



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

MISC. APPL. NO. 2 OF 2015

OMULELE & TOLO ADVOCATES.....APPLICANT

-VS-

MOUNT HOLDINGS LTD.....RESPONDENT

RULING

1. By a notice of motion dated 10th July 2017 made under section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules, the Respondent seeks orders that:

1) Spent

2) There be and is hereby issued an order to stay the hearing of the Bill of costs dated 25th September 2014 pending hearing and determination of this application.

3) The Honourable court be pleased to review, vary or set aside its ruling and order made on 29th May 2017 by Honourable Mr. Justice C. Yano dismissing the Respondent's Notice of motion Application dated 16th August 2016.

4) The Honourable court be pleased to order that the Respondent's Notice of Motion Application dated 16th August 2016, be heard afresh.

5) There be an order to stay the hearing of the Bill of costs dated 25th September 2014 pending hearing and determination of the Respondent's notice of motion dated 16th August 2016 afresh.

6) Costs of this application be provided for.

7) The orders made herein to apply to the following cases:

i. High Court Miscellaneous Application No. 3 of 2015: Omulele & Tolo Advocates –VS- Great Lakes Port Limited.

ii. High Court Miscellaneous Application No. 4 of 2015: Omulele & Tolo Advocates – VS- Delgreen Limited.

iii. High Court Miscellaneous Application No. 191 of 2015: Omulete & Tolo Advocates – VS- Doshi Iron Mongers limited.

2. The application is based on the grounds on the face of the application and the affidavit of Ashok L. Doshi sworn on 10th July 2017 and a further affidavit sworn on 18th August 2017. Briefly, it is the applicant's contention that there is an error apparent on the face of the record in that the Honourable court did not have an opportunity to consider and compare the Respondent's/Applicant's Notice of motion Application dated 16th August 2016 with the Respondent's/Applicant's previous application dated 12th February 2015.

That the two applications are different and the evidence contained in the Respondent's Notice of motion Application dated 16th August 2016 were not part of the Respondent's previous application dated 12th February 2015 and the error on the record led the court to erroneously conclude that the issue of the registration status of Omulele & Company Advocates had been dealt previously yet it was raised for the first time in the application dated 16th August 2016 and evidence adduced to support the non-registration. That the application has been made without unreasonable delay.

3. The Applicant/Respondent filed grounds of opposition dated 18th July 2017 in which they oppose the application and contend inter alia that the court is functus officio with regard to the orders sought in the application and that there has been inordinate delay in making the application.

4. The advocates on record filed written submissions and cited various decided cases in support of their respective positions in the matter.

5. I have considered the application together with the affidavits in support as well as the submissions filed and the relevant law. In my considered opinion the key issue that emerges for determination is whether the applicant has satisfied the grounds for review.

6. Section 80 of the Civil Procedure Act provides as follows:

“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(1) of the Civil Procedure Rules states as follows:

“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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

7. Whereas Section 80 gives the power of review, order 45 sets out the rules. The rules in my view restrict the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds:

(a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or: (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground, there is a requirement that the application has to be made without unreasonable delay.

8. In the case of National Bank of Kenya Ltd –VS- Ndungu Njau (1997) eKLR the court of Appeal held that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of law cannot be a ground for review.”

9. In the instant case, the application is made on the grounds that: (a) there is an error apparent on the face of the record in that the court did not have an opportunity to consider and compare the applicant's Notice of motion application dated 16th August 2016 with the previous application dated 12th February 2016 with the previous application dated 12th February 2015, (b) the two applications are different and contained different evidence, (c) the court erroneously concluded that the issue of registration status of Omulele & Company Advocates had been dealt with previously whereas the issue was raised for the first time in the application dated 16th August 2016 and evidence adduced to support the non-registration. I have looked at both the applications dated 12th February 2015 and 16th August 2016.

In the application dated 12th February 2015, the Applicant was seeking orders that:

- a) This application be certified as urgent and heard ex-parte first on priority basis.**
- b) There be stay of taxation of the applicant's Bill of costs scheduled for hearing on 13th January 2015 until further orders of this Honourable court.**
- c) The Honourable Judge do give directions and determine whether retainer existed between the firm of Omulele & Tolo Advocates and make appropriate orders.**
- d) The Honourable Judge do dismiss the application for taxation filed by Omulele & Tolo Advocates.**
- e) Costs of this application be provided for.**

10. The application dated 16th August 2016 sought the following orders:

- a) That the Honourable court be pleased to certify this application as urgent and heard on priority basis.**
- b) That the Honourable court be pleased to suspend/stay of taxation of Bill of costs dated 25th September 2014 scheduled to be heard on 19th August 2016 pending hearing and determination of this application inter partes.**
- c) That the Honourable court be pleased to strike out the Bill of costs dated 25th September 2014 filed by the firm of Omulele & Tolo Advocates, Applicant/Respondent on account of work done by the purported firm of Omulele & Co. Advocates.**

d) That the Honourable court do declare that the firm of Omulele & Company Advocates had no legal capacity in terms of Registration of Business Names Act, cap 499 Laws of Kenya to trade as such for lack of registration of the same.

e) Costs be provided for and paid by Christopher Omulele in person.

11. Having outlined the prayers sought in the two applications dated 12th February 2015 and 16th August 2016, it is clear that the issue of the registration status of Omulele & Company Advocates were not part of the Applicant's application dated 12th September 2015. The prayer relating to the registration status of Omulele & Company Advocates was not adjudicated in the application dated 12th September 2015 nor the application date 16th August 2016. I find that the Applicant has demonstrated that indeed there was an error apparent on the face of the record.

12. In the case of *Evan Bwire –V- Andrew Nginda, Civil Appeal No. 103 of 2000, Kisumu, (2000) LLR 8340*, the court held that:

“An application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh.”

To the extent that the ruling set to be reviewed did not adjudicate the prayer relating to the issue of the registration status of Omulele & Company Advocates, I am persuaded that the applicant has satisfied the conditions for review. The issues raised are matters that the court did not make a finding on and in my view they fall within the scope for review. This will allow the parties to articulate their case in respect of the grounds that had not been decided on. As was stated by Oder, JSC, in the case of *Branco Arabe Espanol –V- Bank of Uganda [1999] 2 EA 22*, “the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and the errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.” The main concern of the court is to do justice and the court can only do so if it allows the parties to articulate all their issues before making a finding.

13. The logical question that follows is, was the present application made without unreasonable delay. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. The Order sought to be reviewed was made on 29th May 2017 and this application was filed on 11th July 2017. This was a delay of about 40 days. The applicant has explained that the delay was occasioned by the fact that its erstwhile advocates did not advise them on the possibility of having the decision of the court reviewed and only advised them on appeal and only got advise from its current advocates when over 30 days had lapsed. In my view, this is a reasonable explanation and is excusable.

14. In the light of all these and in exercising my discretion, I find and hold that there is sufficient cause why I should review my ruling and order of 29th May 2017.

15. Accordingly, the application dated 10th July 2017 is hereby allowed in terms of prayers (2), (3), (4), (5) and (7) thereof.

16. There shall be no order as to costs.

Ruling delivered dated and signed at Mombasa this 17th day of January 2018.

C. YANO

JUDGE