

MISC CIVIL APPLICATION NO 99 OF 2018

INVESCO ASSURANCE CO LTD.....JUDGEMENT DEBTOR/APPLICANT

VERSUS

KINYANJUI NJUGUNA & CO ADV .....DECREE HOLDER/RESPONDENT

LEAKEYS AUCTIONEERS.....2ND RESPONDENT

RULING

1. The ruling relates to two applications that were filed in the High court at Kitui.

2. In the 1st application dated 26th June, 2020, the applicant approached the Kitui High Court vide certificate of urgency as well as notice of motion that was brought under section 1A, 1B, 34, 44(1) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. The following orders were sought;

a) Spent

b) Spent

c) Spent

d) The honourable court be pleased to set aside and/ or quash the proclamation, attachment and/ or sale of the applicant's tools of trade as listed in the proclamation dated 24th June, 2020 namely 3 work stations, 12 office chairs, 6 office desks, 2 book shelves, 2 filing cabinets, 2 plastic chairs & 4 computers;

e) The honourable court be pleased to permanently restrain the respondents by themselves or their agents from proclaiming, attaching and/ or selling the applicant's tools of trade as listed in the proclamation dated 24th June, 2020 namely 3 work stations, 12 office chairs, 6 office desks, 2 book shelves, 2 filing cabinets, 2 plastic chairs & 4 computers and or any such similar items in execution of the decree of this court dated 28th March, 2019

f) The costs of the application.

3. According to the applicant, vide affidavit deponed on 26.6.2020 on their behalf by Paul Gichuhi who is stated to be the Legal officer of the Judgement debtor/applicant, the proviso to section 44(1) of the Civil Procedure Act exempts tools and implements of a person necessary for performance by him of his trade or profession and books of accounts from attachments in execution of decrees. It was averred that neither the Act nor the rules defined tools or implements necessary for the performance of a trade and profession and therefore the lacuna had been hijacked by the judgement creditor's auctioneers who in abuse of discretion proclaimed items that were the applicant's tools and implements necessary for its insurance business. The deponent lamented that the judgement creditor unless restrained would continue unabated to attach and cart away the protected tools of trade from the front and back offices of the judgement debtor that would also have a reputational cost. It was pointed out further that the attachment of the office furniture and stationery would lead to loss of man hours of the applicant's staff whose work would be interrupted. It was specifically pointed out that the applicant would be exposed to risks and losses in underwriting due to wrong premium computations; in claims operations due to delayed payments; in regulatory returns due to interference with data required for filing regulatory returns; to brokers and agents commissions due to interruptions leading to erroneous financial statements; to daily lapsing cover and renewal of business due to interruption of the judgement debtor's servers and ICT software; to insurance premium finance transactions caused by disconnections to the judgement debtor's software; to shared payment platforms due to interference with computers and servers and to interconnected branch operations due to attachment and disruption of ICT software by the auctioneers. The court was

urged to grant the orders sought in the application.

4. The application proceeded exparte as against the respondents and interim reliefs were granted pending hearing interpartes before the Kitui High Court.

5. In reply to the application was an affidavit deponed on 8.7.2020 by Seth Khisa who is stated to be an advocate practicing in the firm of Kinyanjui Njuguna & Co. Advocates. It was averred that section 44(1) of the Civil Procedure Act applied to natural persons and not to corporations such as the applicant. It was averred that the furniture and computers listed in the proclamation notice dated 24.6.2020 could not be said to be tools of trade of the applicant who is in the insurance business. It was averred that the issue that the applicant took with the lacuna in section 44(1) (ii) of the Civil Procedure Act ought to be raised with the Attorney General or petitioning the National Assembly to amend the said provision. According to the deponent, the applicant had not indicated how it would settle its obligations to settle the decrees of the court and the only assets that the decree holder can rely upon to satisfy the decree of 28.3.2019 is what the applicant seeks to have protected by invoking the mentioned provisions of the law. It was pointed out that the applicant collected millions in premiums and yet sought to avoid to settle the decrees issued by this court.

6. There is no indication of any response by the 2nd respondent.

7. On 9.7.2020, an application was filed by the 1st respondent under section 1A, 1B, 3, 3A, 44(1) of the Civil Procedure Act as well as Order 22 Rule 19 (2), 22, 23(3), 25 & 28(3), Order 40 Rule 1 and Order 51 of the Civil Procedure Rules seeking various reliefs that were to the effect that the judgement debtor deposit security of the decretal sum. The application was deemed spent as the court on 9.7.2020 granted orders *inter alia* that the judgement debtor deposit security in the total amount of the decree and or securing a bank guarantee within 7 days from 9.7.2020. That being the position I find that the said application had already been spent and thus there is no need to make a determination thereon. This then leaves the two applications dated 26.6.2020 and 3.8.2020 for determination.

8. The applicants then approached the Kitui High Court vide certificates of urgency as well as notice of motion dated 3.8.2020 that was brought under Rule 3(2) of the Judicature Act (High Court Practice & Procedure) Rules, Section 1A, 1B, 34 of the Civil Procedure Act and Order 51 Rule 1 and Order 45 Rule 1 of the Civil Procedure Rules. The following orders were sought;

a) *Spent*

b) *Spent*

c) *Spent*

d) *This honourable court be pleased to review and set aside its ruling delivered on 9.7.2020 and all and/or any consequential orders therein*

e) *Spent*

f) *Spent*

g) *The costs of this application*.

9. In support of the application was an affidavit deponed on 3.8.2020 by Paul Gichuhi who is stated to be the legal manager of the applicant company. The deponent pointed out that the court directed the applicant to deposit a security in the form of cash or bankers cheque equivalent to the decretal amount. The applicant however upon reconciliation had noted that the applicant had indeed paid the 1st respondent all the sums allegedly owed. Copies of receipts were attached and marked PG3. It was pointed out that there were regimes of different legal managers whom the 1st respondent engaged and it was not practicable to avail to the court in good time evidence of payments that were made to the 1st respondent. The deponent averred that the 1st respondent was guilty of deliberate material non-disclosure of the fact that they received payments and as such the 1st respondent if not restrained would be unjustly enriched with double payments.

10. The application was strenuously opposed vide replying affidavit deponed on 7.9.2020 by Don Otury from the respondent firm of Advocates. The deponent took issue with the inordinate delay in filing the review application as the time within which to comply with the orders of the court on 9.7.2020 had lapsed. It was pointed out that the judgement debtor is guilty of contempt of the court orders by failing to comply with the same hence coming to equity with unclean hands. It was averred that the applicant was non-deserving of review orders as the annexure PG3 was within the knowledge of the applicant prior to filing the instant application and prior to taxation of the bill of costs hence the same could not be said to be new and important matters of evidence. It was further pointed out that the annexure PG3 ought to have been adduced at the stage of taxation proceedings and as such the belated reliance on the same was *functus officio* the taxing court. It was averred that the deponent did not oppose the taxation proceedings and that the PG3 had no relation to the decree before this court. The court was urged to dismiss the application.

11. The parties agreed by consent to canvass the applications vide written submissions. Vide submissions filed on 28.9.2020 on behalf of the applicant by learned counsel Awele Jackson Advocates LLP, reliance was placed on the case of **Bora Capital Ltd v Jance Njeri Munyi (2018) eKLR** where the appeal court agreed with the finding of the trial court that the appellant's assets including chairs, tables, officer counter (sic), metal cabinets, computers and a printer that were proclaimed were tools of trade. Cited was the case of **Jonathan Wepukhuli t/a Gati Cleaning Agency Limited v Julius Odhiambo Oduor [2019] eKLR** in which it was held that:

"*There is a second point that points to prospects of substantial loss being suffered by the Appellant. It is disclosed in the*

application when the applicant says that execution has issued and levied against his tools of trade. Even though it has not been revealed what his trade is, the proclamation reveals that the proclaimed goods are office equipment and tools. In the present word if one runs any business, computers and furniture are critical and necessary tools for such business or trade and would qualify for protection granted under Section 44 of the Civil Procedure Act. That being the case to allow execution upon such goods would be to allow violation of the law."

12. The court was urged to grant the reliefs sought. It was submitted that by dint of Order 22 Rule 51 of the Civil Procedure Rules, the applicant had a right to lodge the objection proceedings to protect its legal interests.

13. It was the strong argument of counsel that the review orders ought to be granted as that was the only way that the court could establish the amounts paid to the 1st respondent. It was pointed out that the 1st respondent had failed to disclose that it commenced insolvency proceedings against the applicant vide **Milimani Insolvency Petition E155 of 2019- Kinyanjui Njuguna & CO Advocates v Invesco Assurance CO Ltd**; that this was contrary to section 429(1)(a) and 430 of the Insolvency Act 18 of 2015 that proscribed two or more execution processes and as such the winding up petition together with allowing the present execution was un-procedural, unjust and an abuse of office. It was submitted that in view of section 429(1)(a) and 430 of the Insolvency Act 18 of 2015, the respondent's actions ought to be rendered null and void and the warrants of attachment as well as the application for deposit of security be nullified. It was further submitted that the warrants of attachment and application for deposit of security were intended to defeat the primary object of the Insolvency Act and therefore the court could not issue directions that were contrary to the express provisions of statute. It was revealed that there was an order of stay of execution of all warrants of attachment against the applicant in Milimani Insolvency Petition E155 of 2019 issued on 6.8.2020 and this court was bound by the said order hence the present attachments were stayed.

14. In response, counsel for the 1st respondent vide submissions dated 21.9.2020 framed four issues for determination, *to wit*; Firstly whether the applicant as a company is covered by section 44(1) of the Civil Procedure Act; Secondly whether the permanent restraining orders sought by the applicant/judgement debtor should be declined; Thirdly whether the court ought to review and set aside its order issued on 9.7.2020 and direct/supervise the reconciliation of the parties' accounts in this matter and finally who should bear the costs of the applications.

15. In respect of the 1st issue, in placing reliance on the case of **Blackwood Hodge (Kenya) Ltd v Lead Gasoline Tank Cleaning Sam and Chase (K) Ltd [1986] KLR 749** where it was held that:

"*The debt having been pending for a very long time, the conduct of the applicant in failing to make any payment in settlement of it had been such as would not persuade the court to come to its aid…Section 44 of the Civil Procedure Act is intended to protect, not corporate entities but artisans whose livelihood depends on their workmanship. The section reads "the tools and implements of a person for the performance by him of his trade or profession". "Person" as used in the subsection does not include a corporate body. This section did not protect the applicant…There was a high probability that if the attached property was released, it may be attached in satisfaction of the applicant's other debts*."

It was submitted that the applicant could not benefit from section 44(1)(ii) of the Civil Procedure Act that covered natural persons and not corporate entities.

16. It was submitted that the proclaimed properties were items that were subject to the Movable Properties Securities Rights Act, 2017 and were not tools of trade. It was further submitted that the judgement debtor could still carry on its business of insurance notwithstanding the attachment of the proclaimed items.

17. In respect of the 2nd issue, it was submitted that the applicant had not meet the threshold for grant of the injunctive orders sought. It was the argument of counsel that the failure to settle the decretal amount meant that the applicant came to court with unclean hands. It was also pointed out that the injunctive orders sought would interfere with the jurisdiction of the courts to execute the decrees passed by them. Reliance was placed on the case of **Michael Bartenge v Stephen Bartenge [2007] eKLR** where it was held that:

"*By virtue of section 30 of the Civil Procedure Act; "A decree may be executed either by the court which passed it or by the court to which it is sent for execution." In effect, it is the court which executes decrees. The party who holds a decree which is in his favour, only applies to the court to execute the decree. Therefore, if the order to stop the execution was issued in the nature of an injunction, it would effectively be addressed against the court. And, as it is the duty of the court to execute its decrees, an injunction to restrain it from so doing would be purporting to stop the court from performing one of its roles. That, in my considered view, would not be proper, even if the orders were clothed is such language as suggested that the orders were directed against the defendant. The only manner in which courts are stopped from taking steps to execute decrees is through orders for stay of execution. No such order has been sought herein*."

18. In respect of the 3rd issue, it was submitted that the prayer for reconciliation of accounts was late as the taxing court was functus officio.

19. It was submitted that in applying for review the applicant was guilty of unreasonable delay hence not entitled to the prayer for review. Reliance was placed on the case of **Jaber Mohsen Ali & Another v Priscilla Boit & Another (2014) eKLR.**

20. Learned counsel took issue with the filing of the further affidavit without leave of the court. It was pointed out that no insolvency order pursuant to section 431(2) of the Insolvency Act 18 of 2015 was issued by any court hence preventing the decree holder from recovering the debts owed to it. It was posited that section 428(1)(b) & 2 of the Insolvency Act 18 of 2015 was to the effect that a party may only apply to the court before which an insolvency order is pending for orders of stay of proceedings against it pending in other courts and that there were no orders by the Milimani Court in Milimani Insolvency Petition E155 of 2019 preventing the decree holder from executing the decree issued by this court. It was pointed out that the order issued by the insolvency court (PG2) was a status quo order and that the 1st respondent was in the process of executing and could continue notwithstanding the order.

21. The issues that this court is commended to consider are

a) Whether the suit property should be released from attachment for being tools of trade.

b) The corollary issue to (a) is whether the respondents should be restrained from attaching the suit property.

c) Whether the purported attachment of the suit property should be nullified and/or set aside for being contrary to statute and more specifically the Insolvency Act 18 of 2015.

d) Whether the applicant had established grounds for review of the orders of this court issued on 9.7.2020

e) *What other remedies are available to the parties*?

22. In respect of the 1st issue, the applicant's case is that it is protected by section 44 of the Civil Procedure Act and it also sought to invoke Order 22 Rule 51 of the Civil Procedure Rules whereas the respondent's case is that the section affords protection to natural and not artificial persons.

23. Section 34 of the Civil Procedure Act, and Order 22 Rule 51 of the CPR both mandate the court to investigate any contentious matter regarding execution and make a finding thereon. Section 34 states that the finding of the court is subject to inter alia objection on jurisdiction.

24. Order 22 rule 51 provides as follows:

"*51 (1) person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.*

(2) Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.

25. In the case of **Chotabhai M. Patel v Chaprabhi Patel [1958] EA 743,** it was stated that;

a) Where an objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to attachment the court shall proceed to investigate the objection with the like power as regards examination of the Objector, and in all other respects as if he was party to the suit.

b) The Objector shall adduce evidence to show that at the date of attachment he had some interest in the property attached.

c) The question to be decided is, whether on the date of attachment, the Judgment Debtor or the Objector was in possession, or where the court is satisfied that the property was in the possession of the Objector, it must be found whether he held it on his own account or in trust for the Judgment Debtor. The sole question to be investigated is, thus, one of possession of, and some interest in the property.

d) *Questions of legal right and title are not relevant except so far as they may affect the decision as to whether the possession is on account of or in trust for the Judgment Debtor or some other person. To that extent the title may be part of the inquiry*.

26. According to **Halsbury's Laws of England, 4th edition, volume 13 at par 249** the learned authors rendered themselves as follows;

"*The tools and instruments of a man's trade or profession and instruments of husbandry are distrainable only if there are no other goods on the premises sufficient to countervail the arrears of rent. The axe of a carpenter, the books of a scholar, the kneading-trough of a baker, the stocking-frame or loom of a weaver and even the cab of a cab driver have been held to be within this rule*."

27. The English Court of Appeal case of **Lavell v Richings (1906) 1 KB 480** was concerned with the question of whether a cab hired by a professional cab-driver was a "tool [or] implement of his trade" for the purposes of section 147 of the County Courts Act 1888 and so protected from distrain by the owner of stables at which the cab-driver kept the cab. It had been argued that the cab-driver did not have to drive the particular cab but could still earn a living by hiring a different cab from elsewhere. This argument was rejected. The Court accepted the plaintiff's argument that "implement of trade" meant an "existing implement of an existing trade" and that it was "no answer to say that a man might go elsewhere and make use of other implements". The Court of Appeal in this case handled the question of whether the cab in question was in fact an implement of the cab-driver's trade and not whether it was necessary to that trade. It was also found that the plaintiff's passport and business permit could not be distrained.

28. The applicants conduct insurance business and under section 2 of the Insurance Act *"insurance business" means the business of undertaking liability by way of insurance (including reinsurance) in respect of any loss of life and personal injury and any loss or damage, including liability to pay damage or compensation, contingent upon the happening of a specified event, and includes—*

(a) the effecting and carrying out by a person not carrying on a banking business, of contracts for fidelity bonds, performance bonds, administration bonds, bail bonds or customs bonds or similar contracts of guarantee, being contracts effected by way of business (and not merely incidental to some other business carried out by the person effecting them) in return for the payment of one

or more premiums;

(b) the effecting and carrying out, by a body (not being a body carrying on a banking business) that carries on business which is insurance business apart from this paragraph, of capital redemption contracts;

(c) the effecting and carrying out of contracts to pay annuities on human life, and any business incidental to insurance business as so defined but does not include—

(i) business in relation to the benefits provided by a friendly society or trade union for its members or their dependants;

(ii) business in relation to the benefits provided for its members or their dependants by an association of employees;

(iii) deleted by Act No. 9 of 2003, s. 2;

(iv) business in relation to a scheme or arrangement for the provision of benefits consisting of—

(A) the supply of funeral, burial or cremation services, with or without the supply of goods connected with any such service; or

(B) deleted by Act No. 9 of 2003, s. 2, and no other benefits, except benefits incidental to the scheme or arrangement;

(v) business consisting of the effecting and carrying out, by a person carrying on no other insurance business, of contracts of such description as may be prescribed, being contracts under which the benefits provided are exclusively or primarily benefits in kind;

(vi) business declared by the Minister by notice in the Gazette not to be insurance business for the purposes of this Act;"

29. In view of the above provisions of the law as well as the cited authority, whereas the computers, works stations, office desks, book shelves, filing cabinets, plastic chairs may be useful for facilitating the smooth operations of the applicant's business, the same are not tools of trade for insurance business as the applicants can still use portable equipment like their phones and ipads to process insurance policies and claims.

30. I also associate myself with the finding in the case of **Invesco Assurance Co. Ltd v Kinyanjui Njuguna & Co. Advocates & another [2020] eKLR** where Justice Odunga rendered himself thus;

"41. The said decision was cited with approval in the case of Master Fabricators Limited vs. Patrick Omondi Ndonga [2014] eKLR.

42. I associate myself with the said holding as expressing the correct law as regards the intention of the said section. In the premises the applicant herein cannot successfully invoke in its aid the said provision in order to bar the 1st Respondent from realizing the fruits of its judgement. It is my view that the said section must be restrictively interpreted so as to aid only those whose means of livelihood and sustenance are in jeopardy of being ruined. It ought not to be invoked to simply protect those whose profits and businesses are in jeopardy. The exemption, in my view, is not meant for the protection of a particular industry but is only meant to protect a particular person's ability to earn livelihood."

31. I have no hesitation in finding that the applicants are not afforded protection under section 44(1) of the Civil Procedure Act and hence the proclaimed items are amenable for sale for purposes of realizing the decretal sums due. In this regard, issues (***a)*** and (***b)*** are answered in the negative.

32. In respect of issue (***c)***, the cited sections provide as follows

"429. (l) In a liquidation ordered by the Court-

(a) any disposition of the company's property; and

(b) any transfer of shares, or alteration in the status of the company's members,

made after the commencement of the liquidation is void, unless the Court otherwise orders.

430. If a company is being liquidated by the Court, any attachment, sequestration, distress or execution instigated against the assets of the company after the commencement of the liquidation is void."

33. In addition, section 431 provides for when liquidation of a company by the court commences. It states in material part that:

"(2) If the Court makes a liquidation order under section 534, the liquidation commences on the making of the order.

(3) In any other case, the liquidation of a company by the Court commences when the application for liquidation order is made."

34. The import of the above section is that bankruptcy proceedings take precedence over execution proceedings. Whereas the judgment creditor is a creditor, he does not take priority over other creditors and the official receiver upon appointment would be the proper person to receive all the assets of the bankrupt. See the cases of **Marley Tile Co Ltd v Burrows and another [1978] 1 All ER 657**; **Re Andrew, Official Receiver, v Standard Range and Foundry Co Ltd [1936] 3 All ER 450**; and **Re Barrell Enterprises and others [1972] 3 All ER 631**. It is the 1st respondent's submission that there was a status quo order that the status quo be maintained and that the 1st respondent was already in the process of executing hence was to continue the same pending the determination of the applications. Lord Wright MR at page 465 in the case of **Re Andrew, Official Receiver, v Standard Range and Foundry Co Ltd [1936] 3 All ER 450** stated:

> "**…***The operation of the section in such cases is limited to cases where there is at the date of the receiving order, or when the creditor has notice of a bankruptcy petition or of an act of bankruptcy, still on foot a subsisting execution, and is limited to the balance for which the execution is still operative. In respect of that balance it is true that there is a benefit of the still incomplete execution, which may be affected by the operation of s 40(1). In this connection the result is the same whether the payment has been made to avoid seizure or to avoid sale, or whether the partial discharge of the debt has been effected by a sale of goods under an execution which is kept on foot in order, if possible, to realize enough to pay the balance of the debt*."

35. At this point in time and from the evidence available, it is not possible to tell whose side of the story is true. In any event the court has power to stay legal process against the property or person of the debtor upon proof of presentation of a Bankruptcy petition. Such order may be served on the plaintiff or other party prosecuting the proceedings. Section 428 of the Insolvency Act is in the following terms

> "*(l) At any time after the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or contributory, may-*
>
> *(a) if legal proceedings against the company are pending in the Court-apply to the Court for the proceedings to be stayed; and*
>
> *(b) if proceedings relating to a matter are pending against the company in another court-apply to the Court to restrain further proceedings in respect of that matter in the other court.*
>
> *(2) On the hearing of an application under subsection (lXa) or (b) the Court may make an order staying or restraining the proceedings on such terms as it considers appropriate.*
>
> *(3) If, in relation to a company registered (but not formed) under the Companies Act, 2015, the application is made by a creditor, this section extends to any contributory of the company.*

36. As of the date of this ruling, this court does not have the benefit of knowledge of the nature and details of the mentioned Insolvency Proceedings in Milimani so as to determine what part of section 431 of the Insolvency Act 2015 applies. Similarly, there is no application in terms of section 428 of the Act and this court cannot make any determination in the manner that is suggested by the applicant in paragraphs 22, 23 and 25 of their submissions. To purport to make a finding would be going beyond the pleadings before this court and as such I decline the invitation to make a finding on the validity of the execution as against the mentioned insolvency petition in Milimani Court. Consequently, I am unable to agree with the applicant's request to invalidate or nullify the execution of the decree as sought and this has perfectly answered the question in issue (**c)**.

37. As regards issue (***d)***, it is the applicant's case that the court went into error in granting the prayer to deposit security as the 1st respondent had been paid and further that the evidence consisted in payment receipts was not available because of change of guard at the applicant's establishment. The court was urged to believe the piece of evidence and review its earlier orders and consequently discharge the applicants of their obligation to deposit security.

38. In the case of **James M. Kingaru & 17 others v J. M. Kangari & Muhu Holdings Ltd & 2 Others (2005) eKLR** the court rendered itself as follows: -

> "*Applications on this ground (review) must be treated with caution. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial.*

39. Review cannot be an avenue to supplement or introduce new evidence. I find that the piece of evidence ought to have been tackled at the taxation stage and the applicant had an opportunity to utilize the said evidence at that stage to challenge the bill of costs. It is not for this court at this stage to consider evidence that ought to have been presented at the taxation stage. The new and important evidence limb in the review application fails. There is no evidence that the applicant ever lodged an appeal or review of the taxation and hence the I must agree with the 1st respondent's submission that the said issue is belated and overtaken by events as the taxation court is already functus officio.

40. The applicant appears to rely on the ground that there is a mistake or error apparent on the face of the record. It was the argument of the applicant that the trial court went into error in disregarding the evidence that the 1st respondent was already paid hence not entitled to any further payment. An error apparent on the face of the record was defined in **Batuk K. Vyas v Surat Municipality AIR (1953) Bom 133** thus:

> "*No error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.……."*

41. In making an examination as to whether there is an error apparent on the face of the record, the court must be quick to draw a parallel

between a decision that is merely erroneous in nature and an error that is self-evident on the face of it. A review application must confine itself to the scope and ambit of Order 45 rule 1 lest it mutates into an appeal.

42. In the instant case therefore, I am not convinced that there is an error apparent on the face of the record in this case. What is being raised by learned counsel for the applicant requires examination of the evidence on record and in my view the piece of evidence ought to have been presented at taxation stage. It is my considered view that the applicants have not demonstrated an error apparent on the face of the record.

43. Regarding the element of sufficient reason, this means a reason sufficient on ejusdem generis to those in Order 45. In the instant case, a sufficient reason put forward by the applicant is that failure of the court to display perceptive abilities as it were and accept that the 1st respondent already received his payment. I disagree that there is sufficient reason raised and in any event the taxation proceedings have not been set aside. I answer issue **d** in the negative.

44. The upshot of the foregoing is that the applicant's applications dated 26/06/2020 and 3/08/2020 lacks merit. The same are dismissed with costs to the 1st Respondent.

It is so ordered.

Dated and delivered at Machakos this 5th day of November, 2020.

D. K. Kemei

Judge