



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA**

Civil Appeal 111 of 2005

EDWARD MAINA NJANGA T/A

MAINA NJANGA & CO. ADVOCATES APPELLANT

AND

NATIONAL BANK OF KENYA LIMITEDRESPONDENT

***(Appeal from an Order and Ruling of the High Court of Kenya at Mombasa (Maraga, J)
dated 4th April, 2005 in H.C. Misc. Application No. 583 of 2003)***

JUDGMENT OF THE COURT

The main contention in this appeal is indeed a short one. The appeal arises from the ruling of Maraga, J dated 4th April, 2005 by which it granted the respondent an order for extension of time for objection under the Advocates (Remuneration) Amendment Order 1983 to allow the respondent to file amended grounds of objection against the ruling of 11th June 2004 given by the Taxing Master. Though the appellant has preferred 16 grounds of appeal, the main issue actually is whether the learned Judge was wrong in the exercise of his discretion.

The appellant, MAINA NJANGA & COMPANY, Advocates, is a firm of advocates while the respondent NATIONAL BANK OF KENYA LIMITED is one of the local leading banks. The firm of A.B. Patel & Patel, Advocates, is on record as appearing for the respondent as its client in Mombasa Misc. Application Nos. 583 and 584 of 2003. Immediately after the Taxing Master delivered a ruling on taxation in Advocate/client bill of costs on 11th June, 2004, Mr. Shah of the said firm of advocates wrote to the Taxing Master pursuant to the 1980 edition of the Advocates Remuneration Order giving notice of the respondent's objection to the taxation and giving the grounds thereof. The appellant by his letter dated 9th September, 2004 drew Mr. Shah's attention to the amendment and this led to the lodging in the superior court by the National Bank of Kenya Limited ("the Bank") of the Notice of Motion dated 15th September, 2004 and expressed to be brought under *Section 59* of the Interpretation & General Provisions Act, Section 3A of the Civil Procedure Act and paragraph 11 of the Advocates (Remuneration) Amendment) Order 1983 and by which it sought an order:-

“THAT time provided for objection under the Remuneration Order be extended duly and appropriately to allow the objector file amended grounds of objection against the Ruling of 11th June, 2004 given by the Taxing Master herein.”

Mr. Shah in canvassing the motion before the learned Judge submitted that he was honestly unaware of Legal Notice No. 73 of 1983 amending the Remuneration Order. That, that being his mistake, the same should not be visited upon the client; and that the error in relying on obsolete provision is merely a technical mistake which is not fundamental and does not go to the jurisdiction of the court and should not bar the court from exercising its discretion in favour of the respondent.

In opposition to the application, Mr. Njanga argued, first, that ignorance of the law, especially by an advocate cannot be excused; and secondly that the application before the court was fatally defective having been brought by way of Notice of Motion instead of by chamber summons.

However, the learned Judge in dismissing Mr. Njanga's second limb of objection to the application held that:-

“----failure to bring the application by chamber summons does not go to the jurisdiction of the court and such, (sic) an irregularity can be ignored.”

In rejecting the first limb of Mr. Njanga's submission the learned Judge stated:-

“In this case as soon as the Taxing Master delivered her ruling on the taxation counsel for the Bank immediately wrote giving notice of his client's intention to challenge the taxation but instead of specifying the items he wanted to challenge as required by the new rule he gave the grounds upon which he wanted to challenge the taxation. In my view the crucial requirement in paragraph 11 of the Remuneration Order is the giving of notice of intention to challenge the taxation. This counsel for the Bank gave and he gave it promptly. As soon as it was pointed out to him that the notice did not quite comply with the new paragraph 11 he immediately made this application seeking enlargement of time to give a proper notice. That is not the same as doing nothing for one year as was the case in Baber Alibhai Mawji case.”

The learned Judge then allowed the application and ordered the respondent's advocates to file and serve a proper notice within 7 days. He gave the appellant costs of the application. Being aggrieved by the ruling the appellant filed this appeal.

The appellant contends in ground 7 of the grounds that the learned Judge erred in failing to appreciate the distinction between genuine mistake of counsel and ignorance of the law by an advocate and thus leading him to wrongly exercise his discretion. In our view, considering the particular circumstances of the matter before the court there is no valid ground for distinguishing mistake of counsel and ignorance of law by Counsel. As was said by Madan, J.A (as he then was) in Murai & Others vs. Wainaina [1978] LLR 2782 (CA):-

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better.”

Mr. Shah readily admits that he was honestly unaware or genuinely ignorant of the amendment. But, though ignorance may not be equated to a mistake as was held in Mawji v. Lji & others {1992} LLR 2155 (cak), that case is distinguishable from this appeal and the holding has no relevance here. We are of the firm opinion that this case falls under the category in which an advocate's error is not necessarily a bar to the learned Judge exercising his discretion in favour of the respondent by granting an extension of time to him though he is in default. The fine qualification herein is unnecessary. A default had been occasioned and what mattered most is the interests of justice. It is unnecessary to make a distinction between the parties.

Despite the many grounds of appeal incorporated in the memorandum of appeal, we are satisfied that there are no valid grounds for us to disturb the discretion of the learned Judge since the appellant has not convinced us that the learned Judge did in any way misdirect 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 he was clearly wrong in the exercise of his discretion and that as a result there has been injustice.

As the issues we have discussed above are the gravamen of the appeal we do not see any reason to consider the other enumerated grounds of appeal as they will not in any way affect the decision we have already reached. In the result, this appeal is hereby dismissed with costs.

Dated and delivered at Nairobi this 8th day of May 2009

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR