REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO.332 OF 2015

MARTIN MAINA T/A MAINA & MAINA ADVOCATES.....PLAINTIFF

VERSUS

VIOLET BARASA T/A VIOLET BARASA & COMPANY ADVOCATES....DEFENDANT

LAW SOCIETY OF KENYA.....AMICUS CURIAE

RULING

1. Through the application dated 5th June 2017, the applicant plaintiff herein seeks orders to review the order of Lady Justice Farah Amin delivered in 29th March 2017 and substitute it with an order that each party bears their own costs. The application is brought under Order 45 Rule 1 of the Civil Procedure Rules (CPR) and Section 80 of the Civil Procedure Act (CPA).

2. A summary of the applicant's case is that upon filing the suit on 20th July 2015, to enforce a professional undertaking made by the defendant, the court in 4th December 2015 *suo moto* enjoined the Law Society of Kenya to the suit as the *Amicus Curiae* after which it directed the said *amicus curiae* to prepare a detailed report on whether the defendant was guilty of professional misconduct as alleged by the plaintiff. In the impugned ruling delivered on 29th March 2017, the plaintiff's suit filed by way of an originating summons was dismissed with costs to the defendant and the *amicus curiae* thereby sparking the instant application in which the applicants contends that their efforts to prosecute the suit were hampered by the non-availability of the court file despite their spirited efforts to trace the said court file in the registry.

3. In the written submissions filed on 22nd May 2019, the applicant argues that this court has jurisdiction to grant the review orders sought in view of the fact that Amin J. is no longer attached to this court.

4. It was submitted that the court erred in awarding costs of to the *amicus curiae* and that such costs, if any, should be borne by the judiciary as the *amicus* is not a party to a court action. For this argument, Counsel cited the decision in the case of ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*** [2015] e KLR where the Supreme Court held that:

> **"An amicus curiae is not a party to an action, has not control over it and generally, should not be allowed costs."**

5. It was submitted that since the *amicus curiae* was enjoined in the suit at the court's instance, the costs should be borne by the judiciary. It was further submitted that the costs that had already been paid to the *amicus curiae* should under Section 91(1) of the Civil Procedure Act be refunded to the applicant.

6. The *amicus curiae* opposed the application through a notice of objection dated 20th May 2019 in which it states, Firstly; that the court lacks jurisdiction to hear and determine the application and secondly; that the application is incompetent, bad in law, misconceived and an abuse of the court's process.

7. The *amicus curiae* also filed the replying affidavit of its advocates **Miss Doreen Nakato** in opposition to the application. The gist of the replying affidavit is the averment that upon dismissing the applicant's case, the court had the discretion to award costs to any of the parties and further, that the *amicus curiae's* costs had already been taxed and paid by the applicant in which case, the matter had already been finalized and laid to rest.

8. At the hearing of the application, Miss Nakato submitted that the court lacks jurisdiction to review the orders as he application does not

meet the conditions set under Order 45 Rule 1 of the Civil Procedure Rules. For this argument, the applicant cited the decision in ***Stephen Mwaura Njuguna v Douglas Kamau Ngotho*** CA No. 90 of 2005 consolidated with Civil Appeal No. CA No. 90 of 2005 consolidated with Civil Appeal No.247 of 2007 where the court held:

> **"the learned judge had no jurisdiction to determine a matter that was decided by a fellow judge of concurrent jurisdiction. He could not for instance set aside a judgment of Muga Apondi J, a judge who has the same jurisdiction as himself. Such setting aside could only be an appellate court but not by a judge of the High Court as the appellant sought."**

9. I have considered the application dated 5th June 2017, the respondent's/*amicus curiae's* response thereto and the parties rival submissions together with the authorities that they cited. The main issues for determination are as follows:

a. Whether the court has the jurisdiction to determine the application.

b. Whether the applicant has made out a case for the granting of the orders of review.

10. On jurisdiction, I note that Order 45 Rule 1 of the Civil Procedure Rule stipulates as follows:

> **"1. Application for review of decree or order**
>
> **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 a review of judgment to the court which passed the decree or made the order without unreasonable delay."**

11. Section 80 of the Civil Procedure Act on the other hand stipulates as follows:

> **"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".**

12. Having regard to the above stated statutory provisions, I find that the instant application is properly before the court as the said provisions empower this court to review its own orders as long as the application meets the conditions outlined under Order 45 Rule (1) (b) of the Civil Procedure Rules.

13. The main question that this court has to grapple with is whether the application meets the threshold set for the review of orders under Order 45 Rule 1(1) (b) CPR. I am not satisfied that the applicant has demonstrated that he is entitled to the orders of review as he has not shown that he has discovered a new and important matter or evidence, which after exercise of due diligence, was not within his knowledge and could not be produced by him at the time the impugned orders were passed. In the same vein, the applicant has not demonstrated that there was any error or mistake apparent on the face of the record so as to warrant the issuance of an order of review.

14. I note that the applicant's main reason for seeking orders for review is the claim that the *amicus curiae* is not entitled to any costs and that such costs, if any, ought to have been paid by the judiciary. I find that the applicant's argument is not in tandem with the legal position that the award of costs is at the discretion of the trial court which discretion, this court cannot interfere with unless such discretion has not been exercised judiciously or is based on wrong principles.

15. This was a finding in the case of ***Supermarine Handling Services Ltd v Kenya Revenue Authority*** CA No. 85 of 2006 where the Court of Appeal held that:-

> **"….Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles…."**

16. For the above reasons, I find that the instant application is not merited and the order that commends itself to me is the order to dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 7th day of November 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Wanjeri for the applicant.

Mr. Nakato for the respondent

Court Assistant – Sylvia