REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

MISCELLANEOUS APPLICATION NO. 71 OF 2018

LAUREN INTERNATIONAL FLOWERERS LIMITED....APPLICANT/CLIENT

VERSUS

V. CHOKAA T/A

V. CHOKAA AND COMPANY ADVOCATES...RESPONDENT/ADVOCATE

CONSOLIDATED WITH

MISCELLANEOUS APPLICATION NO. 72 OF 2018

V.CHOKAA AND COMPANY ADVOCATES.....APPLICANT

VERSUS

LAUREN INTERNATIONAL FLOWERS LIMITED..... RESPONDENT

CONSOLIDATED WITH

MISCELLANEOUS APPLICATION NO. 73 OF 2018

V. CHOKAA AND COMPANY ADVOCATES.....APPLICANT

VERSUS

LAUREN INTERNATIONAL FLOWERS LIMITED.....RESPONDENT

CONSOLIDATED WITH

MISCELLANEOUS APPLICATION NO. 74 OF 2018

V. CHOKAA AND COMPANY ADVOCATES..... APPLICANT

VERSUS

LAUREN INTERNATIONAL FLOWERS LIMITED..... RESPONDENT

CONSOLIDATED WITH

MISCELLANEOUS APPLICATION NO. 75 OF 2018

V.CHOKAA AND COMPANY ADVOCATES..... APPLICANT

VERSUS

LAUREN INTERNATIONAL FLOWERS LIMITED..... RESPONDENT

CONSOLIDATED WITH

MISCELLANEOUS APPLICATION NO. 76 OF 2018

V.CHOKAA AND COMPANY ADVOCATES..... APPLICANT

VERSUS

LAUREN INTERNATIONAL FLOWERS LIMITED.....RESPONDENT

CONSOLIDATED WITH

MISCELLANEOUS APPLICATION NO. 77 OF 2018

V. CHOKAA AND COMPANY ADVOCATES.....APPLICANT

VERSUS

LAUREN INTERNATIONAL FLOWERS LIMITED..... RESPONDENT

RULING NO. 2

By an advocate/client's Bill of Costs dated 20th July 2017 and filed on 21st July 2017, the Advocate/Applicant herein filed his Bill of Costs for taxation against the client, the Respondent herein. Upon service the client through the firm of M/s Murage Juma and Company Advocates filed Grounds of Opposition to the Bill of Costs dated 11th September 2017 and replying affidavit of Joseph Antonios Tawk sworn on 21st September 2017 in response.

The taxation of the Bill of Cost was canvassed before the Deputy Registrar by way of written submissions.

By an application dated 15th March 2018 and filed on 16th March 2018, the Advocate applied to have judgment entered in his favour in accordance with the taxed Bill of Costs. In response to this application the client filed a Notice of Motion under Certificate of Urgency dated 28th May 2018 seeking a stay of execution of the Certificates of Taxation and further proceedings in the matter pending its filing a Reference against the taxation under Rule 11 of the Advocates Remuneration Order.

When the matter came up in court on 23rd April 2018 before Abuodha J. he granted a stay of execution of the Certificates of Taxation and further proceedings in the matter pending the filing of a Reference by the client against the taxation.

The Reference was filed by the client on the same date. It was due for hearing on 18th October 2018 but when served with the application the advocate did not file a response. He however filed written submissions dated 8th August 2018 in respect of that application as well as the pending applications dated 5th March 2018 and 25th April 2018. The written submissions were served on the client/respondent advocates on 23rd August 2018.

The application dated 19th July 2018 came up for hearing on 3rd July 2019 and proceeded ex parte as the Advocates (applicant) did not attend. Ruling on that application was delivered on 2nd August 2019. In the ruling the court set aside the taxation by the Deputy Registrar on the grounds that:

(a) There was an agreement between advocate/client on fees,

(b) The advocate had been paid in full.

(c) The application was unopposed.

The Advocate's Notice of Motion dated 27th August 2019 brought out under the provisions of Order 45 Rule 1(1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks a review of this Court's ruling dated 2nd August 2019. The ground on which the application is brought is that there is an error upon the face of the record in that the application was in fact opposed by the Advocate. That though he did not attend the hearing of the application on 3rd July 2019 the Advocate had in fact filed written submissions on that application and these submissions are on the file. That in those submissions the advocate has clearly stated that there was no agreement as to fees in terms of Section 45 of the Advocates Act and none exists. That he has also in the submissions admitted that he was paid Kshs.390,000/- as

deposit for fees and the Deputy Registrar had taken into account this sum during taxation and it was not in full and final settlement of the advocates fees.

The advocate avers that he had also stated in the submissions that there was no error in principle committed by the Deputy Registrar in terms of principles set out in the cases of **Preinchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Another (1972) EA 162** and **Trust American Bank of Kenya v Shah & Others (2002) 1 EA 64** in order to attract the intervention of the Court in the decision the Deputy Registrar made on taxation.

The Advocate's submission is therefore that had the court considered those submissions which were on record and which would seem not to have been referred to, the court would perhaps have arrived at a different decision on the matter. It is for those reasons that the advocate/applicant prays that this court's decision of 2nd August 2019 be reviewed and/or set aside, and the matter be heard afresh.

Respondent/Client's Case

The Respondent/Client avers that on or about 18th July 2016, it was served with Summons and Suit Pleadings for seven (7) labour related claims made by its former employees. That the Managing Director of the Respondent/Client called the Advocate to discuss the claims and thereafter instructed him to defend the Company against the seven (7) suits ELRC Cause Nos. 1396 to 1402 of 2016 that had been filed before the Employment and Labour Relations Court at Milimani.

The Advocate informed the Respondent that the seven claims were statute barred and would be summarily dismissed by the Court having been filed six (6) years after the date of the alleged wrongful termination.

The Advocate thereafter informed the Respondent that he would charge Kshs.50,000/- for each suit and later demanded a further Kshs.40,000/- bringing the total fee agreed upon for the seven (7) matters to Kshs.390,000/- which was paid in full by the Respondent. This agreement, though undisclosed in his Bill of Costs was not disputed by the Advocate when the matter came before the taxing master.

The Advocate thereafter filed a Notice of Appointment and a Response to Memorandum of Claim in each of the 7 files.

The Respondent avers that it wrote to the Advocate on 7th September 2016 asking him to make an application to have the seven (7) claims consolidated and thereafter dismissed for being statute barred, which instructions the Advocate failed, refused and or neglected to carry out.

The Respondent avers that none of the seven (7) matters were ever listed for hearing nor were the files ever placed before a Judge for directions. That Respondent further avers that nothing further was done by the Advocate in any of the seven files until 21st July 2017, when the Advocate filed his Advocate/Client Bill of Costs, whose taxation was the subject of the references Nos 71 – 77 of 2018.

The Respondent avers that the Advocate did not file any response to the References and the Hon. Court delivered its Ruling on all the References (now consolidated) on 2nd August 2019.

That it is the Ruling on those References that caused the Advocate to file the present Application seeking to have the said Ruling reviewed and or set aside. The Respondent contends that the applicant has not proved that the ruling had an error apparent to warrant a review and relied on the case of **Francis Njoroge v Stephen Maina Kamore (2018) eKLR** where in dismissing an Application for review, the court held that the Applicant had not adduced sufficient grounds for review having failed to identify any error apparent.

The Respondent also relies on the Court of Appeal decision in **Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243** where the Court described an error apparent on the face of the record as follows:

> *"an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record..."*

> *"... Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."*

The Respondent avers that the Court delivered a Ruling having assessed all the Pleadings filed as is clear from the Ruling itself where the Hon. Judge gave a clear step by step recount of the activities on the file and that there is no error apparent or at all.

The Respondent submits that the Advocate/Applicant is seeking a review of the Court's Orders due to its own mistake(s) in failing to respond to the Reference and or attend the hearing of the said References.

The Respondent avers that the Advocate/Applicant via his application is asking this Court to sit on appeal in its own Ruling which is not permissible in law. That an issue which has been fully canvassed as in this case cannot be reviewed by the same Court which had adjudicated upon it.

The Respondent's prays that the Court dismisses the Advocate/Applicant's application filed in Court on 30th August 2019 and award costs to the Respondent.

Analysis and Determination

I have carefully considered the motion and written submissions made by the parties. The issue for determination is whether the application meets the threshold for review and whether the orders sought are merited. Although the application is premised on Order 45 Rule 1(1) of the Civil Procedure Rules, the same is not applicable in this court. The threshold for review is set out in Rule 33 of the Employment and Labour Relations Court (Procedure) Rules –

> **33. Review**
>
> > **(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—**
> >
> > > **(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;**
> >
> > > **(b) on account of some mistake or error apparent on the face of the record;**
> >
> > > **(c) if the judgment or ruling requires clarification; or**
> >
> > > **(d) for any other sufficient reason.**
> >
> > **(2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.**
> >
> > **(3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.**
> >
> > **(4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.**
> >
> > **(5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.**
> >
> > **(6) An order made for a review of a decree or order shall not be subject to further review.**

In the application there is only one ground upon which the review is sought being that the court made an error on the face of the record in holding that there was no response by the Applicant/Advocate to the application dated 19th July 2018 which was the subject of the ruling that the Applicant/Advocate seeks to be reviewed. In the affidavit of Vincent Chokaa, Counsel admits that he did not respond to the application dated 19th July 2019. The application sought specific orders as follows –

> *1. That the Court be pleased to Order that the execution of the Certificate of Costs arising from the Deputy Registrar's Ruling on the Taxation dated 23rd January 2018 in Misc. Application No. 86 of 2017 and any proceedings arising therefrom be stayed pending the hearing and final determination of the Reference herein filed.*
>
> *2. That the Court be pleased to vacate/set aside in its entirety and on all items, the Ruling of the Honourable Daisy Mutai, Deputy Registrar, dated and delivered on 23rd January 2018, in respect of the Advocates-Client Bill of Costs dated 20th July 2017.*
>
> *3. That the Court be pleased to issue a declaration that the Client/Applicant settled the Respondent/Advocates fees in*
>
> *full.*
>
> *4. That in the alternative and without prejudice to any of the above, the Court be pleased to call on the Respondent/Advocate by whom such costs have been so incurred to show cause why such costs should not be disallowed.*
>
> *5. That costs of this Application be provided for.*

The application made allegations against the Applicant/Advocate on oath. These included allegations that there was an agreement on costs, allegations of negligence and allegations of failure to comply with instructions of the client. The Respondent/Client further made allegations that the Applicant/Advocate was paid in full for work done according to agreement on fees.

These were serious averments of fact that the Applicant/advocate ought to have responded to either by way of a replying affidavit or grounds

of opposition which he did not do. All he did was file omnibus submissions in respect of several applications dated 5th March 2018, 28th April 2015 and 19th July 2018. The Applicant/Advocate again failed to attend court on the date of hearing of the application.

Can submissions constitute a reply to an application?

Courts have pronounced themselves on this issue in innumerable decisions. In **Kenpipe Co-operative Savings & Credit Society Limited v Daniel Githinji Waiganjo (2017) eKLR**, the Court of Appeal reviewed several cases then pronounced itself as follows –

> *In the case of **Galaxy Paints Company Ltd v Falcon Guards Ltd [2000] eKLR** the Court of Appeal held as follows:-*
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> > *"It is trite law, and the provisions of O.XIV of the Civil Procedure Rules, are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination."*
>
> *Similarly the Court of Appeal in the case of **D E N vs P N N [2015] eKLR** held as follows:-*
>
> > *"Generally, the law is that the courts would determine a case on the issues that flow from the pleadings and judgment would be pronounced on the issues arising from the pleadings or from issues framed for courts' determination by the parties. It is also a principle of law that parties are generally confined to their pleadings unless pleadings were amended during the hearing of a case."*
>
> *And lastly in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**, this Court held thus with regard to the essence of pleadings:-*
>
> > *"……We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point…..*
>
> *Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."*
>
> *Failure to revert to the appellant's pleadings meant that the trial court proceeded as though the claim was undefended or unopposed. Indeed, it is quite evident that in the body of the judgment, little regard seems to have been had of the appellant's response. Only a tangential mention was made on some of the issues raised by the appellant allegedly through its written submissions. **However, written submissions are not pleadings."***
>
> [Emphasis added]

Again in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR,** the Court of Appeal stated as follows with respect to submissions**.**

> *"We have already found that the 1st respondent **failed to discharge his burden of proof of the existence of facts claimed** of the companies, what they owned and whether property sales indeed took place, followed by transfers. So what we conclude is that the learned trial judge simply lifted the figure of sh.80,161,720/= from the 1st respondent's submissions and awarded it against the appellant. This was wholly in error. **Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid.** Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. **Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."***
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> [Emphasis added]

Further in **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 Others [2018] eKLR,** Supreme Court held as follows on filing of a defective affidavit that was not dated, signed or commissioned as per provisions of the Oaths and Statutory Declarations Act, Cap 15: -

> *"A Replying Affidavit is the principal document wherein a*
>
> *respondent's reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. **Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent on 17th August, 2018 are of no effect.** Curiously, we further note that even the said Written Submissions are not dated, though this possibly might not have been fatal had the foundational document, the Replying Affidavit, been in order. From a perusal of the Written Submissions, it is clear to us that they are substantially based and relies on the undated and unsworn Replying Affidavit. **Also, there are no Grounds of Objection raising any specific points of law of any preliminary or jurisdictional nature.** The upshot is that as the 2nd and 3rd Respondents had categorically stated that they do not oppose the application, the Court will be*

excused for therefore deeming the application as being unopposed entirely."

In the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** the Court cited the decision of the Malawi Supreme Court of Appeal in **Malawi Railways Ltd v Nyasulu [1998] MWSC 3**, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled ***"The Present Importance of Pleadings."*** The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….*
>
> *In the adversarial system of litigation therefore, it is the parties*
>
> *themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."*

From the foregoing, it is clear that the Applicant/Advocate did not file a response as was stated in the ruling that he seeks to be reviewed. The observations of the Court in the said ruling to the effect that there was no response and the averments of the client remained uncontroverted are therefore not an error on the face of the record to warrant the review of the said ruling. The findings of fact were based on the uncontested affidavit evidence of the client.

This having been the only ground upon which the application was anchored, I find no merit in the application with the result that the same fails. The application dated 27th August 2019 is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF FEBRUARY 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this+ court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE