IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 48 OF 2014

BETWEEN

CENTRAL BANK OF KENYA.....APPELLANT

AND

MAKHECHA & COMPANY ADVOCATES.....RESPONDENT

(Application for review or alternatively correction of the Orders given by the

Court of Appeal at Nairobi (Waki, Nambuye & Kiage, JJ.A.) dated 8th

***December, 2017* in HC. MISC. CIVIL APPLICATION NO. 296 OF 2012)**

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RULING OF THE COURT

The motion before us dated 1st February, 2018, prays for one substantive order;

> ***"That this Honourable Court be pleased to correct its judgment delivered on 8th December, 2017, and direct that the Bill of Costs dated 15th May, 2012, be remitted to the Taxing Master, for taxation, under the Advocates Remuneration Order."***

The application is said to be *"an application for review and alternatively of (sic) correction of the orders given by [this bench] dated 8th December, 2017"*. It is said to be brought under **section 3(2)** of the **Court of Appeal Act**, **Rules 42** and **47** of the **Court of Appeal Rules,** *"and all enabling provisions of law including **Article 159(2)** of the **Constitution of Kenya**"*.

It is telling that even though described as an application for correction of errors, and indeed substantially seeks to correct our judgment, the motion does not cite the relevant rule for correction of errors. The relevant provision is **rule 35(1)** which in explicit terms provides;

> ***"A clerical or arithmetic mistake in any judgment of the court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or the application of any interested person so as to give effect to what the intention of the court was when judgment was given."***

The scope for correction of errors is quite narrow and limited to dealing with simple errors or mistakes of clerical and arithmetical character arising from accidental slips and omissions in the writing or typing of the judgment of the Court. It really is a cleaning up mechanism, a tidying up of small-time errors. It definitely does not anticipate or include substantive decisional matters.

Having perused the motion with the grounds it is based on, as well as the supporting affidavit of **Kennedy Abuga** sworn on 1st February, 2018, it is quite clear that what the applicant complains of is not arithmetic or clerical error resulting from some accidental slip or omission. Rather, there is a complaint that our decision allowing the respondent's reference in which it prayed that its bill of costs be taxed as drawn *"greatly prejudices the applicant as it is deprived of the opportunity to exercise its rights under, inter alia, Article 47 of the Constitution, to be granted a hearing before a court/tribunal of competent jurisdiction"*, as deposed to in paragraph 5 of the supporting affidavit. The applicant essentially seeks a reversal of our decision and a substitution thereof with an order referring the respondent's bill of costs to a taxing master for taxation.

The motion is opposed. The respondent's replying affidavit sworn by **Wambugu Gitonga**, advocate on 14th June, 2018, is to the effect that the applicant by the motion before us invites us to sit on appeal against our own judgment and reverse it. He swears that the judgment is *"sound and does not disclose any errors on the face of it or at all*." He then deposes at paragraphs 8 and 9 as follows;

> ***"8. That further, the bill of costs lodged is under Schedule VI B of the Advocates Remuneration Order which is fees based on party and party costs as consented to and paid by the applicant, therefore the taxing master has no discretion in reducing the amount under this paragraph.***
>
> ***9. That I believe that in view of this factual and legal position, it would in any event be superfluous to render the bill back to the High Court."***

These rival positions were argued before us by **Mr. Murgor** and **Ms Shaw,** respective learned counsel for the applicant and the respondent, in addition to the written submissions previously filed. According to Mr. Murgor, there never has been a taxation of costs '*in the strict sense of the word'* between the parties herein and that we should have remitted the matter to the taxing master for it would be wrong for the respondent to get what they seek without taxation having occurred. He asserted that on authority, where the taxing master has committed an error of principle, as happened herein where he had proceeded on the basis that there was an agreement as to fees, which we found not to have been the case, the proper order is for a re-taxation. He cited ***S. R. D'SOUZA & OTHERS -vs- C. C. FERRAO & OTHERS [1960] EA 602, STEEL CONSTRUCTION & PETROLEUM ENGINEERING EA LIMITED -vs- UGANDA SUGAR FACTORY LIMITED [1975] EA 141*** and ***JORETH LIMITED -vs- KIGANO & ASSOCIATES [2002] 1 EA 91*** in aid of those submissions.

On her part, Ms. Shaw contended that there was no error in our judgment as the bill of costs at the heart of this litigation was granted before the High Court under **Schedule VIB** of the **Advocates Remuneration Order**. The party & party costs were argued and agreed by the parties. Upon such agreement, all that the respondent's advocate did was add a half of the agreed party & party costs plus filing fees. There having been no agreement as to fees between the advocate and the client, the taxing master was bereft of discretion in the matter, the law being that an advocate is entitled to party and party costs plus one half. Thus it is that this court allowed the bill of costs to go as drawn '*without frills or additions'*. The decision allowing the reference and the bill of costs as drawn was therefore proper. Ms Shaw saw mischief and an attempt to mislead this court in the applicant's purporting to seek our exercise of the slip rule to correct errors yet invoking and citing **Articles 47** and **159** of the **Constitution** which are of no relevance. She was dismissive of the authorities cited as being inapplicable to the application before us.

We have considered the application, the affidavits for and against it, as well as the submissions filed and made, and the cases cited. It is quite obvious to us that what this application seeks is not an engagement of the slip rule. There is no arithmetic or clerical error or mistake that it asks us to correct. It does not seek for us to do some editorial clean-up of the judgment. Rather, it asks us to essentially reverse ourselves and to order that there be a taxation of the advocate - client bill of costs when we had consciously and clearly determined that the respondent was entitled to the costs in the bill of costs as drawn.

It seems to us quite clear that where the party and party costs have been taxed and agreed, then, unless there be an agreement as to fees between the client and the advocate, the advocate is entitled, as of right, by dint of Schedule VIB of the Remuneration Order, to the party and party costs plus half of the same. It is a matter of arithmetic, requiring no exercise of discretion on the part of the taxing officer, hence our decision that the reference was granted with the effect that the bill be taxed as drawn. It is for these reasons that the authorities cited by the applicant cannot advance its cause in the circumstances of this case.

That should be enough to dispose of this appeal. We need only add that the creeping practice of litigants who have lost in this Court bringing applications for review or re-consideration of this Court's judgments is one to be discouraged. There has to be a necessary finality to the decisions of this Court, which can be re-opened before it only in the most exceptional of cases and only when certain conditions obtain. See ***STANDARD CHARTERED FINANCIAL SERVICES LIMITED & 2 OTHERS -vs-MANCHESTER OUTFITTERS (SUITING DIVISION) LIMITED*** (now known as ***KING WOOLLEN MILLS LIMITED & 2 OTHERS) [2016] eKLR.***

This is no such case.

The upshot is that we find no merit in this application and the same is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2019

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR