REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC. APPLICATION NO. 296 OF 2012

MAKHECHA & COMPANY ADVOCATES …… APPLICANT

VERSUS

CENTRAL BANK OF KENYA ……. RESPONDENT

R U L I N G

1. Before this Court is the Client's Notice of Motion dated 14th August 2013 and filed herein on 15th August 2013. The same is brought under the provisions of **Order 45 Rule 1 (1)**, **Order 22 Rule 22 (1)** and **Order 51 Rule 1** of the *Civil Procedure Rules, 2010* as well as **sections 1A, 1B** and **3A** of the *Civil Procedure Act*. The Application seeks a stay of execution of the Decree dated 29th July 2013 together with all warrants and Orders arising therefrom as well as praying this Court to review and/or set aside its Ruling delivered on 20th June 2013. When the matter came before Lady Justice Kamau on the 19th August 2013, she ordered that the status quo should be maintained as between the parties which this Court interprets as a temporary stay of execution.
2. The Client's Application is brought on the following grounds:

"a) There is an error apparent on the face of the Court's record:

i. **By a Notice of Motion dated 4th February 2013, the Advocate sought judgement against the Client for the sum of Kshs.8,917,163/-, being the taxed costs, in terms of the Certificate of Taxation.**

ii. **In its Ruling delivered on 20th June 2013, the Honourable Court held inter alia that the Deputy Registrar erred in awarding the Advocate one half of the agreed fees, but proceeded to enter judgement in favour of the Advocate for the sum of Kshs. 15,047,798.40, but failed to clarify that the said awarded costs was subject to the amount already paid to the Advocate by the Client.**

b) The Advocate has extracted a decree from the said ruling, and has, through Bealine Kenya Auctioneers, proclaimed the Client's property in execution of the decree.

c) The decree and the sum demanded by the Advocate is clearly in error, since Kshs. 13,656,740.00 has already been paid to, and acknowledged by the Advocate.

d) It is therefore in the interest of justice that an order of stay of execution be granted as prayed, pending the hearing and determination of the application herein.

e) The Client is ready, able and willing to provide such security or undertaking which may be required by the Court, or to comply with any conditions imposed by the Court, for grant of the stay orders sought, including depositing the amount in Court.

f) The Client is reasonably apprehensive that unless stay of execution is granted:

i. **The Advocate will proceed with execution, and the Client will suffer irreparable damage, as it may not be able to recover the amount from the Advocate.**

ii. **Its meritorious application for review, if successful, will be rendered nugatory, as the Advocate will proceed with execution.**

g) If the stay orders are granted, the Advocate will not suffer any or great prejudice as the Client, being the Government's banker, and the regulator of inter alia all banks in Kenya, is financially stable, and will undoubtedly be able to settle the amount, in the unlikely event that its application for review filed herewith is unsuccessful.

h) This application has been brought without undue delay.

i) It is in the interest of justice and for the benefit of both parties hereto, that the orders sought by the Respondent are granted".

3. The Client's Application is supported by the Affidavit of its Manager of Legal Services, **Neala Wanjala** sworn on 14th August 2013. The deponent related the history of the matter of the Advocates' costs and referred to the Ruling of the Taxing Officer delivered on 12th October 2012 in which he had found that there was an agreement between the Advocate and the Client on the issue of fees and that the agreed instruction fee was Shs. 12,972,240/-. He had also found that the agreed fee should be increased by one half as provided for under *Schedule VI B* of the *Advocates Remuneration Order, 2006* which gave a figure of Shs. 6,486,120/-. He also awarded the sum of Shs. 3,113,337/-as VAT on the taxed costs. As a result the total amount due to the Advocate was Shs. 22,573,903/-less the sum of Shs. 13,656,740/-which had been paid by the Client and acknowledged by the Applicant. That left a sum to be paid of Shs. 8,917,163/-. By a Notice of Motion dated 4th February 2013, the Advocates sought judgement against the Client in this amount. This court delivered a Ruling as regards the Advocate's said Notice of Motion on 20th June 2013. In that Ruling the Court found that the Taxing Officer had erred in awarding the Advocate a further one half of the agreed fees amounting to Shs. 6,486,120/-. As a result, the Advocate's taxed costs would be reduced by that sum.
4. However, the deponent noted that this Court had entered Judgement in the amount of Shs. 15,047,798.40 made up of agreed Client/ Advocates fees of Shs. 12,970,240/-and VAT at Shs. 2,075,558.40. The deponent went on to say that she had been advised by the Client's advocate that this Court in its said Ruling, did not seek to award the Advocate the sum of Shs. 15,047,798.40 over and above the amount already paid by the Client to the Advocate amounting to Shs. 13,656,740/-. It was the deponent's contention that the sum already paid should be deducted from Shs. 15,047,798.40 leaving a balance to pay by the Client of Shs. 1,391,058.40. The deponent then, at paragraph 12 of her Affidavit, set out in table form, what she had been advised and considered as the position in relation to the fees of the Advocate. Miss Wanjala pointed out that, after the Ruling of this Court had been delivered on 20th June 2013, correspondence had been exchanged between the advocates for the Client and the Advocate as to the contents of the Decree which had been extracted following upon the said Ruling. It had been the interpretation of the

Advocate that this Court had awarded Shs. 15,047,798.40 over and above the amount awarded by the Taxing Officer. The draft Decree and indeed, the Decree which emerged from Court dated 29th July 2030 cited the application for judgement to be entered for the sum of Shs. 8,917,163/-but that, in fact, judgement had been entered for Shs. 15,047,798.40 as above. The deponent suggested that the Decree had been wrongfully extracted and subsequent Warrants of Attachment had been drawn up indicating the wrong decretal amount. Indeed, the deponent opined that the execution by the Advocate is on the basis of a Ruling and/or Decree which is vitiated by an error on the face of the Court's record.

5. In response to the Affidavit in support of the Application, **Wambugu Gitonga** an Advocate of this Court swore a Replying Affidavit on 16th August 2013. He also filed a Notice of Preliminary Objection dated the same day. In his said Replying Affidavit, the Advocate noted that he was practising under the name and style of Makhecha & Company, Advocates. The deponent opened his Affidavit by stating that the Application before Court is really an appeal camouflaged as an application for review. Quite wrongly in my opinion, the Advocate opined in his Replying Affidavit that the Client had relinquished its right to make an application for review when it lodged an appeal from the decision of this Court vide a Notice of Appeal dated 4th July 2013. This is a matter best left for submissions and it is not a deposition in relation to fact. The ensuing paragraphs of the Replying Affidavit continued in the vein of commenting upon the procedure adopted in the Court by the Client and ended by stating that the Advocate's right to execute should not be sacrificed at the altar of the Client's reputation as the Government's banker and, as it disputed the Judgement and/or decree of the Court, then its recourse lay in an appeal.
6. The Client's submissions in relation to this matter set out the history behind the filing of the Application. In a nutshell, the Client submitted that in the Ruling of this Court delivered on 20th June 2013 it did not seek to award to the Advocate the sum of Shs. 15,047,798.40 over and above the sum of Shs. 13,656,740/-which had already been paid by the Client and acknowledged by the Advocate. That sum having been paid, it was the Client's submissions that a balance of Shs. 1,391,058.40 was all that remained to be paid together with nominal disbursements awarded in the taxation. The Client then detailed what had transpired surrounding the application for the Decree herein to be issued by the Court and noted that upon belatedly receiving a draft Decree it had responded to the Advocate in the vein as above. However, the Advocate had ignored the Client's protestations and proceeded to execute as against it through Bealine Kenya Auctioneers. The Client drew the attention of the Court to matters not mentioned in the Replying Affidavit namely that:

a. It did not address the question of whether or not the Applicant was entitled to the amount claimed in the Decree.
b. The Advocate did not deny having received the sum of Shs. 13,656,740.00 from the Client and
c. It sought to rely and dwell upon legal and/or procedural technicalities to unjustly, and without any reasonable cause, benefit from an error on the part of the Court.

7. The Client submitted that the error apparent on the face of the Court's record was that it failed to indicate or take into account that the awarded costs was subject to the sum of Kenyan shillings 13,656,740/-already paid to and acknowledged by the Advocate. In the Client's opinion the matter was so grave that the Court is obliged to correct the same and overlook any procedural technicality. In this regard, the Client submitted that the Court, in deciding this Application, should ask (presumably itself) the following questions:

a. If the Advocate prayed for judgement for a sum of Shs. 8,917,163/-and the one half of Shs. 6,406,120/-was declared to have been erroneously awarded, and, therefore, subtracted from the Shs. 8,917,163/-, on what basis is the Advocate executing for Shs. 15,047,798.40?
b. If the court finds that the award of Shs. 15,047,798.40 to the Advocate was an error, can the Advocate be allowed to rely on procedural technicalities and benefit from such grave error by getting Shs. 15,047,798.40 whereas the Client bought to pay only Shs. 1,363,264.40 in full settlement of the taxed costs?

Finally, the Client submitted that it was ready and willing to remit the sum of Shs 1,363,264.40 to the

Advocate or deposit the same in Court. It was also ready able and willing to provide such security or undertaking which may be required by the Court for the grant of stay orders sought including depositing the above amount in Court.

8. The Advocate detailed that prayer 2 of the Client's Application would be spent upon the determination by this Court of the Application. As regards prayer 3 involving the review and/or setting aside of its Ruling dated and delivered on 20th June 2013, the Advocates submitted that this Court does not have jurisdiction to hear this matter. It referred to **section 80** of the *Civil Procedure Act* as well as **Order 42 rule 6 (4)** of the *Civil Procedure Rules, 2010*. Those provisions provide that a review could be made but only from an Order from which no appeal is preferred or where a Notice of Appeal has been given. The Advocate referred to the Client's Notice of Appeal lodged on 4th July 2013 which, in his opinion, set the appellate process in motion and ousted the jurisdiction of this Court. The Advocate referred the Court to the case of **Abdul Aziz Juma v Nikisuhu Investment & 2 Ors ELC Suit No. 291 of 2013** as per **Mutungi J.** The Advocate drew the attention of the Court to the finding of the learned Judge as follows:

> **"Article 159 of the Constitution was never intended to override clear provisions of Statue unless such revisions of the statute had been found and held to be unconstitutional. Acts of Parliament …. make provision for the application of the law and the Constitution demands of the courts to protect the Constitution the law and the Acts enacted by Parliament. In my view, Article 159 of the Constitution cannot be resorted to where there are clear and express provisions of the law."**

9. The Advocate went on to detail that **Order 45 (1)** of the *Civil Procedure Rules* set out the grounds upon which an application for review may be premised:

> **"a) Discovery of new and important matter or evidence which, after exercise of due diligence, was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or order made;**
>
> **b) On account of some mistake or error apparent on the face of the record; or**
>
> **c) For any sufficient reason."**

The Advocate went on to say that on the face of it, the Application did not fall within any of the purview of a review. It maintained that the Client, by making the Application before Court, was inviting the Court to re-write its judgement when it was already *functus officio*.

The Advocate referred this Court to the cases of **National Bank of Kenya Ltd v Ndung'u Njeru CA No. 211 of 1996 (unreported)** as quoted in **Anthony A. Ngotho v National Industrial Credit Bank Ltd.** He also referred the Court to the High Court Appeal case of **Salome Wangari Rugoiyo t/a Wakina Enterprises v Benson M. Mwangi HCCA No. 227 of 1993**.

Finally, the Advocate submitted that it was of paramount importance that in lodging an application for review, the application must be brought within reasonable time. The Applicant having recited the history of the Client's Application for interpretation of the Ruling of the 28th June 2013, stated that it was not until the Advocate moved to execute the Decree, that the Client moved under Certificate of Urgency to apply for review. In the opinion of the advocate, the Client was guilty of laches and, as such, its Application before Court should not be allowed.

10. The submissions of the parties came for highlighting before Court on 25th September 2013. Mr. Murgor, learned counsel for the Client, proposed that the Application and the Advocate's Preliminary Objection should be heard together, although the Client had only put in submissions in respect of the Application. Counsel pointed out that the error that the Client considered to be on the face of the record is that the amounts detailed in the Ruling of this Court delivered on 28th

June 2013 were subject to any payments already made. That omission or error had been taken advantage of by the Advocate to claim double fees for execution. The Ruling of the Taxing Officer clearly noted the payments made by the Client in the amount of Shs. 13,656,740/-. It was common ground that these payment had been made. This Court had awarded judgement for the Advocate in the amount of Shs. 15,047,798.40 as per page 25 of the Ruling. Counsel maintained that there was an oversight that the Court had not included the amount that had already been paid. Mr. Murgor then pointed to the procedure which had been adopted as regards the settling of the Decree and the correspondence ensuing thereafter. He noted that in the execution documentation, there was a paragraph which had provision for a Decree Holder to account for payment or adjustment if any. The amount inserted had been detailed as "Nil". Counsel believed that the signature at the Certificate at the bottom of the Application for Execution was not signed by an advocate in the firm of Ransley, McVicker & Shaw but by Mr. Wambugu Gitonga, the Advocate himself. Counsel went on to say that the Preliminary Objection was part of the issue of the same extraction – the advocates acting for the Advocate would not deal with the issue of having received part payment. Counsel would have thought that a law firm of some repute would agree to place the matter of the settlement of the Decree before Court for interpretation. Instead, the Advocate's advocates had passed the Decree which omitted the amount that had already been paid. Mr. Murgor continued in his highlighting of the Client's submissions, by noting that the Advocate's submissions that had been filed, made no mention of the amount that the Client said had been paid but instead, maintained that this was a matter for appeal and, in the meantime, the Advocate should execute. The Preliminary Objection of the Advocate, counsel maintained, was an attempt to take up a technical legal point in order to perpetuate (a) abuse of the Court's process and (b) fraud on the Client. Finally, Mr. Murgor informed the Court that he had made the decision that the Notice of Appeal should remain for the simple reason that if this Application to review would fail, the Client may still be able to apply for a stay of execution pending appeal.

11. Miss Nyaga for the Advocate, in response to Mr. Murgor's suggestions that the Replying Affidavit was not sworn by the Advocate, pointed to the provisions of **sections 70** and **71** of the *Evidence Act* which provided that any person who alleges a fact should prove its authenticity or otherwise. Nothing could have been easier than to issue a notice to cross-examine Mr. Gitonga. Counsel went on to say as regards the Preliminary Objection, that it was clear that there are express provisions at **section 80** of the *Civil Procedure Act*, **Order 42 Rule 6 (4)** of the *Civil Procedure Rules*, **Rule 75 (1)** of the *Court of Appeal Rules* and **Order 45 Rule 1**under which the Application before this Court is proferred. Review and appeal are alternative remedies and whereas the law is gracious enough to allow a party to review, it does not give the same grace to a party who proffers an Appeal first, to apply for review. It was the Advocate's submission that this Court is *functus officio* and void of jurisdiction to hear and determine the Application. As regards the substantive Application, counsel submitted that in both the Application and the Affidavit in support revealed that this is not an application for review. What counsel for the Client is seeking to do is to ask this Court to sit on appeal from its own decision and to rewrite the same to the Client's advantage. To ask the Court to reopen a matter which is to be decided upon Appeal is clearly an abuse of the Court's process. The record and the pleadings would show that there has been delay by the Advocates for the Client in settling the amount herein and in proferring the Application for review. The Application was before this Court on 24 July 2013 after the stay Order had lapsed. The Advocate had indulged the Client who had filed its Notice of Appeal on 4 July 2013 against the entire Ruling of this Court. There had been no activity on the part of the Client until 13th August 2013 after the Advocate had moved to realise the Decree. Counsel maintained that it was that delay that she called indolence and the same should not be rewarded. In conclusion, Miss Nyaga emphasised that the issues raised should be heard in an Appellate Court. However, on a question put by Court, counsel detailed that the payment of Shs. 13,656,740/-had been paid to the Advocate as admitted in paragraph 5 of the Replying Affidavit dated 24th July 2013.

12. Having the last word, Mr. Murgor noted that as regards the Preliminary Objection, there had been no admission of the part payment of Shs. 13,000,000/- odd. The **Abdul Aziz Juma** case, to which the Court had been referred, dealt with the point as to whether an advocate could practice without a practising certificate and as a result was distinguishable from the Application before Court. In counsel's view, **section 80** of the *Civil Procedure Act* dealt with matters of procedure rather than

substance. He maintained that well after the time for filing an appeal has gone, a party can still come to Court for an Order. The Client had shown that the Notice of Appeal was filed with abundant caution. At all times, the Client had believed that this was a matter of simple interpretation. The Client did not want this Court to be embarrassed in any way now that an Appeal had been proffered. Following the strict rules of procedure should not lead to a miscarriage of justice. The Client was asking the Court to invoke its powers under **section 3A** of the *Civil Procedure Act*. Mr. Murgor maintained that the Advocate was taking advantage of the rules of procedure to take double fees. Finally, his view was that the Preliminary Objection was misplaced and was intended to perpetrate a fraud.

13. The power to review is a statutory power bestowed on the Court by **section 80** of the *Civil Procedure Act* which gives the Court power to make such orders as it thinks fit, but the rule must be strictly considered. I do not consider that the failure by this Court to give credit to the Client for monies already paid to the Advocate can necessarily amount to an "error on the face of the record". The Court may have assumed, perhaps wrongly, that the Advocate holding a Judgement in the amount of Shs. 15,047,798.40 would give credit to the Client for the monies already paid to him totalling Shs. 13,656,740/-. Instead, it appears that the Advocate would unjustly be attempting to enrich himself by not giving such credit, as evidence on the execution documentation before Court. Of course, **Order 45 Rule 1 (1)** further details that an applicant can seek review "for any other sufficient reason". 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 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 as 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 and, in my view, I would answer this in the affirmative.

14. Having said that, this Court's hands are tied as regards the interpretation (albeit procedural) of **section 80** of the *Civil Procedure Act* as well as **Order 45 Rule 1 (1)** of the *Civil Procedure Rules, 2010*. Both those provisions detail the words:

> **"from which no appeal has been proffered"**.

Mr. Murgor submitted that it had been his decision not to withdraw the Notice of Appeal filed by the Client herein on 4th July 2013. Counsel wished to leave the door open for a possible application for stay of execution pending appeal. That is counsel's own decision in relation to procedure but, be that as it may, the Notice of Appeal while it still remains not withdrawn, precludes any such Application as has been made by the Client before this Court. Consequently in that regard, I consider that I would have no alternative but to dismiss the Client's Application dated 14th August 2013 as brought under **Order 45 Rule 1 (1)**. To this end, I fully endorse the sentiments as expressed by my learned brother **Mutungi J.** in the **Abdul Aziz Juma** case (supra).

15. However, as Mr. Murgor has detailed, the Application is also brought under the provisions of **sections 1A, 1B, 3** and **3A** of the *Civil Procedure Act*. **Section 1A (3)** of the Act reads:

> **"A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act."**

As per **section 1A (1)** the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The important word here is the word "just". In my opinion it is not "just" for the Advocate in this matter to fail to give credit to the Client for amounts already paid to him for services rendered and for him to seek, frankly, unjust enrichment in exploiting an error by the Court. The Court cannot be seen to condone such action. As a result, I have no hesitation in resorting to exercising the inherent powers of the Court. **Section 3A** of the *Civil Procedure Act* reads as follows:

> **"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

To my way of thinking, it would be unjust and an abuse of the process of this Court if it should allow the execution process to go ahead based on the execution documentation which clearly gives no credit to the Client for monies already paid to the Advocate. As the Client admits that it owes the difference between the Judgement amount of Shs. 15,047,798.40 and the amount which the Advocate himself admits has been paid to him of Shs. 13,656,740/-, being Shs. 1,393,264.40, I direct that the Client will pay such amount to the Advocate within 10 days from the date of this Ruling. As a consequence, I allow the Client's Notice of Motion dated 14th August 2013 with costs.

DATED and delivered at Nairobi this 9th day of October, 2013.

J. B. HAVELOCK

JUDGE