



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL MISC. APP. NO. 86 OF 2019

AGRICULTURAL DEVELOPMENT

CORPORATION.....RESPONDENT

VERSUS

JAMES ONKUNDI OMAKORI

T/A LIFEWOOD AUCTIONEERS.....APPLICANT

RULING

The applicant, **James Onkundi Omakori T/A Lifewood Traders Auctioneers** is determined to have his pound of flesh. He was aggrieved by the Ruling delivered by this court (H.K. Chemitei J) on **11th December, 2020**. The Ruling was in respect of a Reference filed by the Respondent, **Agricultural Development Corporation**, in which it challenged the taxation of the Applicant's costs in regard to an execution of a warrant of attachment. The Learned Judge reduced the sum that had been taxed in favour of the Applicant to, respectively, **Kshs.22,065/-**, and **Kshs.25,175/-**. The court ruled that the Applicant was entitled to a total sum of **Kshs.47,420/-**.

The Applicant moved the court under **Order 45 Rule 1, 2(1), (2), 3(1), (2) of the Civil Procedure Rules** seeking to have the said Ruling reviewed and set aside on the ground, essentially, that the Learned Judge erred in applying the wrong principles in determining the costs that is to be paid to the Applicant. It is instructive that although the Applicant predicated his application on provisions of **Order 45 (1) of the Civil Procedure Rules**, seeking orders of review, the Applicant did not indicate under which heading he was seeking to have the said Ruling reviewed. Be it as it may, this court shall consider the merits of the application.

According to the Applicant, the Learned Judge fell in error when he failed to appreciate that the Applicant's costs ought to have been based on **10%, 5% and 2%** of the commission on the value of the goods attached which was **Kshs.1,720,000/-**. The Applicant argued that this was based **Auctioneers Rules 1997 Schedule 4 Part II Item 4**. For added measure, the Applicant relied on a Court of Appeal decision **National Industrial Credit Bank Ltd -vs- S.K. Ndegwa Auctioneers Civil Appeal No. 195 of 2004**. The Applicant was of the view that had the Learned Judge considered the above, he would have reached a decision upholding the taxation by the taxing master. The Respondent was of course opposed to the application. A replying affidavit to that effect was sworn by Dr. Maurice Cherogony. The Respondent indicates that the decision of the Learned Judge should not be disturbed or interfered with.

An issue that came to the fore for consideration by this court is whether the Applicant properly invoked this court's jurisdiction to review a decision that was previously rendered by this court. The Court of Appeal in **Pancras T. Swai -vs- Kenya Breweries Ltd [2014] eKLR** held thus:

"24. In National bank of Kenya -vs- Ndungu Njau Civil Appeal No. 211 of 1996 (unreported) this court, with respect, correctly held:-

"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 will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review".

In **Francis Origo & Another -vs- Jacob Kumali Mungala CA Civil Appeal No. 149 of 2001 (unreported)**, the court stated:

"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but maybe a good ground for appeal. Once the appellants took that option to review rather than appeal they are proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellants' application for review..."

Later in the Judgement, the court held thus:

“27. We think Benett J was correct in Abasi Belinda -vs- Fredrick Kangwamu & Another [1963] EA 557 when he held that:

“a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal”.

In the present application, it was clear to this court that the thrust of the Applicant’s application for review is that the Learned Judge failed to consider or misapprehended the applicable law before he reached the said verdict. The Applicant submitted that had the Learned Judge applied his mind to the applicable law, he would have reached a different decision, hence this application.

This court is not persuaded that such reason forms a valid basis for this court to review the decision of the Learned Judge. As clearly shown by the decided cases above, which I concur entirely with their reasoning, an averment that the court misapprehended or misapplied the law is not a ground for review but forms a fertile ground for an appeal. As stated earlier in this Ruling, the applicant is not alleging that there was a mistake on the face of the record or that a new and important piece of evidence had been discovered which was not within his knowledge at the time the reference was heard. It is clear to this court that the Applicant is challenging the decision of the court because he was aggrieved with its findings; that is a ground of appeal and not for review.

This court is not satisfied that the grounds put forward in support of the application for review are legally tenable. The grounds are suitable for the lodging of an appeal to a higher court and not an application for review. This court lacks jurisdiction to sit on appeal on a decision of a court of concurrent jurisdiction.

It is apparent from the foregoing that this application is for dismissal. It is so dismissed but with no orders as to costs since the Respondent did not appear before the court during the hearing of the application.

It is so ordered.

DATED AT KITALE THIS 28TH DAY OF APRIL, 2021.

L. KIMARU

JUDGE