



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A)

CIVIL APPEAL NO. 60 & 62 OF 2017

BETWEEN

OTIENO, RAGOT & COMPANY ADVOCATES... APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED..... RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Kisumu (**D.S. Majanja, J.**) dated 6th March, 2017 in **HC Miscellaneous Civil Case No. 61 of 2015**)

JUDGMENT OF ASIKE-MAKHANDIA, JA

Disputes and disagreements over fees are a normal occurrence between advocates and their clients. Sometimes, the advocate-client relationship breaks down leading to the filing and taxation of Advocate/client bill of costs as was the case in the present appeal.

A brief background of the appeal is that when a disagreement arose over fees between the appellant and the respondent, the appellant filed its Advocate/client bill of costs. The respondent objected to the bill and claimed that the appellant was barred from filing a bill of costs pursuant to a remuneration agreement they had entered into dated 1st April, 2005. The taxing officer in her ruling held that there was no remuneration agreement between the parties and proceeded to tax the bill. Aggrieved by the decision of the taxing officer, the respondent and appellant filed references before the High Court pursuant to Rule 11 of the Advocates Remuneration Order. The two reference were heard together and a composite ruling delivered. The learned Judge in his ruling dated 17th August, 2017 held as follows on the issue of the remuneration agreement:

“[9] Section 45(1) of the Act recognizes that there can be agreements with respect to advocates remuneration and it provides that, “[That] such agreements shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized”. For an agreement to meet the requirements of the Act, it must be an agreement in writing and signed by the Client. It was the burden of the respondent to place before the Deputy Registrar the agreement it sought to rely on. Two letters were produced in evidence. The first letter (unsigned copy) dated 1st April, 2005 addressed to the Advocates proposing legal fees to be applied with effect from 8th July 1999. The letter requested the Advocates to confirm their acceptance of the terms by signing and returning a copy. The advocates wrote back through their letter dated 3rd May 2005 in which it acknowledged receipt of the letter dated 1st April 2005, returned the document executed and ended with, “ Please return to us a copy duly executed by yourselves for our records.” The respondent did not exhibit a copy of the agreement duly executed by the “client” within the meaning of Section 45(1) of the Act. I therefore find and hold that on the material before the Deputy registrar, there was no remuneration agreement.”

The essence of the ruling was that the agreement that was placed before the taxing officer by the respondent did not meet the requirement of the law. The court however allowed the appellant’s reference in part to wit that the amount certified by Deputy Registrar shall accrue interest at 14% per annum from 25th April, 2005 until payment in full. Following the delivery of the ruling, both parties sought leave to appeal which was granted. The respondent proceeded to file and serve the notice of appeal. However, 5 days thereafter the respondent filed an application seeking to review the court’s orders aforesaid so as to allow the reference that it had dismissed as aforesaid. The main ground in support of the application was that the respondent had mixed up two letters when responding to the claim for fees before the taxing officer and in the process had failed to file a letter that was material to the dispute. It also claimed that its decision to look into the records again was prompted by the observation by the court in the ruling that it had failed to exhibit a copy of the agreement duly executed by it as a client in accordance with section 45 of Advocates Act. The respondent claimed that it was the second letter that depicted the remuneration agreement but it was not produced by inadvertent mistake. Instead what it produced was the letter on terms and conditions.

The appellant opposed the application and contended that the issue whether there was a valid retainer agreement between the parties was dealt with by the taxing officer and the document sought to be placed before the court was never placed before her. As such the appellant contended that the application sought to introduce fresh evidence at an appellate stage. That had the respondent exercised reasonable diligence it would not have made the error that it alleges it made. That the issue of whether or not there was a valid retainer agreement was one of the issues before the taxing officer which was the only forum in which all documents touching on the issue could be validly raised. The respondent further deposed that even if the matter was to be considered with the new document on record, the court would not arrive at any finding that is different from the finding of the taxing officer. That the Judge in entertaining the reference was exercising an appellate jurisdiction. It had to deal with reference based only on what was placed before the taxing officer and therefore she could not be accused on a reference of having made an error on the basis of a document that was not placed before her. Finally, the respondent deposed that the application was incompetent having been brought under the Civil Procedure rules which did not apply on matters of taxation.

The learned Judge while rejecting the objection to the competency of the application addressed himself on the procedural objection raised by the appellant and reverted to the cases of **Noor Khan v Ramji Kanji and Company & Others [1966] EA 506**, **R v C. Lutta Kassamani t/a Kasamani and Company Advocates ex-parte United Insurance Co., Ltd [2005] eKLR**, **Najib Balala and 13 Others v David M. Githere and 9 Others [2005] eKLR** and **Doreen Nasieku Pussy, Advocate v Mara Conservancy [2005] eKLR** which have held that the Advocates Remuneration Order is a complete code that excludes the application of provisions of the Civil Procedure Rules. He however took the view that the matter before him was civil in nature by virtue of Section 89 of the Civil Procedure Act and did not conflict with the express provisions of the Advocates Remuneration Order. The learned Judge also invoked the inherent jurisdiction of the High Court as read together with the overriding objective in the Civil Procedure Act and the rules made thereafter as well as Article 159(2) (d) of the Constitution to justify his review of the ruling. He held that Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Act are general provisions which are not inconsistent with the provisions and objects of the Advocates Remuneration Order.

In accepting the explanation given by the respondent that there was an inadvertent mistake in presenting two letters which were similar in nature, the learned Judge quoted with approval the case of **The Official Receiver and Liquidator v Freight Forwarders Kenya Limited [2000] eKLR** and **Richard Nchapai Leiyangu v IEBC & 2 others [2013] eKLR** in holding that the court's discretion to set aside an ex parte judgment or order is intended to avoid hardship or injustice resulting from accident, inadvertence, excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice since the existence of the two letters were not disputed and as such parties should be allowed to ventilate their legal effect. The learned Judge observed that the application was made without delay and that it was not intended to obstruct justice and thus proceeded to review the orders made on 17th August, 2015 by setting them aside. He ordered that the references be heard afresh. Costs of Kshs. 30,000/- were awarded to the appellant for the mistake by the respondent.

It is this ruling and order that prompted the two appeals filed by the appellant herein being Civil Appeal Numbers 60 & 62 of 2017. Eight (8) similar grounds of appeal were raised in respect of the two appeals to wit, that the learned Judge erred in law in holding that; the application was competent and that it had the requisite jurisdiction to entertain it; the application met the criteria for the grant of an order for review; failing to find that the documents sought to be admitted were documents which could only be admitted by the taxing officer and that he had no power to admit fresh evidence at the level of a reference; the ruling and orders amounted to a usurpation of the powers of the taxing officer; failing to find that from the reasoning of the taxing officer, the document produced before him would have made no difference in her findings; and failing to find that on the facts before him, there was in fact no agreement capable of being enforced by the court and that the order for review would be pointless.

During the hearing of the appeal, learned counsel **Mr. Otieno** appeared for the appellant while learned counsel **Mr. Ojuro** appeared for the respondent. Counsel relied on their written submissions and opted not to highlight. Parties however agreed that this judgment will apply to mutatis mutandis to Civil Appeal Number 62 of 2017.

Mr. Otieno argued that the application was incompetent, an abuse of the court process and the court lacked jurisdiction to entertain it on the grounds that Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules permitted a party to file an application for review only where no appeal had been filed. That though no substantive appeal had been filed, a notice of appeal had been lodged which was as good as an appeal. To the appellant the respondent was gambling with the law. Counsel pointed out that the court granted orders which had not been sought when it made a finding that the two references be heard afresh. The respondent had prayed for his reference to be allowed. In any event none of the parties addressed the court on the issue. There was no jurisdiction to grant relief which had not been sought and on which the parties had not been given the opportunity to address the court on. That the appellant was prejudiced since it was not given a hearing on the question of whether or not the references should be heard afresh since its response would have been different.

Counsel submitted that the discretion of the court under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules was not unfettered as they prescribe the conditions which must be met before an application for review can be allowed. These are that there should be no appeal against the order sought to be reviewed, there should be new and important matter discovered by the applicant 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 or order made; or on account of some error or mistake apparent on the face of the records or for sufficient reason, and the application is made without unreasonable delay. It was the appellant's submission that the application by the respondent did not meet the above criteria as envisioned by the law. The taxing officer while rejecting the document purported to be the retainer agreement observed that the letter adduced in evidence predated the date of instructions to the appellant and referred to another document which was not exhibited. Counsel urged this Court to take note that all the letters produced bore the same reference number and were therefore kept in the same file, that though the documents bore the same date, the contents were different hence no excuse for the alleged confusion and that the appellant did not ambush the respondent for his demand for costs. In fact four letters were written to the respondent demanding fees in accordance with the Advocates Remuneration Order to which they failed to respond. That had the respondent exercised due diligence then it would have seen the documents. He faulted the learned Judge for finding that this was an inadvertent mistake. That Order 45 does not excuse every error or mistake even if it is inadvertent, it excuses those mistakes and allows a party to introduce documents which could not be found even after the exercise of due diligence.

That it was clear that the retainer agreements which the learned Judge found not to meet the requirements of the law were always before the court. They were on record when the bill was taxed and also when the reference was heard. That the Judge did not reject the reference because there was no evidence that the appellant did not return the retainer agreement to the respondent but rather because the document filed did not meet the conditions set out in Section 45(1) of the advocates Act. That as the Judge correctly put it, the only thing that required proving was that the fee agreement had been signed by the respondent and the two documents produced were not signed by the respondent as

required.

Counsel argued that a party who seeks an order for review must prove that whatever he failed to place before court and which he now seeks to show the court is new and important. That a reference is an appeal seeking to either set aside or alter the ruling of the decision of the taxing officer or for the Judge to either tax the bill himself or refer it back to taxing officer with appropriate directions. (See: **Kipkorir Titoo & Kiara Advocates v Deposit Protection Fund Board [2005] eKLR**). Therefore, no additional evidence could be produced before the learned Judge unless they formed part of the record in the lower court. He faulted the learned Judge for exercising his discretion to admit new evidence on appeal without following due procedure when allowing the application for review. Relying on the case of **Wanga & Co. Advocates v Pan Africa Insurance Co. Ltd, Civil Appeal No. 78 of 2009 (unreported)**, counsel reiterated that allowing a party to introduce new evidence at the appellate level was not only prejudicial to the opposing party but is also against public policy and the law. Counsel contended that by seeking to introduce evidence which could only be admitted at taxation, the respondent was seeking to review the decision of the taxing officer before the Judge who was sitting as an appellate court. That admission of documents in taxation proceedings is a preserve of the taxing officer under Rule 13A of the Advocates Remuneration Order and on reference the Judge only deals with what was on record.

Counsel further submitted that a review is pointless where it is clear that it will make no difference to the decision sought to be reviewed and it is in fact inimical to the overriding objective, Article 159 of the Constitution and an error of principle for the court to be asked to hear a matter a fresh if the result would be the same. While directing the references to be heard afresh, the learned Judge ruled that in view of the position he had taken it would not be necessary for him to consider the legal effect of the alleged agreement. This, according to counsel was a serious error in the light of the overriding objective. He submitted that in order for the respondent to successfully rely on such an agreement, it had to prove that the parties' relationship had all along been guided by the agreement and as such the appellant was estopped from running away from it. However, the respondent failed to explain how and why it had been paying the appellant fees way above what was contained in the alleged agreement. That the respondent's conduct was inconsistent with any claim that there existed any such agreement. Relying on the decision of the court in **Adopt A Light Limited v Ochieng, Onyango, Kibet and Ohaga Advocates [2016] eKLR** counsel emphasized that in the event of a dispute whether parties intended to be bound and were still bound by an agreement on fees the court needs to look at the intention of the parties and their conduct in the course of the relationship hence parties had no intention of being bound by the fee agreement in light of the numerous payments made over and above the limit. That by making a provision that the balance was to be recovered from the customer, the respondent acknowledged that the appellant's fees was to be paid according to scale. He also contended that the reference by the respondent had been filed out of time, was incompetent and the learned Judge had no jurisdiction to entertain the same.

The appeal was opposed. Mr. Ojuro submitted that the decision of the taxing officer was made without considering the retainer agreement and that the High Court arrived at a different conclusion after looking at the agreement. He argued that the taxing officer lacked jurisdiction to hear issues relating to retainer agreements and whether the filing of the Advocate/client bill of costs was statute barred. He maintained that the High Court had jurisdiction to hear the application for review having been the court that had heard the application sought to be reviewed. That the notice of appeal was filed with regard to the part of the decision of ruling and there was no law that prevented a party who has only appealed against part of the ruling from lodging an application for review on the other part of the ruling. He contended that if the court can refer a matter for re-taxation then it can also rehear parties. It was submitted that the letters in the records were never placed before the taxing officer. That the letter dated 3rd May, 2005 at page 143 was also never filed before the taxing officer. Counsel was of the view that the letters were relevant with regard to the retainer agreement and the said letters were not availed to the Judge when he first made his ruling as there was no other way of introducing the letters before court other than by filing an application for review. That the similarities of the letters cannot be wished away. They were from the appellant, the fonts and dates were the same and they referred to the same documents hence there was new and important matter that had been discovered that needed to be brought to the attention of the court. Counsel submitted further that no law prohibits the filing of documents before the Judge at the reference stage. The taxing officer sits under the supervision of the High Court and a reference is merely a supervisory role over the taxing officer exercising the powers of the High Court. Counsel contended that the handling of cases on a case to case basis by the appellant did not rescind the agreement between the parties.

This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: **Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR**).

I have carefully considered the record, submissions by counsel and the law. The issues for determination are whether the application for review was competent and or met the threshold prescribed by the law; and whether the High Court was justified in allowing the application.

Section 2(2) of the Court of Appeal Rules defines an appeal to include an intended appeal. The respondent lodged a notice of appeal on 30th August, 2016. The appellant submitted that though no substantive appeal had been filed, a notice of appeal had been lodged. Mr. Ojuro on the other hand submitted that the appeal was intended for part of the ruling and as such the law did not bar the respondent from filing for review on the other part of the ruling. A perusal of the notice of appeal indicates that the respondent intended "to appeal to the Court of Appeal on dismissal of the client reference and allowing the advocates reference on taxation". A careful look at the ruling dated 17th August, 2016 shows that what the respondent intended to appeal against though phrased as part was the entire ruling delivered by the learned Judge. It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of **Karani & 47 Others v Kijana & 2 Others [1987] KLR 557** the court held that:

"...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal."

(See also: **African Airlines International Limited v Eastern & Southern Africa Trade Bank Limited [2003] 1 EA 1 (CAK)**).

Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can

be no place for review once an intention to appeal has been intimated by filing of a notice of appeal. (See: **Kamalakshi Amma v A. Karthayani [2001] AIHC 2264**). The respondent's application for review was therefore incompetent hence the court did not have jurisdiction to grant the orders sought under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. This determination is sufficient to dispose off the appeal. However, for completeness sake, I will venture further.

Section 80 of the Civil Procedure Act and order 45 rule 1 of the Civil Procedure rules gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However as it has been constantly stated this discretion should be exercised judiciously and not capriciously. In **National Bank of Kenya Limited v Ndungu Njau (1997) eKLR** this Court 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”.

The applicable law for grant of review is Section 80 of the Civil Procedure Act which provides *inter alia*:-

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.**

Whereas order 45 rule 1 of the Civil Procure Rules is in terms:-

(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.**

The main grounds for review are therefore; **discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.**

In the instant appeal, the learned Judge in allowing the application for review held that there was an inadvertent mistake in presenting two letters which were similar in nature. The respondent argued that the similarities of the letters could not be wished away as they were from the appellant, had the same fonts and dates and that they referred to the same documents. In rebuttal, the respondent took the view that the letters were not new and important evidence that had been discovered that needed to be brought to the attention of the court by way of review. The appellant submitted that the document purported to be the retainer agreement and the letter adduced in evidence before the taxing officer predated the date of instructions to the appellant and referred to another document which was not exhibited. The appellant reiterated that all the letters produced had the same reference number and were therefore kept in the same file and that though the documents had the same date, the contents were different and therefore there was no excuse for the alleged confusion. The appellant had written four letters to the respondent demanding for fees in accordance with the Advocates Remuneration Order to which the respondent failed to respond thus had the respondent exercised due diligence then it would have seen the documents.

It is not in dispute that there was a mistake in the letter filed before the taxing officer. However, the mistake was not apparent on the face of the record. The taxing officer could not have known that there was another letter in existence and therefore taxed the bill in light of the evidence tendered before her or that the learned Judge should have known there was a letter not filed. The respondent failed to prove that it had discovered new evidence after the exercise of due diligence not within its knowledge or which could not be produced at the time when ruling was delivered. Order 45 Rule 3(2) provides that an application for review shall “...not be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree was passed or made without strict proof of such allegation. Other than the confusion in dates, no sufficient reason was given by the respondent as to why the letters were not filed before the taxing officer. This to my mind was an oversight on the part of the respondent but it was not a mistake apparent on the face of the record.

Order 45 rule 1 does not excuse every error or mistake, even if inadvertent. It excuses those mistakes and allows a party to introduce documents which it could not lay its hands on even after the exercise of due diligence. There was no response to the replying affidavit in so far as it accused the respondent of lack of diligence. The discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence. It is also instructive to note that the respondent actually misled the High Court about when and how it realised it was mistaken. Mr. Mundia disposed in an affidavit in support of the application that he noted that there was a problem when he read the sentiments of the court at paragraph 9 of the ruling in which the Judge found that there was no agreement signed by client in accordance with section 45(1) of the Advocates Act. It was quite clear therefore that the respondent having found out why the Judge decided against it went back to the drawing board and fished out evidence that would bolster its case. This was too late in the day as the horse had already bolted from the stable. The respondent's explanation about how it realised there was a problem was therefore designed to mislead the court and the learned Judge failed to see through this trick. Had he considered this fact, I have no doubt at all, that he would not have allowed the application.

Further, during the hearing of the application counsel for the respondent is captured as saying **“The application is dated 5th December, 2016. It seeks review of the orders made on 17th August, 2016. The main issue is paragraph 9 of the ruling. We have shown in the affidavit at paragraph 3 of the supporting affidavit that the terms and conditions were executed as per the letter dated 3rd May, 2005. The list filed on 13th July, 2015 had a copy of the signed agreement. This constitutes an error of (sic) record. The parties are bound by the agreement...”**

This submission provides an interesting twist. The respondent’s counsel confirms in his submissions that the application was no longer about the discovery of any new evidence as it was made to appear. The respondent’s case is now about an error on the face of the record. The learned Judge should have seen straightaway that the respondent had changed its case from one of review based on discovery of new and material evidence to one of an error on the part of the court apparent on the face of the record. He should have seen that the application as presented could not succeed and he should not have allowed the respondent to shift the goal post midway without amending the application thereby denying the appellant opportunity to respond. An application for review must be specific on the ground on which it is brought. And if the complaint was that the Judge made an error, then he should have pursued an appeal which it had already commenced. Clearly then the learned Judge fell into error when he allowed the application for review based on an inadvertent error or mistake on the part of the respondent yet the respondent itself had disclosed that it was an error on the part of the court.

For all the foregoing reasons, I am satisfied that the application for review was bereft of merit and ought to have been dismissed for the simple reason it failed to meet the threshold prescribed by the law.

It is common ground that a reference is an appeal from the decision of the taxing officer. Therefore, for a party to adduce additional evidence on appeal, leave ought to be granted by the said court. This Court in the case of **Kibos Sugar & Allied Industries Limited & Another v Benson Ambuti Atega & 6 Others, Civil Appeal (Application) No. 153 of 2019 (unreported)** quoted with approval the English case of **The National Guild of Removers & Storers Limited v Bee Moved Limited & Others (2018) EWCA Civ. 1302** that:

“In determining whether an appellate court can admit additional evidence, the court must seek to give effect to the overriding objective of doing justice and, in doing so, attempt to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result.”

In the present appeal, the respondent did not seek leave to adduce additional evidence. It filed an application for review on which it purported to introduce new evidence. No additional evidence could be produced before the learned Judge unless they formed part of the record before the taxing officer as correctly submitted by the appellant. Admission of documents in taxation proceedings is a preserve of the taxing officer under Rule 13A of the Advocates Remuneration Order and on reference, the Judge only deals with what was on record before the taxing officer. In the case of **Wanga & Co. Advocates** (supra), the court stated that allowing a party to introduce new evidence at the appellate level was not only prejudicial to the opposing party but also against public policy and the law. The two courts below were not given an opportunity through the proper channels to strike a fair balance. By allowing the new evidence on account of inadvertent mistake, the learned Judge opened a door to litigants to introduce all sorts of material which should have been properly placed and considered by the taxing officer and not before the first appellate court. Having discussed elsewhere in this judgment and concluded that the application for review was not merited, I find that the learned Judge erred in allowing the said evidence.

I am also not persuaded that the introduction of the letters would have led the court to arrive at a different conclusion as alleged by the respondent. The letters sought to be admitted was a forwarding letter purporting to show that a certain document and or letter had been duly executed by the appellant. The document is unknown and the duly executed letter was not even attached. The court would still be in limbo as to whether the alleged retainer agreement was indeed in existence and duly executed by the parties.

The respondent sought an order that the application be allowed which meant that the reference that had been dismissed be allowed. It did not ask that the reference be heard afresh. Yet the learned Judge went ahead to grant an order not prayed for by the respondent. As correctly submitted by Mr. Otieno, once the learned Judge formed the view that the respondent was not entitled to the order allowing its reference as prayed, he should have dismissed the application. There is no power on the part of the learned Judge to grant a relief that has not been asked for. Had the appellant known that one of the option under consideration was the re-hearing of the reference, may be its approach would have been different? The recourse adopted by the learned Judge meant that the appellant was not given a hearing on the question of whether the reference should be heard afresh. The court granted orders which were not sought and none of the parties addressed it on that question.

The upshot then is that the appeal is allowed in its entirety. The decision of the High Court is set aside. The appellant shall have the costs of the 2 appeals.

This judgment as already stated shall apply *mutatis mutandis* to Civil Appeal No. 62 of 2017. Which in effect means that the said appeal is equally allowed with costs.

This Judgment is delivered pursuant to rule 32(3) of the Court of Appeal Rules since Odek, JA passed on before the delivery of the judgment.

As Kiage, JA concurs, orders accordingly.

JUDGMENT OF KIAGE, J.A

I have had the benefit of reading in draft the Judgment of my learned brother Asike-Makhandia, J.A. I wholly agree with his analysis and concur in his conclusions with nothing useful to add.

Dated and delivered at Kisumu this 31st day of January, 2020

P. O. KIAGE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.