



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

ELRC. CAUSE NO. 2 OF 2020

BITALA & CO. ADVOCATES.....CLAIMANT

VERSUS

ANNE CHEPKORIR TURGUT.....RESPONDENT

RULING

1. On 9.3.2021, Wasilwa J delivered a ruling by which she dismissed an application by the respondent (client) seeking dismissal of taxation of the applicant's (advocate) bill of costs against her. The client was aggrieved by the said decision and filed the Notice of Motion dated 21.6.2021 seeking the following orders:

- (a) That the Honourable Court be pleased to set aside, discharge and/or review the orders issued pursuant to the ruling delivered on the 9th March 2021 by Honourable Justice H. Wasilwa pending hearing and determination of this application.
- (b) That the Honourable Court do issue such further orders, reliefs or timelines for compliance as it may deem convenient in the circumstances of the case.
- (c) That costs of the application be provided for.

2. The application is supported by the Affidavit sworn by the applicant (client) on 21.6.2021 and it is opposed by the respondent (advocates) vide the Replying Affidavit sworn on 9.7.2021 by Mr. Mugumya Rogers, an Advocate of the High Court of Kenya.

3. Before long the Client brought Chamber Summons dated 28.7.2021 seeking the following orders:

- (a) Stay of execution of the warrants of sale of property in execution of the decree passed on 30.6.2021 issued to KALYA AUCTIONEERS against the applicant pending hearing and determination of the application dated 21.6.2021.
- (b) Stay of execution of decree issued pursuant to certificate of costs dated 30.6.2021 (if any) pending the hearing and determination of this application.
- (c) Extension of time for lodging a reference to the ruling of Hon. S.K. Ngetich delivered on 30.6.2021.

4. The application is opposed by the respondent (advocates) vide replying Affidavit sworn by Mr. Mugumya Rogers on 31. 8.2021. Both applications were canvassed by written submissions.

Applicant's case

5. The applicant's case is that she has discovered new and important evidence which was not placed before the court at the time when the impugned order was made and which evidence was not within her knowledge then. She contends that the court is clothed with the power to review its decisions by dint of section 80 of the Civil Procedure Act and order 45 rule 1 of the Civil Procedure Rules.

6. She further contends that the issue of the non-existence of the respondent Law firm was not considered by the trial court. She sought to know the status of the said law firm but the response came vide the later dated 25.2.2021 by which the Law Society of Kenya confirmed that all the advocates in the said law firm were not licensed to practice law since the year 2016. That as at the time the said information was received the court file was with the Judge writing the impugned ruling and as such she was not able to file an application to arrest the same.

7. She reiterated that she never instructed the respondent Law firm but Mr. Rogers Mugumya Advocate. She argued that the as per the new information received, there is no nexus between the said law firm and Mr. Rogers Mugumya Advocate who is licenced to practice under Mwakio Kirwa & Co Advocates.

8. She reiterated that the counsel she instructed was Rogers Mugunmya and she paid him the agreed fees and the bill of costs by the respondent firm is aimed to achieve unfair enrichment. Therefore she prayed for the application to be granted. To fortify the application, she relied on **Muyodi v Industrial &**

Commercial Development Corporation & another [2006] 1 EA 243 and other persuasive decisions from other countries.

9. As regards the application dated 28.7.2021, the applicant reiterated the same grounds raised in the earlier applications that she never instructed the respondent firm to represent her in court and that the said law firm does not exist anymore. She maintained that Mr. Mugumya Advocate is acting as an agent of unlicensed Advocate contrary to section 39 of the Advocates Act. She further argued that the respondent being unlicensed is not entitled to claim for costs under section 40 of the Act.

Respondent's case

10. The respondent (advocates) opposed the application for review contending that the law firm is very much in existent and it represented the applicant (client) in her Petition No. 6 of 2017 against the County Government of Bomet; that that the court confirmed the retainer of the respondent firm by the applicant and directed that the Bill of Costs dated 29.10.2020 be taxed; that the bill was taxed and Certificate of costs issued on 30.6.2021; and that the application for review is an afterthought only intended to delay the advocates from enjoying the fruit of their judgment.

11. It is further respondent's case that there is no law that bars Mr Rogers Mugumya advocate from representing the respondent's law firm since he holds a valid practicing certificate. Therefore the respondent contends that the application is misconceived, frivolous, incompetent, and an abuse of the court process as the execution for the said costs has already commenced.

Issues for determination and analysis

12. I have carefully considered the application, affidavits and the written submissions. The relevant law in the application for review is Rule 33(1) of ELRC Procedure Rules 2016 which provides that:

“(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 an 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 same mistake or error apparent on the face of the record;

(c) If the judgment or ruling requires clarification; or

(d) For any other sufficient reasons.”

13. The issues for determination in the two applications are therefore:

(a) Whether the applications were made without unreasonable delay.

(b) Whether the applicant has established any of the above grounds for review.

(c) Whether the time for lodging a reference against the certificate of costs should be extended.

Whether application was made after unreasonable delay

14. The application for review was filed on 28.6.2021 while impugned ruling was delivered on 9.3.2021, about three and half months later. The applicant knew of the said ruling and she already had the new evidence as at the time of the ruling. Although she states that she could not apply for arresting of the ruling because the file was already in the custody of the Judge, one wonders why she took more than three months to make the application for review. The applicant has not explained the said delay and the court deems the same to be unreasonable in the circumstances.

15. However, I will excuse the said delay and consider the merits of the application because the respondent did not raise that legal question in its Replying Affidavit or submissions.

Whether the applicant has established any ground for review.

16. The ground upon which the application stands is that there is discovery of new and important matter or evidence which, after the

exercise of due diligence, could not be produced by her at the time when the impugned ruling was made. The new evidence according to her is that the respondent law firm does not exist and it never acted for her in the suit which led to the instant dispute over legal fees. The said evidence was given to the applicant by the LSK vide the letter dated 25.2.2021.

17. The letter from the LSK confirms that Mr. Mugumya Rogers Advocate has a valid practicing certificate for 2021 and his record shows that he is an Associate in firm of Mwakio Kirwa & Co Advocates. The letter further states that:

“...Echodu Everlyn and Twinamaisiko Edith Advocates last declared to practice in the firm of Bitala & company Advocates. Kindly note that Echodu Everlyn Advocate last took out a valid practicing certificate in the year 2016 and was issued with a receipt on 6th July 2016. Twinamaisiko Edith Advocate last took out a valid practicing certificate in the year 2018 and was issued with a receipt on 28th August 2018. Kindly note that the above Advocates are not certified to practice law.”

18. The respondent maintains that the court made a finding that the firm represented the applicant in her petition; and that there is no law barring Mr. Mugumya Advocate from representing it in this matter.

19. Having considered the material before me including the application leading to the impugned ruling by Wasilwa J, I must say that the alleged new evidence is of no relevance to that decision. Even if the new evidence was presented to the Judge before the ruling was made, the same would not have caused the Judge to arrive at a different decision because existence of the law firm was not an issue in the said application. In my view the issue whether or not the firm is in existence is new and ought to have been raised first before the Taxing Officer or in a Reference challenging the certificate of costs made on 30.6.2021.

20. It follows that the said new evidence cannot be used as a ground for reviewing the impugned ruling which only dealt with the issue whether or not the applicant retained the respondent law firm to represent her in Petition No.6 of 2017. Based on the evidence presented by the parties, Wasilwa J found that indeed the respondent firm acted for the applicant in the said suit. The respondent was in existence then as per the said letter from the LSK which shows that Ms. Twinamaisiko Edith Advocate was practicing there in 2018.

21. If presently the existence of the firm is in doubt, then that is a totally new matter, which should be considered because it goes to the validity of the Advocates' Bill of costs. However the applicant must invoke the jurisdiction of the court properly and not as she has done herein.

22. In view of the foregoing it is clear that the applicant has failed establish the ground upon which review of the impugned ruling is sought and consequently the application dated 21.6.2021 is dismissed.

Leave to extend time for filing reference.

23. The Taxing Officer herein rendered his ruling on the taxed costs on 30.6.2021 and as such any aggrieved party had 14 days from that date to lodge a Reference to the Court under Paragraph 11 of the Advocates Remuneration Order. No party filed any reference within the prescribed time but on 28.7.2021, the applicant (client) filed the Notice of Motion dated 28.7.2021 seeking for the enlargement of the time within which to file her reference to challenge the certificate of costs.

24. Paragraph 11 of the Order provides

“(1). Should any party object to the decision by the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2). The taxing officer shall forthwith record and forward to the objector the reasons for the decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such order may be made by chamber summons upon giving to every other party not less than three clear days' notice in writing or as the court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

25. The respondent contends that the application for leave is an afterthought because the applicant did not show any indication that she was objecting to the costs taxed. The applicant contents that she is disputing the award of costs in favour of the respondent firm because it does not exist and Mr Mugumya Advocate is acting as an agent of unlicensed advocate to pursuing the costs. Her effort to reach out to the respondent firm since the court ruling on 9.3.2021 has been futile. The auctioneer has also told her that it acts for Mr. Mugumya Advocate and not the respondent firm.

26. Paragraph 11(4) of the Remuneration Order has granted power to this court to enlarge time for lodging objection to the decision of the taxing officer. The said power can only be exercised upon the applicant showing sufficient cause which prevented her from filing the objection in time.

27. In this case the applicant has not given any reason for the delay in lodging the objection within the prescribed time. She was aware of the decision by the taxing officer and nothing prevented her from lodging the objection. Consequently, and with much sympathy, I find and hold that the application lacks merits and it is dismissed.

28. As a parting shot, I wish to clarify that the dismissal of the applications herein does not mean that the issue of the existence of the respondent law firm is settled.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY NOVEMBER, 2021.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE