THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 719 - 2014

MINERAL ACCESS SYSTEMS LTD ::::::::::::::::::::::::::::::::

APPLICANT

VERSUS

M/S SIMON TENDO KABENGE ADVOCATES & ANOR. :::::
RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

The Applicant, Mineral Access Systems Limited seeks orders against M/S Simon Tendo Kabenge Advocates, that

(a) The ruling in Miscellaneous Application No. 570 of 2011 be reviewed and set aside.

(b) The suit be set down for hearing inter-parte on the basis of an error apparent on the face of record and sufficient reason and or on account of some mistake.

(c) Costs to the Applicant

The application is grounded on the following; that there is an error apparent on the face of the record in relation to the court fees paid and sufficient reason and or on account of some mistake by the Court.

Further that it is just and equitable and in the interest of justice that the application be allowed.

The background to this application has its origin in Civil Suit No. 275 of 2011. The suit referred to was filed on the 21st September 2011. The Written Statement of Defence that was filed had a counterclaim which therefore attracted Court fees.

It was contended by the Plaintiff before my learned brother who first handled this matter that the Applicant, then Defendant had not paid the requisite fees for the Written Statement of Defence. The learned Judge found that the Defendant/Applicant had revised a receipt they had obtained in fees for some other pleading and so in actual sense had not paid fees for the counterclaim. He wrote;

> *"In this matter reusing a receipt on different Court documents is truly unacceptable."*

Court's record indicates that the Court gave the Applicant/Defendant a chance to correct the wrong that had been occasioned.

The Learned Judge wrote:

> *"I shall however, not allow that to stand in the way of addressing a substantive dispute and order that the Respondent pay all relevant fees of the head suit and all applications with evidence to Court before the hearing of the main suit."*

It was therefore a finding which finding remains standing, that the Applicant/Defendant had not paid fees for his Written Statement of Defence and Counterclaim.

When the suit came up for hearing, Counsel for the Defendant, could not show that the fees had been paid as directed by the Court. Counsel for the Plaintiff basing himself on the disobedience of Court's order applied that the Written Statement of Defence be struck out.
Holding that fees had not been paid as directed, this Court struck out the Written Statement of Defence, entered judgment and set the suit down for formal proof.

Its this order that the Applicant seeks Court to review.

Submissions:

Counsel for the Applicant submitted that there was an error apparent on the face of the record of Miscellaneous Application No. 570/2011. She submitted that Court fees had been paid on 13th September 2011 and she handed in receipts which were dated on 13th September 2011 to support her submissions. She labored at length to explain what had happened, stating that the Cashier at the time of receiving payment received them together with all the documents namely an application for interim order, a Written Statement of Defence and a counterclaim and an affidavit in reply.

The Cashier therefore issued one receipt and made cancellations of the first entries she had made. She invited Court to look at the Written Statement of Defence. She therefore submitted that there was a

bonafide mistake which if upheld would subject the Applicant to injustice by depriving him of the opportunity to defend himself. She relied on the authority of **Githere V Kimungu (1976) Kenya Court of Appeal Cases** in which the Court held that where there is a bonafide mistake and no damage has been done to the other side which can be sufficiently compensated by costs, the Court should lean towards exercising its discretion in such a way that no party is shut out from being heard.

She further submitted that when my learned brother who ordered for payment of fees made the order before him, he did not look at the receipt; that Counsel for the Applicant failed to produce the receipt.

On these submissions, she prayed that Court reviews its order in Miscellaneous Application No. 570 of 2011.

In reply, Counsel for the Respondent submitted that the application was incompetent and incurable on account of res judicata. He submitted that the application was unsupportable because under Order 46 Rule 2, the application for review should have been made immediately and before the Judge who made the order.

Order 46 Rule 2 provides that the application for review shall be made only to the Judge who passed the decree or made the order sought to be reviewed. In this case, the order that I am required to review is the order I made in Miscellaneous Application No. 570 of 2011 on 2nd September 2014. But the order that directed that fees be paid made by Justice Kiryabwire on 27th August 2012 was never appealed against nor reviewed by him or this Court. The order therefore remains

standing. A review of my order in Miscellaneous Application No. 570 of 2011 would still leave the order of Justice Kiryabwire which ordered payment of fees on all the documents undisturbed.

The Applicant has not sought leave of this Court to pay fees beyond the dates that were specified by my learned brother.
Even if I was to review my ruling, it would not undo the earlier order of the Court presided over by my learned brother which clearly directed the payment of fees, an order that was defied by the Applicant.

I therefore find no merit in this application for review and it is hereby dismissed with costs.

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David K. Wangutusi
JUDGE

Date: 11/12/14