



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 616 OF 1999

PETER AMOLO AKUMU GOULD.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

RULING

1. The subject matter of this ruling is the motion dated 5th February, 2014 taken out by Kenya Commercial Bank Limited, the Defendant herein. In the aforesaid motion the Defendant is praying to be given the following orders:

“i) The order of this Court made on 6th December, 2013 be reviewed and set aside.

ii) The Defendant’s reference dated 15th September, 2011 challenging the Taxing Officer’s decision on the defendant’s Bill of Costs filed on 7th July, 2009 be determined on its merits.

iii) The costs of this application be provided for.”

2. The motion is supported by the affidavit of Kiragu Kimani, Learned Advocate for the Defendant sworn on 11th February, 2014. When served, Peter Amolo Akumu Gould, the Plaintiff herein, swore a replying to oppose the motion.

3. The background of this motion appears to be short and straightforward. The Plaintiff filed this suit against the Defendant claiming for damages for unlawful termination of his employment as the Defendant’s Assistant Manager. The Defendant filed a defence denying the Plaintiff’s claim. The suit was heard and dismissed with costs to the Defendant on 19th June, 2009 by Justice J.L.A, (Rtd) Osiemo.

4. The Defendant filed a bill of costs dated 2nd July, 2009 against the Plaintiff. The Plaintiff contested the Defendant’s bill of costs. Both parties filed written submissions. By his undated ruling Honourable Samuel M. Wahome, learned taxing officer taxed the bill at Ksh. 1,331,824/=. The Defendant was aggrieved by the aforesaid decision and was prompted to file a reference against the order on taxation vide the Chamber Summons dated 15th September, 2011.

5. The Defendant was basically unhappy with awards given on items nos. 1, 4 and 149 of the Defendant’s bill of costs. The Plaintiff filed a replying affidavit to oppose the reference. The reference was heard and dismissed by Justice Waweru on 6th December, 2013 on the basis that

the reference had been filed out of the time frame fixed under Paragraph 11 of the Advocates (Remuneration) Order. The Learned Judge's decision provoked the Defendant to file the motion, the subject matter of this ruling. It is trite Law that an application for review should be heard by the Judge who made the decision sought to be impugned. However, the Law allows any other Judge to hear and determine the application if the Judge has inter alia, been transferred from the station which is the case in this matter. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have further taken into account the rival oral submissions of Learned Counsels from both sides.

6. It is the submission of Mrs. Okech, Learned Advocate for the Defendant that there is an apparent error on the face of record which influenced Justice Waweru's decision. She pointed out that the Learned Judge inadvertently failed to notice that the ruling on taxation was not dated so as it was difficult to know when it was delivered. She further pointed out that the Court record does not show when the ruling was delivered by the Taxing Officer yet the Honourable Judge indicated in his ruling that the Taxing Officer delivered his ruling on 10th August, 2010. Basing his decision on the aforesaid date, the Honourable Judge found that the Defendant had lodged its objection to the Taxing Officer's decision out of time. Mrs. Okech went ahead to show that the Taxing officer had initially fixed the date for ruling on 10th August, 2010 but come that date, he was unavailable hence no ruling was delivered until 24th September, 2010.

7. A cause list for 24th September, 2010 was supplied to buttress Mrs. Okech's argument. Mr. Lagat, Learned Advocate for the Plaintiff was of the contrary view. He strongly supported the view that the Taxing Officer actually delivered his ruling on 10th August, 2010. He argued that the Defendant had failed to obtain affidavit evidence from the Taxing Officer to indicate when he actually delivered his ruling. Mr. Lagat was of the further view that the error was not obvious nor apparent.

8. After a careful consideration of the material placed before this Court together with the rival submissions, I think the issue put to my attention is largely straightforward. It is the question as to whether or not the Taxing Officer delivered his ruling on 10th August, 2010. If the answer to the above question is yes, then Judge Waweru's holding cannot be reviewed since he committed no mistake.

9. A critical examination of the record will show that Honourable Wahome, the Taxing Officer reserved his ruling for 10th August, 2010. It would appear no coram for 10th August, 2010 was made. The next document to be seen is a handwritten and signed ruing of the Taxing Officer which has no date as to when it was delivered.

10. The Plaintiff's advocate has not tendered evidence to show who attended Court for delivery of the ruling of the Taxing Officer. Mrs. Okech supplied this Court with the cause list for 10th August, 2010. A close examination of the aforesaid cause list shows that this file, the subject matter of this ruling was not amongst the rulings scheduled for delivery by Honourable Ougo, the then Deputy Registrar. Mr. Lagat did not dispute the authenticity of that cause list. Mrs. Okech also supplied to this Court, the cause list for 24th September, 2010 which had this matter being listed as due for delivery by Honourable Gicheha, Learned Principal Deputy Registrar. Again, Mr. Lagat did not controvert the veracity of this cause list.

11. In Paragraph 20 of his replying affidavit the Plaintiff averred that the Defendant manufactured those dates do suit its application for review. He claimed that the ruling was prepared and signed by Honourable Wahome on 10th August, 2010 hence the date of 24th September, 2010 was strange to him. In my own appreciation of the evidence presented to me, it is clear in my mind that the file relating to this dispute did not feature in the cause list for

10th August, 2010 but the same prominently appeared in the cause list of 24th September, 2010. Those facts have not been seriously contravened.

12. It is apparent from the ruling of Justice Waweru, that the two cause lists were not availed to the Honourable Judge. Had those cause lists been presented to the Honourable Judge I am convinced he could have come to a different conclusion. In my view, this could have happened because Learned Counsels merely relied on written submissions. This is one of the weaknesses of the practice of relying on written submissions without advocate's appearing for oral highlights. I am convinced that the Defendant has on a balance of probabilities shown that there was an error apparent on the face of record. It is now patently clear that the ruling on taxation was actually delivered on 24th September, 2010 and not 10th August, 2010.

13. By the time of filing the objection to the ruling of the Taxing Officer, the time to object in terms of Paragraph 11 of the Advocates (Remuneration) order had not lapsed.

14. Mr. Lagat, raised a preliminary point which is to the effect that the order sought to be impugned by way of review was not extracted and annexed to the affidavit in support of the motion. A careful reading of Order 45 of the Civil Procedure Rules, will reveal that it is a requirement to extract and annex to the application the decree or order sought to be reviewed.

15. In my view an inadvertent failure to annex the decree or order to the motion is not fatal if the order or decree is readily available in the Court file. I have looked at the record and it is apparent that the order has been extracted and placed in the Court file. I find the failure to annex the order or decree to the motion to be a procedural technicality.

16. In any case, the Plaintiff has not shown the prejudice he would suffer if the same was not annexed. For the broad interest justice I will overlook the defect.

17. In the final analysis, I find the motion to be well founded. It is allowed as prayed save that costs shall be in the cause.

Dated, Signed and Delivered at Nairobi this 1st day of December, 2014.

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J. K. SERGON

JUDGE

In the presence of:

Opondi holding brief for Lagat for the Plaintiff

Miss Maathai for the Defendant