REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. E920 OF 2021

SAMUEL B. KEENGWE

T/A KEENGWE & COMPANY ADVOCATES…… PLAINTIFF

VERSUS

WAUMINI COOPERATIVES

SAVINGS & CREDIT SOCIETY LIMITED.....DEFENDANT

RULING

1. There are two applications for consideration.

2. Both applications seek review of the judgment delivered on 30.1.2025 by **Hon. Mwamuye J**.

Plaintiff's application

3. The plaintiff's application dated 7.3.2025 is based on the grounds that the award of Kshs. 21,338,544.44/- does not reflect the claim which was amended to Kshs. 38,219,297.56/- when the matter was mentioned on 2.10.2024.

4. The application is supported by the affidavits sworn by **Samuel B. Keengwe** on 7.3.2025 and 8.4.2025.

5. The defendant opposed the application through a replying affidavit sworn by its Chief Executive Officer (CEO) **Peter I. Obbuyi** on 4.4.2025.

Defendant's application

6. The defendant's application dated 6.3.2025 seeks that the entire judgment be set aside and that the time for furnishing financial records be extended beyond the 30 days granted. The application is supported by the affidavits sworn by its CEO on 6.3.2025 and 4.4.2025.

7. The main grounds are: -

(1) The failure to furnish the full financial records was the mistake of its previous advocate, **Ngugi & Company Advocates**, and should not be visited upon it.

(2) It has instructed **Miller & Company Advocates** and wishes to furnish the financial records as ordered by the court.

(3) The court failed to deal with the issue of jurisdiction raised by it in its defence dated 16.3.2022.

8. The plaintiff opposed the application through a replying affidavit sworn by **Simon B. Keengwe** on 20.3.2025.

9. The applications were canvassed through written submissions. The plaintiff and the defendant filed written submissions dated 5.5.2025 and 4.7.2025 respectively.

Plaintiff's submissions

10. The plaintiff submitted that his application is merited, while the defendant's application is incompetent, unmerited, and an abuse of the court process.

11. The plaintiff submitted that the amended claim of Kshs. 38,219,297.56 was properly before the court. He asserted that he properly amended his plaint through an oral application made in court, which was not opposed and was allowed by consent. The amendment complied with **Order 8 Rule 8 of the Civil Procedure Rules**, which permits the Court to hear and determine an oral application for amendment. He cited **Reliable Electrical Engineers (M) Ltd v Fundi Island Resort Limited & 2 others**, where the court

held that although a formal application is ordinarily required, it may be dispensed with under **Order 8 Rule 8**.

12. The plaintiff relied on **Francis Njoroge v Stephen Maina Kamore**, on the threshold for review. He argued that his application was filed timeously and satisfies the threshold for review; the ground of an error apparent on the face of the record. He asserted that although the amended sum claimed was Kshs. 38,219,297.56, the court awarded Kshs. 21,338,544.44/-, thereby occasioning an error in the contractual award.

13. The plaintiff argued that the defendant's application does not meet the threshold. He contended that the grounds raised, lack of jurisdiction, failure by previous counsel to adduce financial accounts, willingness to produce records, and contestation of sums collected, are matters that go to the merits and would properly be ventilated on appeal, not review.

14. The plaintiff submitted that the defendant is inviting the court to sit on appeal over its own judgment. He relied on the Court of Appeal

decision in **Kibias & another v Muyesu**, to the effect that review jurisdiction is limited and cannot be used to disguise an appeal. He further relied on **Murgani v Kenya Revenue Authority**, where the Supreme Court held that once a court delivers judgment, it becomes *functus officio* and cannot revisit the merits except as provided by law.

15. The plaintiff contended that the defendant has not demonstrated discovery of new and important matter. He claimed that the financial statements were always within the defendant's possession, and its failure to produce them amounts to indolence rather than due diligence.

16. The plaintiff further submitted that the defendant has approached the court with unclean hands. Despite demand letters, contractual obligations under the Service Level Agreement (SLA), the plaint seeking production of accounts, a default judgment directing production, the setting aside of that judgment, and a final judgment ordering production within 30 days, the defendant failed to furnish the required accounts. He contended that the documents now annexed are said to be

external bank statements that do not constitute proper debtor accounts as ordered by the court and are therefore skewed and incomplete.

17. The plaintiff also disputed the defendant's challenge to the validity of the SLA, arguing that the by-laws relied upon came into force after the agreement was executed and cannot apply retrospectively. Further, he highlighted that the defendant executed another agreement in 2017 with a single signatory and paid the plaintiff thereunder, thereby undermining its own argument on execution requirements.

18. In conclusion, the plaintiff submitted that the defendant's application should be dismissed with costs. Conversely, its application satisfies the requirements for review and ought to be allowed as prayed.

Defendant's submissions

19. The defendant submitted that it has discovered new and important evidence which was not presented at trial due to the negligence of its former advocates. It contended that the bank statements and correspondence discovered

demonstrate that the plaintiff only recovered Kshs. 3,000,000/- from the Catholic University of Eastern Africa, not the amount claimed. This material, it submits, directly undermines the Plaintiff's case and could have altered the outcome of the suit.

20. The defendant relied on **Itando Mission of Hope and Health Care v Munyasi & 2 others** and **Shital Bimal Shah & 2 Others v Akiba Bank Limited**, to argue that mistakes of counsel, where excusable, should not be visited upon innocent litigants and that courts should lean toward substantive justice rather than technicalities. It submitted that it had no role in the omission and has since diligently regularized its representation and produced the evidence.

21. The defendant submitted that the judgment is fundamentally flawed because the court failed to determine the issue of jurisdiction raised in the defence. It relied on **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd** and **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others** on the importance of jurisdiction.

22. The defendant challenged the validity of the plaintiff's oral amendment of the plaint increasing the claim to Kshs. 38,219,297.56. It acceded that oral applications for amendment are allowed. However, it argued that the amendment was never formalized by filing and serving an amended plaint or supported by a computation. It submitted that the absence of a properly endorsed and filed amended pleading renders the amendment invalid and incapable of forming a lawful basis for judgment.

23. The defendant denied being guilty of laches or unclean hands. It asserted that its application was filed within six weeks of judgment. It also asserted that it acted transparently and in good faith, and that equitable doctrines should not be invoked to bar it from seeking substantive justice.

24. The defendant maintained that the underlying Service Level Agreement (SLA), is invalid and unenforceable. It argued that the SLA was executed contrary to its registered by-laws and statutory requirements under the **Co-operative Societies Act**, as it was signed by only one

official instead of the mandated three. It also argued that the plaintiff had constructive notice thereof.

25. Finally, the defendant argued that enforcement of the judgment would result in unjust enrichment. It contended that recoveries of about **Kshs. 45.3 million** were secured by **Ngugi & Company Advocates** between 2019 and 2021 under a separate engagement, and that the plaintiff had disengaged from the matter in 2018.

26. The defendant therefore urged that the plaintiff's application be dismissed with costs, that its application for review be allowed with costs, that the matter be reopened for determination on a complete evidentiary record.

27.

Analysis and Determination

Issues

28. The common prayer in the two applications is review of judgment herein. Has each applicant met the threshold for review of the judgment delivered on 30.1.2025? The request of setting

aside the judgment will also be considered and determined.

Review

29. The court has discretion to review its order or decree pursuant to **Section 80 of the Civil Procedure Act.** The discretion ought to be exercised reasonably based on principles and not capriciously. The grounds for review are set out under **Order 45 of the Civil Procedure Rules**, namely, discovery of new and important matter or evidence or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

30. The final orders in the subject judgment are: -

a) **Judgment is entered in favour of the Plaintiff for the unpaid legal fees claimed of Kshs. 21,338,544.44/- being money due and owing to the plaintiff by the defendant.**

b) **The defendant shall pay the plaintiff general damages of Kshs. 2,000,000 for breach of contract.**

c) **Interest on (a) and (b) above at the Court rates.**

d) **The Defendant is ordered to provide full disclosure of its financial records for the relevant period within 30 days of this judgment.**

e) **The Defendant shall bear the costs of this suit.**

31. I will first consider the defendant's application as it seeks to set aside the entire judgment. The application is premised on two major grounds: -

a) It wishes to produce full financial records and correspondence to show that the plaintiff only recovered Kshs. 3,000,000/- and that the failure to furnish the said records was its previous advocate's mistake which should not be visited upon it.

b) The court failed to deal with the issue of jurisdiction raised by it in its defence dated 16.3.2022.

Jurisdiction

32. Is the question of jurisdiction a sufficient reason for review? The defendant claims that the court failed to consider the issue of jurisdiction.

33. The plaintiff argued that the court had the proper jurisdiction to hear the matter. He also argued that failure to expressly address jurisdiction does not automatically warrant review.

34. To my mind, the issue of jurisdiction was important as the court has jurisdiction where the parties have a retainer agreement under section 45 of the Advocate's Act. **Chaudhri Associates v Registered Trustees of Sheikh Zayed Bin Sultan Al Nahyan (Miscellaneous Civil Application E202 of 2022) 2024 KEELC 13803 (KLR) (11 December 2024)**

35. At para. 10 (d) of the judgment, headed defendant's case, the court noted that the jurisdiction of the court is contested, as the dispute falls within the purview of the taxing master.

36. Linked to the above is para. 10 (a); that there was no legally binding SLA between the parties.

37. The court considered the existence of the service level agreement at para.s 13, 14, 15, concluding at para. 16 that the absence of evidence to challenge the validity of the SLA, coupled with the plaintiff's detailed submissions, leaves no room for doubt about the existence of a legally binding agreement.

38. I have plainly deciphered the record, court's expressions and findings without any analysis because I am of the considered opinion that these are issues for appeal rather than review.

39. What about the claim of discovery of new evidence by the plaintiff?

40. The arguments by the plaintiff are relevant; that the alleged new evidence was always within the defendant's knowledge and possession and could have been produced at trial with diligence. He also argued that the previous advocate's negligence does not absolve the defendant from its duty to follow up. He suggested that the defendant is attempting to fill gaps in evidence after judgment.

41. Having found that there was a service level agreement in existence, the court had the requisite jurisdiction to determine the matter. **Omulele & Tollo Advocates v Mount Holdings Limited [2016] KECA 523 (KLR)**

42. The defendant has not shown discovery of new evidence which could not have been produced during trial even with due diligence. The ground therefore fails.

43. Further ground argued by the defendant was that the SLA was signed by one official instead of three which was contrary to its By-laws and the Co-operative Societies Act.

44. The plaintiff disputed the defendant's challenge to the validity of the SLA, arguing that the by-laws relied upon came into force after the agreement was executed and cannot apply retrospectively.

45. In my view, this is not a ground for review but for appeal. ***Nyamogo & Nyamogo Advocates v Kogo [2001] EA 173***

Advocate's mistake should not be visited upon it

46. The second ground is that the failure to furnish the said records was its previous advocate's mistake which should not be visited upon it.

47. The defendant was required to provide full disclosure of its financial records for the relevant period within 30 days of the judgment.

48. The defendant faulted its previous advocate for not requesting it for any certified financial documents to be produced in court which it would have provided. It asserted that the previous advocate had a duty of care.

49. The plaintiff contended that the defendant has not demonstrated discovery of new and important matter. He claimed that the financial statements were always within the defendant's possession, and its failure to produce them amounts to indolence rather than due diligence. He also contended that the defendant is seeking to fill gaps in evidence post-judgment.

50. Evidence is produced by the parties not the advocate. It is safe conclusion that the bank statements and the correspondences were in its possession and due diligence lay on the defendant

to have them produced in court or within the timeframe given. Other than blanket blame on the advocate, there is no plausible explanation as to why the evidence was not filed. Litigants have a duty to follow up their cases even when they are represented by counsel. **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR**

51. I have held that the defendant has not demonstrated 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 as required under **Order 45**.

52. The ground on blame on the advocate also fails.

53. The defendant's application is a candidate for dismissal.

Error on face of record

54. I now turn to consider the plaintiff's application for review. It is based on the ground that there is an error on the face of the record.

55. The plaintiff's argued that the award of Kshs. 21,338,544.44/- does not reflect the claim which was amended to Kshs. 38,219,297.56/- when the matter was mentioned on 2.10.2024.

56. Conversely, the defendant argued that submitted that the absence of a properly endorsed and filed amended plaint renders the amendment invalid and incapable of forming a lawful basis for judgment.

57. The plaintiff retorted that although a formal application is ordinarily required, it may be dispensed with under Order 8 Rule 8.

58. The record shows that on 2.10.2024, the court recorded that there was no objection to the application for amendment of the plaint. It then recorded that: -

> ***"By consent of the parties, the total plaint amount is amended to 32,133,418.16, the VAT amount is amended to 5,141,418.16 and the disbursements are to be 949,015.90 cents....***

The defendant, by consent, shall be granted 7 days to file and serve a supplementary witness statement."

59. There is no supplementary witness statement by the defendant on record.

60. As good practice, where amendment of a pleading is allowed, the amended pleading should be filed and served; and in the final submissions, reference should be to the claim in the amended pleading. Nevertheless, an amendment is not proof thereof. The claim as amended must be proved through evidence upon which the court makes a final determination. Whereas, this may appear to be an apt case for review, it would require probing of evidence for me to conclude that the claim as amended was proved. Therefore, removing it from the strict purview of review on the basis of an error or mistake apparent on the record. Which should be an error so plain as not requiring copious explanations to establish. This, is however, a potent point for appeal.

61. Accordingly, the plaintiff has failed to show that there is an error on the face of the record to warrant a review.

Disposal

62. In the upshot, the plaintiff's and the defendant's applications for review dated 7.3.2025 and 6.3.2025 are both dismissed for want of merit. No orders as to costs.

Dated, signed and delivered at Nairobi through Microsoft Teams online application this 19th day of February, 2026

F. Gikonyo M

Judge

In the presence of: -

Kipkesei for Kimanthi for Respondent
Mugambi for Plaintiff
CA – Ivan/Aggrey