



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISC. CIVIL APPLICATION NO. 61 OF 2015

BETWEEN

NATIONAL BANK OF KENYA LIMITED CLIENT /APPLICANT

AND

OTIENO RAGOT & COMPANY ADVOCATES ADVOCATES/ RESPONDENT

RULING NO. 3

1. Following a disagreement on fees, the Advocates filed an advocate-client bill of costs pursuant to the ***Advocates Remuneration Order***. In the proceedings, the Client submitted that the Advocates were not entitled to file the advocate–client bill of costs since the parties had entered into a remuneration dated 1st April 2005. The Deputy Registrar heard both parties and in the ruling, delivered on 19th November 2015, held that there was no remuneration agreement between the parties and proceeded to tax the bill.

2. Aggrieved by the Deputy Registrar’s ruling, the Client filed a reference before this court pursuant to **Rule 11** of the ***Advocates Remuneration Order***. After hearing the matter, I delivered a ruling on 17th August 2017 (Ruling No. 2) where I held as follows on the issue of the remuneration agreement:

[9] Section 45(1) of the Act recognises that there can be agreements with respect to advocates remuneration and it provides that, “[That] such agreements shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorised”. For an agreement to meet the requirements of the Act, it must be an agreement in writing and signed by the Client. It was the burden of the respondent to place before the Deputy Registrar the agreement it sought to rely on. Two letters were produced in evidence. The first letter (unsigned copy) dated 1st April, 2005 addressed to the Advocates proposing legal fees to be applied with effect from 8th July 1999. The letter requested the Advocates to confirm their acceptance of the terms by signing and returning a copy. The advocates wrote back through their letter dated 3rd May 2005 in which it acknowledged receipt of the letter dated 1st April 2005, returned the document executed and ended with, “ Please return to us a copy duly executed by yourselves for our records.” The respondent did not exhibit a copy of the agreement duly executed by the “client” within the meaning of Section 45(1) of the Act. I therefore find and hold that on the material before the Deputy registrar, there was no remuneration agreement.”

3. The Client has now returned to this court with an application dated 5th September 2017 brought under **sections 1A, 1B, 3A and 80** of the ***Civil Procedure Act***, **Order 45 Rule 1** of the ***Civil Procedure Rules*** and **section 45** of the ***Advocates Act*** seeking review of the orders of this court made on 17th August 2016. The Client claims that there is a mistake as to two letters that were issued between the Client and the

Advocate dated 1st April 2005 and 3rd May, 2005. The Client avers that there were to letters received from the Advocate dated having the same date and bearing identical references. One of the letter was headed, “*Terms and Conditions of Appointment to the National Bank of Kenya Panel of Lawyers*” whereas the other one was headed “*Legal fees- Rule 3 of the Advocates Remuneration Order 2005*”. The Client claims that it is the second letter that depicted the remuneration agreement but it was not produced by inadvertent mistake but instead it produced the letter on terms and conditions.

4. The Advocates opposed the application through the replying affidavit sworn by David Otieno on 13th December 2017. They contended that the issue whether there was a valid retainer agreement between the parties was dealt with by the Deputy Registrar and the document sought to be placed before this court was not before her and as such the application seeks to introduce fresh evidence at an appellate level. The Advocates submit that the application is incompetent as it is brought under the **Civil Procedure Rules** which does not apply to matters under the **Advocates Remuneration Order**. The advocates urged the court to dismiss this application with costs.

5. Let me first deal with the procedural objection that the **Civil Procedure Act** and **Rules** do not apply to proceedings under the **Advocates Remuneration Order**. There is good authority to support the proposition that the **Advocates Remuneration Order** is a complete code that excludes the provisions of the **Civil Procedure Rules** (see *Noor Khan v Ramji Kanji and Company and Others* [1966]EA 506, *R v C. Lutta Kassamani t/a Kasamani and Company Advocates ex-parte United Insurance Co., Ltd* NRB Misc. HC Civil App. No. 1047 of 2994 [2005]eKLR, *Najib Balala and 13 Others v David M. Githere and 9 Others* MSA CA Civil Appl. No. Nai 118 of 2005 [2005]eKLR and *Doreen Nasieku Pussy, Advocate v Mara Conservancy* NRB HC. Misc. No. 1148 of 2002 [2005]eKLR). This however is not the end of the matter as the issues is resolved by the application of **section 89** of the **Civil Procedure Act** provides that:

89. Miscellaneous proceedings

The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.

6. The proceedings now before the court are civil in nature and by virtue of **section 89** of the **Civil Procedure Act**, the **Act** and **Rules** made thereunder are applicable in so far as their provisions do not conflict with the express provisions of the **Advocates Remuneration Order**. Moreover, the inherent jurisdiction of the court read together with the overriding objective founded on the express provisions of **Article 159(2)(d)** of the Constitution which provides that, “*justice shall be administered without undue regard to procedural technicalities*” leaves no doubt that the court may review its own decision in an appropriate case to meet the ends of justice.

7. In this regard, I find and hold that the provisions of **section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Act** are general provisions which are not inconsistent with the provisions and objects of the **Advocates Remuneration Order** are applicable to these proceedings. I therefore reject the Advocates objection to the competence of the application.

8. This is an application for review made under **section 80** of the **Civil Procedure Act (Chapter 80 of the Laws of Kenya)** and **Order 45 rule 1** of the **Civil Procedure Rules**. **Section 80** of the **Civil Procedure Act** provides:

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.

While 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.

9. Under these provisions, an applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter or provide for any other sufficient reason for the court to review its orders. In **The Official Receiver and Liquidator vs Freight Forwarders Kenya Limited NRB Civil Appeal No. 235 of 1997 [2000]eKLR**, Gicheru JA., stated that the words, "sufficient reason", "[O]nly mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice 'be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record.'"

10. I have considered the correspondence between the Advocates and Client and I accept the explanation given by the Client is that there was an inadvertent mistake in presenting the two letters which were similar in nature. Their existence is not disputed by the Advocates and I am of the view that the parties should be allowed to ventilate their legal effect. In reaching this conclusion I find solace in the words of the Court of Appeal in **Richard Nchapai Leiyangu vs IEBC & 2 others NYR Civil Appeal No. 18 of 2013 [2013]eKLR** where it set out the overriding objective and observed, in a different context, that:

We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

11. The application in this matter was brought without delay and it cannot be said that the same was intended to obstruct the cause of justice. I therefore review the orders made on 17th August 2015 and set aside the decision. The references shall now be heard afresh. In view of the position, I have taken it will not be necessary to deal with the other arguments relating to the effect of the agreement, if any, as that matter will be determined afresh.

12. As regards costs, the mistake was entirely caused by the Client. In the circumstances, it shall pay the Advocates costs which I assess at Kshs. 30,000/-.

13. Orders accordingly.

DATED and DELIVERED at KISUMU this 6th day of March 2017.

D.S. MAJANJA

JUDGE

Mr Ojuro instructed by Otieno, Yogo, Ojuro & Company Advocates for the Client/applicant.

Mr Otieno instructed by Otieno Ragot & Company Advocates for the Advocates/respondents.