



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT OF KENYA
AT NAIROBI

MISC. APPLICATION NO. E053 OF 2021

KHALWALE & CO. ADVOCATES.....APPLICANT

VERSUS

DEVYAN FOOD INDUSTRIES formerly

SAMEER AGRICULTURE & LIVESTOCK CO. LTD.....RESPONDENT

RULING

1. The Respondent (hereinafter 'client') filed a Notice of Motion Application dated 15th July 2021 seeking for Orders:

a. THAT pending the hearing of this application *inter-partes*, this Honourable Court be pleased to issue an order of stay of taxation in Miscellaneous Application No. E052 of 2021, Miscellaneous Application No. E053 of 2021 and Miscellaneous Application No. E054 of 2021, Miscellaneous Application No. E055 of 2021, Miscellaneous Application No. E056 of 2021, Miscellaneous Application No. E057 of 2021 Miscellaneous Application No. E058 of 2021, Miscellaneous Application No. E060 of 2021.

b. THAT this Honourable Court be pleased to review the Ruling delivered on 13th July 2021 and consider the Applicant's Further Affidavit dated 28th June 2021 filed on 30th June 2021.

c. THAT costs of this application be provided for.

2. The Application is premised on the grounds that when the Client perused the ruling of 13th July 2021, it realised the Court did not consider its further affidavit dated 28th July 2021 filed on 30th June 2021 together with the annexures. That the said pleadings addressed substantive issues and adduced critical evidence that formed the core of the Client's case and that the omission on the part of the registry to put the said Further Affidavit in the court file denied the Court to opportunity to consider the said affidavit. The Client further asserts that there has been no unreasonable delay in making this application which has been brought in good faith and that this is sufficient reason warranting review of the Order of the Court. That it is in the interest of justice that the said Ruling of the Court be reviewed as prayed. The Application is supported by the Affidavit sworn on 15th July 2021 by Maina Karanja who asserts there are fundamental grounds on the basis of which this Honourable Court is moved to review its ruling. He depones that they suspect and it is highly likely that the submissions and authorities also filed together with the said Further Affidavit were not placed in the court record given and the Court made a final determination on the matter without having a chance to look at those documents.

3. The Applicant (hereinafter 'advocate') Wilberforce Khalwale, an Advocate from the law firm swore an Affidavit in Reply dated 22nd July 2021 wherein he depones that at no time during the proceedings did the advocate seek and obtain leave to file the said further affidavit in the matter and neither was the affidavit referred to in the proceedings. That the said affidavit was actually served upon their firm on 22nd July 2021 via e-mail upon requesting for the same on 21st July 2021 and according to him, the affidavit does not introduce any new matter that can cause the Honourable Court to arrive at a different verdict. That the issues raised in the further affidavit and the annexures are similar to the issues raised in their affidavit and that in fact, the said annexures do confirm the existence of an Advocate-Client relationship. That if the Honourable Judge had reached a wrong conclusion, the same could be a ground for an appeal as opposed to a review and that the contested issue of whether or not an Advocate/Client relationship exists between the parties should not be reviewed by the same Court that adjudicated upon it. He further avers that there is no mistake or error apparent on the face of the record to be rectified and that the application is fatally defective and offends the provisions of Rule 33 of the Act as the order sought to be reviewed is not attached. That the Application herein is also *res judicata* in that the issue of stay of taxation as raised in prayer No. 1 of the Notice of Motion before Court is similar to prayer (a) of the dismissed Notice of Motion dated 4th May 2021 and should thus be dismissed with costs to the advocate.

4. The Client herein then filed a Further Affidavit sworn on 13th October 2021 by its Assistant Human Resource Manager and Legal Officer, Paul Maina who avers that they indeed sought and were granted leave of the court to file the said further affidavit and that they served the same upon the Respondent herein on 2nd July 2021 and not the 21st July 2021 as alleged. That the delay by the Client herein to respond to their application is what caused them to delay filing the said further affidavit and the Court then failed to make a conscious decision on the matters in controversy. He further avers that Rule 33 provides that the Court can review its ruling for any sufficient reason and they have given sufficient reason to warrant review and that contrary to assertions, the said Ruling is *Annexure 1* in their supporting affidavit. He contends that the Client herein stands to suffer grave injustice and financial loss if the orders in this application are not granted as prayed.

5. Client's Submissions

The Respondent in the suit and Applicant herein submits that this Court is clothed with powers to review its ruling and set aside its own orders by dint of Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. That in this case, it has deposed that the review is sought on the basis of erroneous exclusion of important evidence that was not considered when the ruling of the court was passed and which thus constitutes an error apparent on the face of the record. That the issue of error apparent on the face of the record was analysed in the case of **Jude Riziki Kariuki v Tharaka Nithi County Government & Another [2019] eKLR** where the Court cited the Court of Appeal's decision in **Nyamogo and Nyamogo Advocates v Kogo [2001] EA 173**. That in **Paul Odhiambo Onyango & Another v Kalu Works Limited [2020] eKLR** Onyango J. considered whether failure to consider filed pleading was an error on the face of the record and concluded that failure to take into account submissions which are not on the court record is not an error apparent on the face of the record and would only be an error if the submissions were on record but the court failed to consider the same. It is the Client's submission that the said further affidavit had been duly filed and rightly on record and should have thus formed part of the Court's ruling. That if the Court had considered the evidence tendered through the said further affidavit dated 28th June 2021, it would have observed that the attached substantive fee notes evidenced the nexus between the advocate and the proposed third party as the proposed third party raised fee notes which it collected on behalf of the advocate, which the advocate denies. The Client herein further submits that the error was on the part of the registry who failed to print the further affidavit and the same should not be visited on the litigant. That the Court in **Bungoma HC, Godfrey Masaba v IEBC & 2 Others [2013] eKLR** held that the court can only be faulted if by the time it wrote the ruling, the respondents' response formed part of the court's record and that if it did not, it must be demonstrated that the court or its agents were responsible for the non-availability of the response in the court file. It further invites the Court to be persuaded by the holding in **Bethwel Omondi Okal v Managing Director KPLC & Co. [2017] eKLR**, which upheld the decision in **National Bank of Kenya Ltd v Ndungu Njau (1996) KLR 469 (CAK) at Page 381** thus: "*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 is the Applicant's submission that this Court should also consider Article 25 of the Constitution which provides that the right to a fair hearing is a fundamental right that shall not be limited. That Article 50 of the Constitution further provides that every accused person has a right to adduce and challenge evidence as a fundamental right. That in light of the foregoing, it is in the interest of justice and fairness that the Notice of Motion dated 15th July 2021 is allowed as prayed.

6. Advocate's Submissions

The advocate submits that the Client's prayer for stay of taxation offends the provisions of Section 7 of the Civil Procedure Act, Cap 21 of the Laws of Kenya on *res judicata* as it was directly and substantially in issue between the parties in the dismissed application and cannot be raised again. It further submits that the power of review is discretionary and unfettered as was held by the Court of Appeal in **Shanzu Investments Limited v The Commissioner of Lands, Civil Appeal No. 100 of 1993**. The advocate asserts that it has argued there is no error apparent on the face of the record and the Client has not met the necessary threshold of review on account of error apparent on the face of the record as outlined in Rule 33. It submits that a finding or a conclusion of the Court cannot in law reveal an apparent error on substantial point of law which can be a basis of review. That a review is available to a litigant who from the discovery of a 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. The advocate submits that the Court has already pronounced itself on the issue of stay of taxation in the previous application and that if the Client is aggrieved by the said decision, it has an option to appeal to the Court of Appeal rather than ask this Court to sit on an appeal over its decision.

7. Determination

The Client seeks a review of the Ruling of the Court. For this it relies on an affidavit it asserts was filed on 30th June 2021 and which it argues provides evidence that would have led the court to make a different determination. It is asserted that the error apparent on the face of the record is capable of permitting the review sought. The advocate on its part asserts that the matter is *res judicata* and that there is no apparent error on the face of the record and the complaint the Client brings should be subject of an appeal not a review. The determination of the Court that there existed an advocate-client relationship is not ousted by the documents that the Respondent irregularly adduced and which the Court has had sight of after the Ruling was made. The motion thus is unmerited and is accordingly dismissed with costs to the Advocate.

It is so ordered.

Dated and delivered at Nairobi this 18th day of November 2021

Nzioki wa Makau

JUDGE