REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATION NO. 624 OF 2009

GICHUKI KING'ARA & COMPANY ADVOCATES …..…. APPLICANT

VERSUS

MUGOYA CONSTRUCTION &

ENGINEERING LIMITED ……..…….. RESPONDENT

R U L I N G

1. The Application before this Court for determination is that of the Respondent dated 7th August 2012 brought under Certificate of Urgency, seeking a review of this Court's decision of 14th June 2012. In the alternative, the Court is requested to substitute its Order entering judgement for the Applicant in terms of the Notice of Motion dated 23rd February 2012, with an Order that the Respondent's Chamber Summons dated 30th April 2012 be heard to completion and a Ruling thereon delivered. The Application is brought under the provisions of **section 80** of the *Civil Procedure Act* and **Order 45 rule 1** of the *Civil Procedure Rules, 2010*. The Application is supported on the following grounds:

   "a) The Defendant is aggrieved by the decision of the Honourable Court delivered on 14th June 2012;

   b) The decision was made on the basis of material non-disclosure;

   c) In the alternative, the application was decided on the basis of an issue which had neither been set out in the Notice of Motion dated 23rd February 2012 nor in the supporting affidavit and for that reason the Respondent was unable to address the same in its response;

   d) The Applicant has commenced execution of the decree obtained against the Respondent which execution is unwarranted and will be greatly prejudicial to the Respondent;

   e) There is sufficient reason to warrant a review of the decision dated and delivered on 14th June, 2012".

2. The Respondent's said application was supported by the Affidavit of its Managing Director Mr. **James Abiam Mugoya Isabirye** sworn on even date therewith. The deponent noted that this

Court (**Musinga J.**) had allowed the said application of the Applicant dated 23rd February 2012 and had entered judgement against the Respondent in the amount of Shs. 29,497,765.55 together with interest thereon at 14% per annum. Contained in the Ruling of the said Judge was an observation that he had considered that the Respondent had taken no steps to finalise its application dated 30th April 2010. The Respondent had been advised by its advocates on record that the finalisation of its Chamber Summons dated 30th April 2010 had not been an issue raised in the Applicant's Notice of Motion dated 23rd February 2012. Further, on no less than two occasions on 24th January 2012 and on 7th February 2012, the said advocates' clerk had visited the Registry in order to fix a date for the resumed hearing of the Application dated 30th April 2010 but had been informed that the Court file was missing. As a result, the conclusion reached by **Musinga J.** in his said Ruling that the Court file had been available at the Registry could not be correct. The deponent believed that the learned Judge would have reached a different conclusion if the attempts made by the Respondent's advocates to fix the hearing and finalisation of the said Chamber Summons had been brought to the Judge's attention. Mr. Isabirye had been informed by the said advocates that there was sufficient reason to warrant a review of the learned Judge's Ruling of 14th June 2012.

3. Unfortunately, the record of this Court became somewhat mixed up as a result of the Applicant's Notice of Motion also dated 7th August 2012 with regard to execution proceedings in relation to the said Ruling dated 14th June 2012. In order to amplify the confusion surrounding the Court file, on 3rd October 2012, **Maureen Muthoni Mithamo**, an advocate with the Applicant firm, swore a Replying Affidavit. The deponent maintained that the Respondent had not demonstrated any grounds to warrant a review of the decision dated and delivered on 14th June 2012. The grounds in support of the said Application were already known to **Musinga J.** when he delivered his said Ruling. There were no new matters which were not before Court at that time. In the deponent's opinion, the explanation advanced by the Respondent as to delay in prosecuting its Application dated 30th April 2010 was misleading and an abuse of the Court process. Further, the Respondent's submission that execution herein was unwarranted was baseless as the learned Judge had ordered that execution should take place within 7 days if the Respondent had not responded with the deposit of the requisite amount as set by Court. In Ms. Mithamo's view, the Respondent had not sufficiently demonstrated any grounds for review as there was no apparent error on the face the record neither was there any discovery of new evidence to show that the decision of the Judge was not made on its merits.
4. However and in amplification of the confusion brought about by the various applications on the Court file, on 18th September 2013, Mr. **Peter Gichuki King'ara** swore a second Replying Affidavit to the Application before Court. The deponent cited the Orders sought by the Applicant in its Notice of Motion dated 23rd February 2012. He maintained that the matter was duly canvassed by both parties who had highlighted their respective submissions in Court and the Ruling was delivered on June 14th, 2012 based on the merits of the Application. The deponent was further of the view that the Respondent had not demonstrated any grounds to warrant a review. The Judge had considered the grounds upon which the application to review the said Ruling had been made and dealt with them in paragraphs 24 to 27 of the said Ruling. Mr. King'ara was of the opinion that the Respondent had sufficient time to prosecute its Application dated 30th April 2010 but seemed not keen on finalising it. He maintained that the Respondent was indolent and guilty of laches. Further, he detailed that there was no new and important matter or evidence which the Respondent had brought for the Court as required by **Order 45 rule 1** of the *Civil Procedure Rules, 2010*.
5. To supplement the Replying Affidavit sworn by Mr. King'ara as above, the Applicant also filed a Notice of Preliminary Objection dated 18th September 2013. Such was brought on the following grounds:

> **"1. The provisions cited in support of the application do not confer on the court jurisdiction to issue the orders sought.**
>
> **2. That the decision that the Respondent/Applicant seeks to review was issued in accordance to the Advocates Act and not under the Civil Procedure Rules and therefore this court has no jurisdiction to hear it.**

3. That the Respondent/applicant is guilty of laches.

4. The application is an abuse of the court process and thus ought to be dismissed with costs".

6. On 26th May 2014, Mr. Kiche appeared for the Respondent before Court and having outlined the history of the Application dated 30th April 2012 including appearances before Court in October 2010, 3rd March 2011 and 4th April 2011, counsel noted that it had been overtaken by the Applicant's Application dated 23rd February 2011. The main ground upon which the Respondent was relying for review was that the application was brought before Court "for any other sufficient reason" as envisaged by **Order 45 rule (1)** of the *Civil Procedure Rules*. He referred this Court to the Ruling of **Musinga J.** as above (paragraphs 23 and 24) in which the Judge had noted that nothing had transpired in relation to the Application dated 30th April 2010 as between April 2011 and February 2012. It was incorrect, as stated in the Replying Affidavit, that the Respondent's advocates were trying to fix a date on the wrong Court file. **Musinga J's** decision was guided by the fact that the said Application had not been fixed for hearing despite the fact that the advocates had made every effort so to do on two separate occasions. He referred the Court to the case of **Sardar Mohamed v Charan Singh & Anor. (1959) EA 793**.
7. Mr. King'ara, appearing for the Applicant, noted that there were no proper grounds set out in the Respondent's Application before Court upon which the Court could review the Ruling of **Musinga J.** on merit. In his view, the Respondent was using delaying tactics. Counsel recounted the appearances before the Taxing Officer and noted that his firm had asked for Shs. 300 million on taxation which sum had been reduced to Shs. 29 million. Since 2009, the Respondent had brought one excuse after another to delay payment. The Reference dated 30th April 2010 was filed out of time and the Applicant had waited 11 months for the same to come for hearing. It was for that reason that the Applicant had filed its said Application dated 23rd February 2012.
8. Mr. King'ara further submitted that all the issues in relation to the Respondent's delay had been dealt with and considered by **Musinga J.** and all that the Respondent had to show by way of excuse were two letters written within 20 days of each other. The Judge had noted that 11 months had passed without any action on the part of the Respondent. When the Applicant had filed its said Application for judgement on the Certificate of Taxed Costs, there was nothing said by the Respondent to put off the Applicant's Application pending the hearing and determination of the Respondent's Reference. At paragraphs 26 and 27 of the Ruling, **Musinga J.** had specifically referred to the outstanding/pending application and the fact that the delay in prosecuting the same could not be laid at the door of the Applicant. No proper grounds had been set out to set-aside the Ruling. There was no valid Reference before Court as the same was filed out of time. The law is not that every party should be heard but that every party should be given an opportunity to be heard. The Respondent had been given that opportunity and had failed for a period of 11 months to take it up. The mere presence of the said 2 letters did not explain that delay. Finally, Mr. King'ara noted that the Respondent Company had ceased operations and that a Winding-up Petition had been filed as against it. In its application for stay before **Musinga J.** the Respondent had been given leave for stay providing it deposited the decretal amount in Court, which it had failed so to do.
9. In a short reply, Mr.Kiche acknowledged that there was no issue as to the Reference for taxation being filed out of time. However, the Notice of Objection had been filed in time on 23rd January 2010. The issue as to why the Respondent had not prosecuted its Reference Application was not put before Court at the time that the Applicant's Application dated 23rd February 2012 was presented. It only came up at the highlighting of submissions before the Judge. Counsel asked that the Respondent's Application before Court be allowed "for sufficient reason". He asked that the Respondent's Chamber Summons dated 30th April 2012 be allowed to proceed to hearing.
10. **Section 80** of the *Civil Procedure Act* as read with **Order 45 Rule 1** of the *Civil Procedure Rules* provides both the substantive and procedural law in an application for review. Under **Section 80**, it is provided that:

"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."

Order 45 for Review, sets out the grounds upon which such an application should be predicated. **Rule 1(1)** of the Order reads:

"(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". (Underlining mine).

The parameters from which such an application for review are to be set out, as stated above, are that there should be discovery of new and important evidence, an error apparent on the face of the record or for any other sufficient reason. The Respondent's Application before this Court is based on the latter premise.

11. The discretion in determining what is sufficient reason is not so rigidly circumscribed that an analogy must be discovered between the grounds immediately specified previously in the above rule. While that used to be the law, the Court of Appeal in **Wangechi Kimita & Doris Nyambura v Mutahi Wakibiru (Nyeri) C A Civil Appeal No. 80 of 1985** as per **Nyarangi JA** stated:

"I see no reason why 'any other sufficient reason' need be analogous with the other grounds in the Order because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for a Review and so the words 'for any other sufficient reason' need not be analogous with the other grounds specified in the Order."

In that regard, **"sufficient reason"** according to **Mulla** in his **Code of Civil Procedure 14th Edition, Vol III** defines the same as meaning:

"the reason must be one sufficient to the court to which application for Review is made is a ground of Review which must have existed at the time the Order was made."

The question to answer is whether obvious injustice would be worked by strict adherence to the terms of the Decree as drawn herein.

12. In order to determine that question, the Court has carefully perused the said Ruling of **Musinga J.** dated 14th June 2012. The learned Judge recorded in paragraph 20 of his said Ruling, as regards the Notice of Objection to the ruling of the Taxing Officer delivered on 18th January 2010, as well as the Chamber Summons dated 30th April 2010 brought by the Respondent under **Rule 11** of the *Advocates (Remuneration) Order*. The learned Judge set out the Court record of appearances before Apondi J. in relation to the said Chamber Summons and eventually, that Judge's transfer to another station. He clearly detailed that such was: **"not a bar to finalization of the pending application."** He then went on to record as follows:

"There was no application made by the respondent to put on hold the hearing of the applicant's application dated 23rd February, 2012 pending finalization and determination of its application dated 30th April, 2010. The applicant was not under any obligation to push for the finalization of the respondent's application. In the circumstances, pendency of the respondent's application seeking to challenge the decision of the Taxing Officer cannot be a bar to the determination of the applicant's application. The court cannot speculate on the outcome of the respondent's application and must therefore determine the applicant's application on its merits."

Thereafter, the learned Judge noted that the Applicant's Bill of Costs had been taxed, a Certificate of Taxation had been issued and that the same had not been set aside as at the time that he was delivering his Ruling.

13. In my view, the Respondent's Application before this Court seeks to go over ground that has already been covered by my learned brother as above. The "sufficient reason" relied upon by learned counsel for the Respondent was that **Musinga J.** failed to take into account the pending application before Court dated 30th April 2010. With due respect to counsel, this simply is not the case as I have indicated in the quotation from **Musinga J's** said Ruling as above. In all the circumstances, I do not consider that the Respondent has put any good or sufficient reason before this Court to warrant the Orders for review. Further, I hold no store as to Respondent's submission that Musinga J. had arrive at a conclusion as regards a matter that was not before him. The learned Judge was perfectly aware in relation to the proceedings herein that the Respondent's Application dated 30th April 2012 lay undetermined before Court. The upshot of all the above, is that I dismiss the Respondent's Application dated 7th August 2012 with costs to the Applicant.

DATED and delivered at Nairobi this 17th day of July, 2014.

J. B. HAVELOCK

JUDGE