



REPUBLIC OF KENYA



**Royal Ngao Holdings Ltd v N. K Brothers Limited & another (Commercial Case 156 of 2019)
[2022] KEHC 13116 (KLR) (Commercial and Tax) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 156 OF 2019
DO CHEPKWONY, J
SEPTEMBER 23, 2022**

BETWEEN

ROYAL NGAO HOLDINGS LTD APPLICANT

AND

N.K BROTHERS LIMITED 1ST RESPONDENT

ALLAN ODHIAMBO OTIENO 2ND RESPONDENT

RULING

1. The court has been called upon to determine on the Plaintiff's application dated August 12, 2022 which seeks for the following orders:
 - (a) Spent;
 - (b) Spent;
 - (c) Spent;
 - (d) This Honourable Court be pleased to vacate and/or set aside both the Ruling dated November 11, 2021 and the order issued on January 26, 2022 which struck out the present Suit and referred the matter to arbitration;
 - (e) Any other suo moto orders as the court may deem to be in the interest of justice;
 - (f) The costs of this application be provided for.
2. The application is premised on grounds on its face which are further explicated in the Supporting Affidavit of David Jo Nyakango, the Plaintiff/Applicant's Company Secretary sworn on August 12, 2022. The Plaintiff's case is that this court delivered a Ruling on November 17, 2021



and subsequent order issued January 26, 2022 with respect to the Respondents' Notice of Motion application dated July 31, 2019 striking out the Plaintiff's suit and referred the matter for arbitration. However, according to the Plaintiff, it came across what appeared to be fraudulent filing and anomalies in that the record has two applications both dated July 31, 2019. According to the Applicant, one application had been assessed, and court fees paid for it had no prayer for striking out the suit. The other application had the prayer for striking out the suit but had neither been assessed nor fees paid for and this is the one the court was made to rely on in striking out the suit.

3. The Plaintiff avers that it subsequently engaged Mr. Emmanuel Kenga, a Forensic Document Examiner who upon examining the court record established that indeed there were two applications both dated July 31, 2019 and alterations had been made on the application filed first in time through the second one by adding a prayer for striking out the suit. Also, the report prepared by Mr. Kenga confirmed that the application which had the prayer for striking out the suit had not been assessed and court fees paid. The Plaintiff attached a report from the Deputy Registrar of this court indicating that she had perused the court file and established that there were two applications dated 31st July, 2019 and the one with the prayer for striking out the suit had not been assessed and court fees not paid.
4. The Plaintiff thus opines that the court was hoodwinked into granting prayers which had not been sought and urges the court to vacate the Ruling dated November 17, 2021 and subsequent order dated January 26, 2022 in the interest of justice.
5. The Defendants opposed the application and in doing so, the 1st Respondent filed a Notice of Preliminary Objection dated August 24, 2022 whilst the 2nd Respondent filed Grounds of Opposition dated August 26, 2022. The grounds advanced by the Defendants/Respondents are similar. In summary, the Defendants have faulted the Plaintiff's application for being res-judicata the proceedings of July 22, 2022 and sub-judice the application dated June 21, 2022 which was later withdrawn. The Defendants further described the application as fatally defective and incompetent for reason that the Plaintiff had filed Civil Appeal Case No.E012 of 2022 against the Ruling dated November 17, 2021 and was thus precluded from filing an application for review or setting aside against the same Ruling.
6. In rejoinder, counsel for the Applicant submitted that the 2nd Defendant is not a party to the arbitral proceedings as the same are pending between the Plaintiff and 1st Defendant. He submitted that the Defendant has bot rebutted the reports by the Document Examiner and Deputy Registrar that the application was filed without assessment and payment of court fees by providing a receipt to confirm this. On the issue of the application ought not to have been filed when there is a pending appeal. Mr. Luseno submitted that it is a special application in the sense that they are not challenging the Hon Judge's decision dated November 11, 2021 and neither are they seeking review of the same. What they are seeking is the setting aside of proceedings anchored on a fraudulent filing of a document which was not paid or its fees assessed by court. And for it to be res-judicata, it ought to have been part of the decision where parties heard, which it is not.
7. On September 8, 2022, the respective counsels for the parties appeared before me and canvassed the application by way of oral submissions. In that respect, Mr. Luseno learned counsel for the Plaintiff/Applicant submitted that there was no substantive prayer inviting the court to strike out the matter and refer it to arbitration. In his view, the court file was tampered with by sneaking a page with such prayer which was missing in the initial application. He stated that at the time, the Plaintiff had a Judgment in its favour in the matter and there could be no dispute of being referred to arbitration. He reiterated the contents of both the Forensic Examiner's report and Deputy Registrar's report confirming the anomaly. The Plaintiff's counsel added that since the Plaintiff had not tendered an affidavit to show evidence on payment of court fees, the court had been hoodwinked into granting prayers not sought as if it was a competent application in the Ruling dated November 11, 2021, hence the subsequent order



issued on January 26, 2022 ought to be vacated and set aside. He pointed out that the Arbitrator had already issued directions on steps to be taken which would be prejudicial to the Plaintiff.

8. Learned counsel Mr. Onyango and Mr. Okatch for the 1st and 2nd Defendants respectively agreed on their submissions. Their case is that the application seeking striking out of the case was filed on July 31, 2019 and was canvassed between the parties until a determination was made without any complaint whatsoever. Therefore, the present complaint and application are an afterthought meant to waste courts time on frivolous grounds. Further, that the matter has previously been handled by three Judges who have addressed the issue on whether the impugned ruling should be set aside and thus the application is res-judicata. The learned counsel further faulted the application for contravening the rules of civil Procedure in that the Plaintiff having opted to appeal against the Ruling, lost the right to seek review against the same Ruling.

Analysis and Determination

9. After a scrupulous probe of the contenting parties respective positions and having taken into account Learned Counsels' submissions alongside the authorities cited therein, I am of the considered view that the substantive issues for determination in the instant application are as follows:-

- (a) Whether having filed an appeal, the Plaintiff has option to seek review on the ruling/order subject of such appeal; if so,
- (b) Whether the Plaintiff/Applicant has adduced viable grounds to warrant the grant of orders for review as sought.
- (c) Whether the application is res-judicata or subjudice.

10. On whether the Plaintiff had the option of filing an application for review having filed an appeal on the same Ruling. I am guided by the provisions of Section 80 of the [Civil Procedure Rules](#), 2010 and Order 45 Rule 1(a) and (b) of the [Civil Procedure Rules](#). Section 80 of the [Civil Procedure Act](#) provides as follows;

80. Any person who considers himself aggrieved –

- a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

11. Order 45 rule 1(a) and (b) of the [Civil Procedure Rules](#), in addition to setting out the conditions that an Applicant in an application for review must satisfy to get the application granted, reiterates the proviso of Section 80(a) and (b) which makes it plainly clear that the options of filing an application for a review and an appeal are not simultaneously available to an aggrieved party. So that, once a party has opted for a review the option of an appeal cannot time be available to the party at the same time. Subrule (2) of Order 45 of the Civil Procedure Rules further makes the matter clearer. It provides: -

Order 45 (2):

“A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.”



12. This court has been asked to make a determination on whether the Applicant having opted to appeal against the Ruling of November 11, 2021 has the right of review on the same. While I appreciate that there are plethora of decisions both the High Courts and the Court of Appeal expressing a school of thought, which subscribes to the view that a litigant has only one option between choosing review and appeal against an impugned decision, there is now the other school of thought which has adopted the view that once an appeal or a Notice of Appeal is filed provided that the said appeal is yet to be heard and or determined, the Appellant has the option of pursuing an application for review. This emanates from the decision by the Court of Appeal in the case of *Multichoice (K) Ltd – vs- Wananchi Group (Kenya) Ltd & 2 Others* [2020]eKLR constituted by a bench of five Judges which addressed the unanimity on whether the right of review would be available to a litigant who has filed an appeal or Notice of Appeal. In that case, the five Judges of the Court of Appeal held that a party would not be precluded from filing an application for review by virtue of filing an appeal or merely a Notice of Appeal provided that the same is yet to be heard or directions issued.
13. In the present case, while it is not denied that the Applicant filed an appeal before the Court of Appeal, the same is yet to be heard and/or concluded. It is therefore my humble view, pursuant to the decision in *Multichoice (K) Ltd –vs- Mwananchi Group* Case (supra), that the Applicant has not lost the right to seek review of the same Ruling, especially in view of the same having been evidently based on a document that was neither assessed and fees paid for. In that regard, I find that the application dated August 12, 2022 is rightfully before the court so that the anomaly can be cured.
14. Turning to the next issue of whether the Applicant has made a case to warrant the setting aside of the Ruling dated November 11, 2021, Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the *Civil Procedure Rules* which have partly been discussed in my analysis above, give the court unfettered discretion to review its decision upon sufficient grounds being shown. However, it would serve repetition to state that this discretion ought to be exercised judiciously and not capriciously. So long as the court considers that it is necessary to correct an apparent error or omission on the face of the record, court on being satisfied that there is discovery of new and important matter or evidence which was not available when the ruling/order was made, or is shown such other sufficient reasons to warrant the grant of review.
15. Therefore, considering the facts of this case, can it be safely be said that the finding of an altered application to include the prayer seeking to strike out the suit by the Defendants as the Applicant alleges, amounts to discovery of new evidence which is an apparent mistake for the court to have relied on in arriving at its ruling in striking out the case, whilst such prayer was not sought.
16. There are two reports, one by the Deputy Registrar and the other by Forensic Document Examiner Mr. Kenga confirming that the court record had been altered to include and a prayer which was not in the first instance sought by the Respondents but granted by the court in its final Ruling. The Applicant has sufficiently explained that such anomaly could not have been realized given that proceedings were conducted virtually at the time. In my view I am agreeable that such was new evidence which could not be determined at the time the Respondent's application was heard. Further, I am persuaded that such discretionary is viable ground to warrant the exercise of this court's decision to review and/or set aside the Ruling granted by the court on November 11, 2021 based on a prayer which was based on an altered record of court inserted in the Respondents application dated July 31, 2019.
17. On the issue of subjudice and or res-judicata, there was no demonstration by the Defendant to this effect and the particular decisions by the three Judges have not been cited to confirm this.
18. The upshot is that the court finds the Applicant's application dated August 12, 2022 merited and the following orders do issue:-



- a) That an order do and is hereby issued vacating and/or setting aside the Ruling dated November 11, 2021 and the subsequent order issued on January 26, 2022.
- b) Parties are at liberty to appropriately move the court as regards the position of this suit before it was struck out.
- c) There shall be no orders as to costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23rd DAY OF SEPTEMBER, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Luseno counsel for Plaintiff/Application

Mr. Onyango and M/S Thambati for M/S Wanjiku counsel holding for Mr. Oketch for 2nd Dependant.

Court Assistant - Sakina

