



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 501 OF 2013

MANYOTA LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

PROTECTIVE CUSTODY LIMITED...1ST DEFENDANT/APPLICANT

JOASH SHIRANDULA.....2ND DEFENDANT/APPLICANT

RULING

1. Before me for resolution is the Notice of Motion dated 15th November, 2019 brought by the 1st and 2nd defendants/applicants and supported by the grounds present on its face and the facts stated in the affidavit of the 2nd applicant. The following are the orders being sought in the Motion:

i. THAT this Honourable Court be pleased to review its judgment delivered on 14th March, 2019 and award costs of the suit to the defendants.

ii. THAT costs of the application be provided for.

2. In his affidavit, the 2nd applicant stated that he is the Head of Operations of the 1st applicant and went further on to state that when this court dismissed the plaintiff's/respondent's case vide its judgment delivered on 14th March, 2019 it gave no order as to costs.

3. The 2nd applicant averred that no reasons were given for denying the defendants costs of the suit yet by law and practice, costs follow the event unless there is good reason for determining otherwise.

4. The 2nd applicant is of the view that the decision to deny the defendants costs of the suit constituted an oversight on the part of this court and that the same can easily be rectified upon review.

5. To oppose the Motion, the plaintiff/respondent filed a replying affidavit sworn by its Director, Kenneth Kuria, who asserted that the Motion is *inter alia*, incompetent, fatally defective and a mere afterthought.

6. The deponent further asserted that as it stands, the applicants have lodged a notice of appeal with the Court of Appeal to challenge the issue of costs. It was also the contention of the deponent that be that as it may, an award of costs is purely discretionary and cannot therefore be challenged by way of an appeal.

7. At the hearing of the Motion, this court directed the parties to file written submissions, which they did. In their submissions dated 19th June, 2020 the applicants argued that there is an apparent error on the face of the record since the provisions of **Section 27(1)** of the **Civil Procedure Act** stipulates as follows:

“Subject to such conditions and limitations as may be prescribed, and to provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for

good reason otherwise order.”

8. The applicants also made reference to the decision by the Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR** where it held that whereas the award of costs is discretionary in nature, such discretion ought to be exercised upon reasonable grounds.

9. It was the contention of the applicants that by virtue of their being successful parties in the suit, they are entitled to costs of the suit and which costs they argue were not granted pursuant to an error on the face of the record.

10. The applicants admitted to filing a notice of appeal but submitted that they have not filed a memorandum or record of appeal.

11. In reply, the respondent argued that this court does not have jurisdiction to entertain the present application pursuant to the provisions of **Order 45** of the **Civil Procedure Rules** which express that a party cannot seek a review of a decision upon filing an appeal against the said decision.

12. The respondent further referred this court to the analysis by the Court of Appeal in the case of **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR** that a party cannot seek both an appeal and a review at the same time.

13. It was also the submission of the respondent that there has been an unreasonable and inexplicable delay of over eight (8) months in bringing the application.

14. On the merits of the Motion, the respondent is of the view that an award of costs is discretionary in nature and cannot therefore be challenged by a party by way of review though it may constitute a ground of appeal. To support its point, the respondent quoted the case of **Ko Holdings Limited v County Government of Kiambu; Red Hill Kentmere Residents Association (Interested Party) [2019] eKLR** in which the court determined that the issue of costs; being an exercise of discretionary power by a court, cannot constitute a ground for review under Order 45 of the Civil Procedure Rules. Furthermore, the respondent relied on the following reasoning given *inter alia*, by the Court of Appeal in the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR**:

“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 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 a ground for review.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. 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.”

25. The respondent also faulted the applicants for failing to annex a copy of the decree in this instance, to their Motion, thereby terming the Motion fatally defective.

16. I have considered the grounds presented in the Motion, the facts stated in the affidavits supporting and opposing the Motion, and the contending written submissions together with the authorities relied upon.

17. A brief background of the case is that the respondent instituted a suit against the applicants and sought for general, exemplary and punitive damages plus costs of the suit, arising out of the cause of action of defamation. Upon hearing the parties, this court delivered judgment on 14th March, 2019 thereby dismissing the respondent’s suit but with no order as to costs.

18. It is apparent that the present Motion concerns itself with the subject of review of the issue on costs. Nonetheless, before this court can delve into its merits, it is required to determine the issue on jurisdiction which was raised by the respondent.

19. The law is well settled that jurisdiction is at the core of a court’s functioning and power, and without it, a court of law has no basis on which to entertain a matter any further. Take for instance the renowned case of **The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Limited [1989] eKLR** where the Court of Appeal held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. The jurisdiction of this court to entertain the present application has been challenged pursuant to the provisions of **Order 45** of the **Civil Procedure Rules** which stipulate as follows:

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

...may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

21. From my reading and understanding of the above-cited provision, I have drawn the conclusion that a party is permitted to pursue a review of a decision irrespective of whether or not an appeal is allowed against the said decision, but that a party cannot seek both to appeal against and review the decision concurrently.

22. This particular subject was adequately canvassed by the Court of Appeal in the authority of **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR** which was cited by respondent and wherein the court rendered itself thus:

“It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of **Karani & 47 Others v Kijana & 2 Others [1987] KLR 557** the court held that:

“...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.”

(See also: **African Airlines International Limited v Eastern & Southern Africa Trade Bank Limited [2003] 1 EA 1 (CAK)**).

Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal. (See: **Kamalakshi Amma v A. Karthayani [2001] AIHC 2264**). The respondent’s application for review was therefore incompetent hence the court did not have jurisdiction to grant the orders sought under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.”

23. In the present instance, it is not in dispute that the applicants have lodged a notice of appeal against the aforesaid judgment delivered by this court, pursuant to the provisions of the Court of Appeal Rules. Moreover, a copy of the same was annexed as “KK 1” to the replying affidavit filed on behalf of the respondent.

24. On that ground alone and going by the reasoning of the Court of Appeal which is of binding effect, it is clear that this court lacks jurisdiction to entertain the present application for review, thereby making it incompetent.

25. In the circumstances, this court has no grounds on which to take any further steps or to consider the merits of the Motion.

26. Consequently, the Motion is hereby struck out with costs to the Respondent.

Dated, Signed and Delivered at Nairobi this 24th day of September, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the 1st and 2nd Defendants/Applicants