



IN THE COURT OF APPEAL

AT MOMBASA

CIVIL APPEAL NO. 35 OF 2018

CONSOLIDATED WITH

CIVIL APPEAL NOS. 36, 37, & 38 OF 2018

BETWEEN

OMULELE & TOLLO ADVOCATES.....APPELLANT

AND

MOUNT HOLDINGS LIMITED.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Mombasa (Yano, J.) dated 17th January, 2018

in

High Court Misc. Application No. 2 of 2015)

JUDGMENT OF THE COURT

[1] This is an appeal from the Ruling of the High Court (**Yano J.**) dated the 17th January, 2018 in which the learned Judge reviewed his own earlier Ruling and order made on 29th May, 2017. This was in regard to the notice of motion dated 16th August, 2016 which he ordered to be heard afresh. Also the Judge ordered there be a stay of the hearing of the Bill of Costs in Miscellaneous Applications Nos;- 3 of 2013; Omulele & Tolo Advocates v Great Lakes Port Limited; Misc. App. No. 4 of 2015; Omulele & Tollo Advocates v Delgreen Ltd; Misc. Appl. No. 191 of 2015 Omulele & Tollo Advocates v Doshi Iron Mongers Ltd. Finally the Judge directed that the said notice of motion dated 16th August, 2016 be fixed for hearing.

[2] Omulele & Tollo Advocates (appellants) were aggrieved by the said order and thus they filed the 4 appeals, which emanated from the same Ruling. Accordingly the said appeals were consolidated for hearing and determination under Civil Appeal No. 35 of 2018 which is the holding file. According to the appellants the learned Judge is faulted for;

- I. Holding that there was an error apparent on the face of the record in his ruling and order delivered on 29th May, 2017
- II. By entertaining an application to review an order that was made on review
- III. By allowing the application for review dated 10th July, 2017 filed on 11th July, 2017 and by so doing sat and determined an appeal of his own order of 20th May, 2017
- IV. By failing to find that his court was *functus officio* in the hearing and determination of the respondent's notice of motion application dated 10th July, 2017 and filed on 11th July, 2017

The appellants prayed that the orders made on the 17th January, 2018 be set aside and the appellants' Bill of costs be taxed by the Taxing Master.

[3] During the hearing of this appeal, **Mr. Tollo** learned counsel for the appellant and **Mr. Oluga** learned counsel for the respondents canvassed their respective positions by written submissions which they highlighted during the plenary hearing. Briefly stated, the appellant is

a firm of advocates, the respondents were their clients and at the core of the dispute that has been going back and forth is the Advocates Bill of costs. The substantive matter seems to have been a suit that was filed in the High Court, it was heard by **Omollo J.** and a ruling dated 16th September, 2015 by which she struck out the said Bill of costs was appealed against by the appellants in **Civil Appeal No. 75 of 2015** which involved the same parties and the same dispute over the advocates Bill of costs. In the said judgement of this Court, the ruling and order of Omollo J. dated 16th September, 2015 was set aside and the said advocates Bill of costs were ordered to be taxed by the taxing master.

[4] The aforesaid decision probably paved way for the appellants to file their Bill of Costs against the respondents and the subsidiary companies connected with the respondents as per the 4 different appeals cited here above. The respondents objected to the said bill of costs vide an notice of motion dated 16th August, 2016 on grounds that the appellant was carrying on business under the name and style of M/S OMULELE & CO. ADVOCATES when he was given the instructions to represent the respondents whereas the Bill of Costs was filed by a firm of OMULELE & TOLLO ADVOCATES which is a different entity as the proprietors include, Christopher Omulele and Ray Tollo. Upon hearing the matter and after weighing the issues placed before the court, the learned Judge, **Yano J.** dismissed the motion by a ruling delivered on 29th May, 2017.

[5] In doing so, this is what the Judge stated in a pertinent paragraph of the said ruling:-

“The statutory provision under section 7 of the Civil Procedure Act is clear and bars a court from hearing a suit or issue if the same was substantially in issue in a former suit in a former suit between the same parties, if the issue was determined in the former suit after a hearing. In this application, the respondents are the applicants just as in the previous application. They have now sought the same reliefs as those they had sought in the former application yet the court (Omollo, J.) and the Court of appeal had already adjudicated on those issues. By virtue of Section 7 of the Civil Procedure Act, this application is barred by the doctrine of res judicata.

By reason of the foregoing, I find that the application is an abuse of the court process as it raises issues which had been substantively litigated and adjudicated upon by courts of competent jurisdiction. The same is hereby dismissed with costs. These orders will apply in Miscellaneous Application Nos 3/15 and 4/15.”

[6] Surprisingly, the respondents filed another notice of motion on the 10th of July, 2017 seeking to review the aforesaid ruling of the 29th May, 2017 on grounds that there was an error on the face of the record in that the Judge did not have an opportunity to compare the respondent’s application dated the 16th August, 2016 and the previous one dated 12th February, 2015. The error being that the legal status of Omulele & Company Advocates had not been dealt with in the previous application. After hearing the application, the Judge was persuaded and as aforesaid, he allowed the application, reviewed the aforesaid order and substituted thereto an order allowing the application.

[7] According to counsel for the appellant the issue of registration of Omulele & Co. Advocates was adjudicated upon and was *res judicata* as it was an issue that ought to have been raised in the application of 12th September, 2015. Moreover, in the application of 12th September, 2016, the respondents fundamental argument was that it had instructed **Omulele & Co Advocates** and not **Omulele Tollo & Co Advocates** which matter was fully adjudicated in Civil Appeals Nos. 74, 75 and 76 of 2015 when the Court of Appeal disagreed with the High Court and held that a change of partnership cannot mean that the retainer or instructions are lost along the way. Counsel went on to submit that the application for review was filed 81 days after the Court of Appeal judgment and indeed the orders sought were similar; being an order to strike out the Bill of Costs. The case of **National Bank of Kenya vs. Ndungu Njau** (1997) eKLR was cited to bolster the argument that review orders cannot be granted unless there is an error that is apparent on the face of record. The fact that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law cannot be a ground for review. An issue that was hotly contested in a matter cannot be reviewed by the same court which adjudicated upon it. Even if the Judge by any stretch of imagination was wrong in the application of the principle of law of *res judicata*, the remedy did not lie in a review but an appeal as the Judge cannot sit on his own judgment.

[8] In opposing the appeal, Mr. Olunga similarly relied on his written submissions and made some highlights to wit that the law provides for review under **Sections 80** and of the Civil Procedure Act and **Order 45** of the Rules. Any person aggrieved by an order can apply to the same court for review on grounds of discovery of new and important matter or evidence, mistake or error apparent on the face of the record or for sufficient reason. The court can make any order as it thinks fit. Thus according to counsel, the court is given great latitude and discretion and that is what the learned Judge did in the instant matter. The Judge simply pointed out the error by juxtaposing the two applications as they were on record and pointing out the prayers and the issues in each. Counsel went on to cite the case of **Ken Opondi & 2 Others vs. James Okoth Omburah T/A Okoth Omburah & Co. Advocates** [2013] eKLR where the Court of Appeal held as follows:-

“The principles upon which this court can interfere with the exercise of discretion of the trial judge are well established. The court must, to interfere be satisfied that the judge has misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice”

[9] According to counsel for the respondents the Judge properly exercised his discretion and found there was an error on the face of the record comparing the two applications. In the first application the challenge was the Bill of costs *vis-a-vis* a retainer while the second application was the legal capacity of Omulele & Tollo Advocates which was not adjudicated on by the Court of Appeal. Counsel was of the view that the appellants should face the re-hearing of the application dated 16th August, 2016 so as to determine the issue of the appellants’ legal capacity on merit. Since the issue of registration of the appellant and their capacity to tax the Bill of Costs was not litigated in the Court of Appeal, the respondent was entitled to seek review. On the issue of delay, counsel for the respondents submitted that it was the appellant who is causing delay by coming to the Court of Appeal twice thus delaying the determination of their own status which is crucial also to the determination of the Bill of Costs. Counsel urged us to dismiss the appeal.

[10] Having reviewed the above matters that were before the learned Judge, the submissions by both counsel as well as the grounds of appeal, what stands out for our determination is whether the learned Judge erred in reviewing his earlier decision by setting it aside and

substituting thereto an order dismissing it and ordering the application dated 16th August, 2016 be heard afresh. Was there an error(s) on the face of the record in the Ruling of 29th May, 2017 that warranted a review or was the matter a candidate of an appeal? In answering the aforesaid issues we are cognizant of our primary role as a first appellate Court which is to re-evaluate, re-assess and re-analyse the evidence before the trial court so as to determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. In **Kenya Ports Authority vs. Kuston (Kenya) Limited** (2009) 2EA 212 the Court succinctly put it;

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

[11] The principles that guide the Court on whether a matter is for review are well provided for under **Section 80** of the Civil Procedure Act and **Order 45** of the Civil Procedure Rules. The said provisions are further expounded in a long line of authorities some by this Court which the learned Judge seems to have appreciated in the impugned ruling. Our task is to find out whether the learned Judge properly exercised his discretion in reviewing his earlier ruling, whether there was an error apparent on the face of the record. Whether the fact that the learned Judge failed to address the issue of the legal capacity of the law firm of Omulele & Tollo Co. advocates who had filed the Bill of Costs was an error on the face of the record, a discovery of a new matter that was not within the respondents’ knowledge which could not be produced at the time or there were other sufficient reasons warranting a review of a previous order.

[12] In answering the above we tread carefully while aware that the Judge was exercising his unfettered jurisdiction in granting the orders that he did, but at the same time bearing in mind the court system in Kenya is well structured in the Constitution. In particular the role of the appellate court and its mandate and the cardinal principle that a Judge must never sit on his or her own judgment and litigants must never be allowed to abuse the court process by litigating in instalments. Or what is referred to in common parlance as having the second bite of the same cherry. We say so while noting the guiding dicta by the Supreme Court in the case of; **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & Others** eKLR where the Court when dealing with the issues of the courts powers in review vis-a-vis appeal had the following to say at paragraph (51)

“The features highlighted above indicate that the words “review” and “appeal” cannot be used interchangeably at the litigant’s election when seeking a higher Court’s intervention in a matter already decided by a lower Court. Neither section 23 of the “Transitional Provisions” to the Constitution, nor Article 163 (3) and (4) of the Constitution gives the impression that an appeal bears the same meaning as a review. While an appeal entails some form of review of a lower Court’s decision in terms of assessing that Court’s interpretation and application of the law, it is not the same as a “review” in the technical sense”.

Also see **Civil Application No. Nai. 232 of 2007 Ramesh Shah vs. Kenbox Industries Limited** where **Bosire JA** sitting as a single Judge had the following to say;

“ The applicant by bringing this application is in effect approaching the courts by trial and error method and is litigating by instalments, both which are unacceptable and amount to abuse of the process of the Court. It is quite clear to me that this application was brought to delay the conclusion of the dispute between the parties. Moreover, this Court dismissed Civil Application No. NAI 340 of 2004 on 27th April 2007. The applicant has not explained why it took him almost five months to bring this application. It is clear he is not serious in what he says he wants to do”.

[13] This issue can only be answered by looking at the prayers in the notice of motion dated 12th February, 2015 which gave rise to a decision of this Court in Civil Appeal No. 75 of 2015 in contradistinction with the notices of motion of 16th August, 2016 and 10th July, 2017.

These are the three key prayers in the application by way of notice of motion dated 12th February, 2015 which went all the way to the Court of Appeal;

“... ”

a) There be stay of taxation of the applicant’s bill of costs scheduled for taxation on 13th February, 2015 until further orders of his honourable court.

b) The honourable Judge do give directions and determine whether retainer existed between the firm of OMULELE & TOLLO, ADVOCATES and make appropriate orders.

c) The honourable Judge do dismiss the application for taxation filed by OMULELE & TOLLO ADVOCATES”

[14] These were the key prayers sought in the notice of motion of the 16th August, 2016

“... ”

a) The honourable court be pleased to suspend/stay of taxation of the BILL OF COSTS dated 25th day of September, 2014 scheduled to be heard on 19th day of August, 2016 pending the hearing and determination of the application inter-parties.

b) 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.

c) The honourable court do declare that the firm of OMULELE & CO. 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”

[15] These were the key prayers sought in the notice of motion dated 10th July, 2017

“ ...

a) 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

b) 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

c) The Honourable court be pleased to order that the respondent’s notice of motion dated 16th August, 2016 be heard afresh.

d) 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 application dated 16th August, 2016 afresh”

[16] In our considered view the germane issue that cuts across the two applications was a prayer to stay the Bill of costs from taxation filed by the firm of OMULELE & TOLLO & CO ADVOCATES. That issue was determined by Omollo J., an appeal was filed and the matter was determined as aforesaid by this Court. We are persuaded that the learned Judge Yano was right in his earlier ruling of 29th May, 2017 when he held the matter of the said Bill of costs by the said law firm was res judicata. We say so because from the onset, the respondents were aware that the Bill of costs were filled by the firm of OMULELE & TOLLO as opposed to OMULELE & CO the latter being the one who had the retainer.

[17] It is obvious to us that is why the respondents made a prayer in the first application that the Bill of costs as filed by OMULELE & TOLLO be dismissed which prayer they repeated in the subsequent application of the 16th August, 2016. When the respondents made those applications, they were opposing the Bill of costs because they were filed by the firm of OMULELE & TOLLO while a retainer had been paid to OMULELE & CO and for that reason that issue could not be litigated again under the guise of review while citing now that the firm of OMULELE & TOLLO was not registered under the Registration of Business Name Act. To us this matter fits the bill of res judicata because the issue of the locus standi of the said firm of advocates was argued before the High court and in the Court of Appeal. This Bench held recently in **Malindi Civil Appeal No. 81 of 2017 Esther Nzingo Kalume vs. Lawrence Sharriff Samson Katit** as follows;

“Therefore, for the bar of res judicata to be effectively raised and upheld the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

See **Section 7** of the **Civil Procedure Act** and this Court’s decision in **Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others** [2017] eKLR.

[18] From the aforesaid analysis it follows that it was an abuse of the court process for the respondents to litigate over one and the same issue over and over again before the same Judge; the legal capacity of the law firm was not a new issue that was not within the respondents’ knowledge throughout the proceedings in the High court before Omollo J. and before the Court of Appeal. For those reasons we are satisfied this appeal has merit, the learned Judge clearly misapprehended the application dated 16th August, 2016 and basically sat on his own appeal in a matter that had been litigated before by the Court of Appeal. Had the Judge considered the germane issue that cut across all the applications was a prayer to strike out the Bill of costs filled by OMULELE & TOLLO ADVOCATES as opposed to OMULELE & CO ADVOCATES, we believe he would have arrived at the same conclusion as we have, that there was no error on the face of the record and there was no new matter that was subsequently discovered. An error on the face of the record is self-revealing; it does not involve protracted arguments to unearth it and does not require a great elucidation of the ruling by the same Judge otherwise the matter turns into an appeal of the same Judge’s ruling.

[19] Accordingly, we allow the appeal, with the result that the ruling and the orders made on 17th January, 2018 are hereby set aside and substituted with an order dismissing the respondent's notice of motion dated 10th July, 2017. The appellants shall have the costs of this appeal as well as before the High court. This judgement shall apply *mutatis mutandis* to Civil Appeals Nos. 36, 37 & 38 of 2018.

Dated and delivered at Malindi this 27th day of September, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR