



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MISC. CAUSE NO. 1 OF 2017
KTK ADVOCATES.....APPLICANT
VERSUS
BARINGO COUNTY GOVERNMENT..... RESPONDENT
RULING

1. By a notice of motion dated 11th December 2017, the Respondent (hereinafter referred to as the applicant) moved this court seeking to review the orders made by this court on 2nd November 2017 dismissing the applicants application dated 15th June 2017 and allowing the Respondent' application dated 28th June 2017 and entered judgement in favour of the Respondent/Applicant herein in the sum of Ksh. 17,570,907.08.

2. The said ruling rendered determined two applications, one by the present Applicant who is the Respondent herein in which it sought to set aside the taxation of bill of costs dated 13th February 2017 by the Deputy Registrar on 8th June 2017 on grounds that:- (i) the Deputy Registrar was openly biased against the applicant; (ii) the taxing master failed to consider the Respondents submissions dated 1st April 2017; (iii) the taxing master failed to exercise her discretion judiciously in arriving at the instruction fees which is highly exaggerated and exorbitant.

3. The other application also the subject of the said ruling was dated 28th June 2017 by the Respondent in the application now under determination in which the applicant, therein, a firm of advocates sought orders that judgement be entered against the Respondent/client in the sum of Ksh. 17,570,907.08 under section 51 (2) of the Advocates Act.[\[1\]](#)

4. The application the subject of this ruling seeks orders to "recall", review or "set aside" the said orders made on 2nd November 2017. Despite the evident confusion in the use of the words "recall", review or "set aside", my understanding from the counsels arguments and from the grounds on the face of the application and the supporting affidavit is that the pith and substance of the application is that the applicant is inviting this court to review the said orders. Also, among other provisions, the application also invokes order 45 Rule 1 of the Civil Procedure Rules which provides for review.

5. The grounds relied upon are that the applicant filed his submissions to the Bill of Costs which was taxed by the Registrar in the Judicial Review Division instead of the Constitutional ad Human Rights Division. A second ground is that at this court omitted or failed to deduct Ksh. 4,000,000/= allegedly paid to the advocate, hence this was an error on the face of the record.

6. Counsel for the Respondents filed a preliminary objection on 16th January 2018. However, he abandoned the idea of raising the objection, and asked that the grounds be treated as his opposition to the application now under consideration. The grounds are that Section 51 of the Advocates Act[2] and the Advocates (Remuneration) (Amendment) Order govern taxation matters and that the law does not envisage the orders sought.

7. In my view, only one issue falls for determination, that is whether the applicant has satisfied the grounds for review.

8. It is a settled principle of law that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45, Rule 1 and Section 80 of the Civil Procedure Act.[3] Whereas a court has power of review its decision, such power must be exercised within the framework of Section 80 Civil Procedure Act[4] and Order 45 Rule 1.[5] Section 80 of the Civil Procedure Act[6] 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 judgement 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 provides 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 judgement to the court which passed the decree or made the order without unreasonable delay."

10. It is clear that whereas Section 80 gives the power of review, Order 45 sets out the rules. The rules restrict the grounds for review by laying down the jurisdiction and scope of review limiting it:- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

11. In *National Bank of Kenya Ltd vs Ndungu Njau*[7] the court stated:-

“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.”

12. The applicant claims that they filed the submissions before the learned Magistrate in the wrong division. Ironically, this same ground was raised and argued in the application which gave rise to the orders the applicant seeks to review. This cannot be a new ground nor can it qualify to an error on the face of the record. Having considered and made a finding on it, this can only be raised by way of an appeal. Inviting this court to address the same issue amounts to inviting this court to sit as an appeal court on its own decision.

13. The second ground raised is that **Ksh. 4,000,000/=** allegedly paid to the Advocate was not factored in the Bill. The taxation was not before me. It was before the Taxing Master. Such matters could have been raised before the Taxing Master. Again, this cannot be said to be a new matter that has been discovered nor can it amount to an error on the face of the record.

14. I reiterate that the power to review can only 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.

15. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, 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 or for any other sufficient reason. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule.[\[8\]](#)

16. The applicant has not demonstrated that the alleged grounds are new matters or evidence that could not be obtained despite the exercise of due diligence. He did not explain that the alleged evidence or material was not available and could not be procured at the time of the hearing.

17. Any attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out would amount to an abuse of the liberty given to the court under the Act to review its judgement.[\[9\]](#) I am also guided by the decision rendered in *Tokesi Mambili and others vs Simion Litsanga*[\[10\]](#) where it was 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.(Emphasis added)

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

18. It is also settled law that 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. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.

19. I reiterate that the power of **review** is available only when there is an **error apparent** on the **face** of the **record**. The ruling, the subject of this application does not suffer any such **error apparent** on the **face** of the **record**. The issue of allegedly filing submissions in the wrong court featured prominently in the earlier applications. The issue of Ksh. **4,000,000/=** was a matter for taxation before the Taxing Master or a ground for appeal not review.

20. **Review** proceedings are not an appeal. The **review** must be confined to **error apparent** on the **face** of the **record** and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.[\[11\]](#)

21. I am not persuaded that the applicant has offered ‘*sufficient reason*’ within the meaning of the rules cited above nor is it *analogous* or *ejusdem generis* to the other reasons stipulated in Order 45 Rule 1. I am also fortified by the holding in the case of *Evan Bwire vs Andrew Nginda*^[12] where the court held that ‘an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.

22. **Mr. Kipkorir** argued that since the order or decree seeking to be reviewed was not annexed, the application should be dismissed. He annexed authorities in support of the said proposition. However, the said decisions were rendered prior to the civil Procedure Rules, 2010. Order 45 as drafted in the Civil Procedure Rules 2010 does not have such a provision.

23. Whereas I agree with **Mr. Kipkorir's** submission that the Advocates Act^[13] is a complete statute on matters of taxation of costs, the decision being reviewed was rendered by this court, hence, the application for review is properly before this court.

24. In view of my findings herein above that the grounds offered do not fall within the scope for review, this application fails. Having so found as herein above stated, I find that this is not a proper case for this court to exercise its discretion in favour of the applicant. Accordingly, the application dated 11th December 2017 is hereby dismissed with no orders as to costs.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 5th day of February 2018

John M. Mativo

Judge

^[1] Cap 16, Laws of Kenya

^[2] Ibid

^[3] Cap 21, Laws of Kenya

^[4] Ibid

^[5] See *Sinha J in Union of India vs B. Valluvan*, AIR 2007 SC 210; (2006) 8 SCC 686

^[6] *Supra*

^[7] *Supra*

^[8] *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608

^[9] Ibid

^[10]{2004} eKLR

^[11] See *Meera Bhanja v. Nirmala Kumari Choudhury*, (1995) 1 SCC 170

^[12] Civil Appeal No. 103 of 2000, Kisumu ; {2000} LLR 8340

^[13] *Supra*

