REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 56 OF 2009

MALINDI MANAGEMENT STRATEGY LIMITED.....APPELLANT

VERSUS

MAJENGO LAUNDRY CORNER .....RESPONDENT

(Appeal from the ruling and order of the Senior Resident Magistrate's Court of Kenya at Mombasa, the Honorable T. Mwangi (S.R.M) dated the 20th March 2009)

In

Senior Resident Magistrate's Civil Case No. 1235 of 1994

MAJENGO LAUNDRY CORNER

VERSUS

MALINDI MANAGEMENT STRATEGY LIMITED

J U D G M E N T

1. The appeal herein challenges the decision by the trial court, Hon. Mwangi (SRM) dated 20/3/2009 by which the court dismissed the appellant's application dated 16/12/2008 which sought an order for review of a judgment made on the merits.

2. In that application, the grounds disclosed to premise the request were that the court misapprehended the fact that the respondent was not a legal entity capable of suing and being sued and therefore there was an error apparent on the face of the record.

3. That application was opposed by an Affidavit sworn by one Michael Jefwa Tinga whose gist was that the matter had proceeded, with each side giving evidence save that the appellants' witness testified in the year 2003 not 2006. The Affidavit then gave history of the happenings in the matter that it went through several magistrates owing to transfers and that the judgment was indeed read in the absence of both parties and the respondents advocate only came by the file in the month of November 2008 whereafter the appellants' advocate was duly notified by a letter of 20/11/2008. It was then contended that the prerequisites of review had been demonstrated including the presence of an error apparent on the face of the record.

4. After hearing the parties on the application, the trial court delivered the ruling now subject of appeal and said:-

> **"The ground upon which review is being sought is that the plaintiff locked locus standii to institute suit as it was never a legal entity. From the pleadings, the defendant in its defence admitted the descriptive parts of the plaint. This essentially means it was satisfied that the plaintiff had capacity to sue. It is thus estopped from raising claim.**
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> **From the proceedings, the matter proceeded ex-parte. Initially and judgment entered. It was however set aside and an *interparties* hearing proceeded. Even then issue of locus standi did not arise. There is a valid judgment on record. The same has not been challenged. O. 44 r provides grounds upon which a review may be entertained. I do not think the ground cited is any of those stipulated. In my view the only avenue open to the application lies on appeal. This has not been considered as an option.**
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> **Last issue of judgment having been delivered without notice cannot and does not constitute a reason for review. Parties were**

heard and magistrate relied on that evidence to write his ruling. Issue at hand was never raised. In my view the application is a deliberate attempt to obstruct execution of the decree issued herein. Court cannot be part of that game".

5. It is that decision now challenged by the appellant on some six grounds of appeal. The grounds fault the trial court for; failure to appreciate the respondent as a non-juristic person capable of suing and being sued; failure to find that upon the death of a partner the partnership stands dissolved by operation of the law and the suit then abated; that it was erroneous to hold that the admission of description of the parties amounted to admission of capacity to sue; that the decision was grounded upon extraneous matter; that it was erroneous to hold that the appellant was playing games with the court and lastly that the decision had occasioned a manifest, miscarriage of justice.

6. This appeal was directed to be canvassed by way of written submissions to be highlighted by the parties. Pursuant to such directions the appellant filed written submissions on 14/3/2017 while the respondent did so on 16/3/2017. However on the date set from highlighting the appellant did not attend despite due service effected upon it. On that default the court only took the highlights by the respondent but has paid due regard to the written submissions by the appellant on the record.

7. Having read the record of appeal pursuant to the courts mandate to re-examine and reappraise the entire evidence afresh and come to own conclusion by way of a rehearing, I take the view that the trial court is being faulted for arriving at a wrong conclusion based on the wrong apprehension and exposition of the law applicable on review.

8. The established law on review is that an incorrect exposition of the law is never a ground for review and that error apparent on the face of the record must be a self-evident one and on a matter of fact not the law. This is the law as enunciated by the Court of Appeal in ***National Bank of Kenya Ltd vs Ndungu Njau [1997] eKLR*** where the court said:-

> "***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. I 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 for 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 ground for review."***
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> ***"He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it."***

9. The application having been grounded upon reasons that the court made a legally untenable exposition of the law on the legal personality and capacity of the respondent, the same did not qualify as attracting an order for review and the trial court was opt in its finding that no ground for review had been established. On that ground, the trial court cannot be faulted.

10. In coming to this conclusion, I have paid due regard to the very persuasive decision in ***HFCK VS Embakasi Youth Development Project [2004] eKLR*** but hasten to make a distinction that the question of the legal capacity of the respondent in this matter was not of the same the kind litigated in the decided case.

11. In this matter, the respondent did disclose that the respondent was indeed registered under the Registration of business names Act, while in the decision cited there was no evidence of registration. My view and finding is that the facts and circumstances in the HFCK's case are different from facts here. The clearest and most obvious of the difference is that the respondent here was admittedly registered under a statute and therefore cannot be said to be a non-legal entity. The second reason why even on the merits the contention would not fly is the existence of Order 30 Rules 1 and 9 which permit suits by and against partners as well as suits against persons carrying out business in names other than their own.

12. However the baseline is that the question of capacity was one of law and an erroneous finding upon it would attract an appeal but not review.

13. On the basis of the foregoing reasons, I do find no merit in the appeal which I hereby order to be dismissed with costs to the Respondent.

Dated, signed and delivered at Mombasa this 6th day of March 2020.

P.J.O. OTIENO

JUDGE