REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 356 OF 2014

PAUL MAKOKHA OKOITI.....PLAINTIFF/APPLICANT

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT/RESPONDENT

HON ATTORNEY GENERAL.....2ND DEFENDANT

RULING

The ruling herein relates to the Plaintiff's application dated the 27th November, 2019 in which he has moved the court seeking to review the Order/ Decree and /or vacate the judgement delivered in this matter, on the 17th October, 2019 and has asked the court to consider the issues of quantum filed on 21st October,2014.

The application has been brought under Order 45 Rules 1 & 2, of the Civil Procedure Rules and Sections 3, 3A of the Civil Procedure Act and its premised on the grounds set out on the body of the same and supported by the annexed affidavit sworn by the applicant, on the 27th November, 2019.

The application is premised on the grounds that; there is an error apparent on the face of the record; that the order is extremely prejudicial to the Plaintiff; that the suit is properly before the court; that the Judge ignored the judicial authority of **George Masinde Murunga Vs Attorney General (1979) eKLR** which gives the threshold for malicious prosecution that a plaintiff must prove and that the judgement was not delivered in open court as required by the law.

The first Defendant filed a replying affidavit on the 28th February,2020, which is sworn by Kariuki King'ori in which he depones that, the application is frivolous, vexatious and an abuse of the court process; that the plaintiff has not fulfilled the legal requirements for review and therefore his application is entirely lacking in merit and it should be dismissed with costs.

The second Defendant filed grounds of opposition, on the 10th February, 2020. He relies on the grounds that; the application is incurably defective, unnecessary and an abuse of the court process; that the application does not meet the criteria for review under Order 45 Rule 2; that there is no discovery of new fact and that there is no clerical or arithmetical mistake or apparent error on the face of the record.

The application was disposed of by way of written submissions which the parties filed and which this court has duly considered.

In his submissions, the plaintiff averred that the court did not consider the issues for determination in that, Barclays Bank Limited who were the owners of cheque number 101361 should have appeared themselves and prosecuted the matter in the Chief Magistrate's court or could have sworn an affidavit authorising Equity Bank to prosecute the matter on their behalf. He submitted that a company could only sue in its own name with the sanctions of its Board of Directors or by a resolution made in a general or special meeting and no such resolution was produced before the court. The case of **Impak Holdings company Limited Vs Comen – Cons Africa Limited (Civil Case Number 1659/11**) was relied on.

It was his contention that the 2nd Defendant's grounds of opposition dated the 7th February, 2020 and the Replying affidavit filed by the 1st Defendant deals with procedural technicalities and they do not go into the substance of the dispute in the plaintiff's application and to uphold the same would in essence defeat the spirit of Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. The applicant also took issue with the 1st Defendant's replying affidavit and averred that the deponent did not have the requisite authority to swear the same.

On its part, the 1st Defendant set out the Law on Review as provided for under Section 80 of the Civil Procedure Act and under Order 45 of

the Civil Procedure Rules and submitted that the applicant has not tendered any new or important matter or evidence that he has discovered which was not in his knowledge during the hearing of the case. To support this proposition, the first defendant has relied on the case of **Charles Kimaita Mwithimbu & another Vs Edward Mutua M' Mwithiga (2016) eKLR** which delineated what the discovery of new and important matter is.

The first Defendant contended that all the issues raised in the applicant's application as grounds for review were already addressed in the judgement and therefore the same cannot be termed as discovery of new matters and evidence.

On whether there was an error apparent on the face of the record, the 1st Defendant averred that such an error must be obvious and self-evident and the same does not require an elaborate argument to be established as was stated in the case of **Veleo (k) Limited vs Barclays Bank of Kenya Limited (2008) eKLR**. It further submitted that the failure by the court to consider a key authority in the Applicant's submissions is a mere erroneous decision on issues of Law and not an error on the face of the record as alleged by the applicant and it cannot be a sufficient ground for review that another Judge could have taken a different view of the matter. That failure to consider the said authority and the subsequent erroneous conclusion of the matter as claimed by the Plaintiff is not a ground for review but rather is a ground for appeal as espoused in the case of **Bethwel Omondi Okal Vs Board of Trustee Telposta Pension & others (2018) eKLR.**

On whether there were sufficient reasons, the 1st Defendant relied on the case of **Executive Committee Chelimo plot Owners Welfare Group & 288 others Vs Joel Langat & 4 others (sued as the management of Chelimo Squatters Group (2018) e KLR** which was cited in the case of **Sadar Mohammed Vs Charan Singh and another** in which the court held;

> ***"Any other sufficient reason for the purposes of review refers to the grounds analogous to the other two (for example error on the face of the record and discovery of new and important matter".***

Counsel argued that the Plaintiff having failed to satisfy that there was discovery of new and important matters of evidence and that there was an error apparent on the face of the record, the court is invited to conclude that there are no other sufficient reasons raised to justify the review of the judgement. It urged the court to find that the plaintiff has failed to make out a case or identify any ground for review.

On its part, the 2nd Defendant analysed the law on review and the guiding principles as set out in Order 45 Rules 1 and 2 of the Civil Procedure Rules and as espoused by the court in the case **Francis Origo & another Vs Jacob Kumali Mungala (2005)** and that of **National Bank of Kenya limited Vs Ndung'u Njau (Civil Appeal No. 211 of 1996**) and averred that the applicant has not shown any new fact that has been discovered that was not in his knowledge during the hearing of the suit.

The 2nd Defendant submitted that there is no error apparent on the face of the record and that the grounds relied upon by the applicant are good grounds for Appeal and not for review. It has urged the court to dismiss the application with costs.

The Court has duly considered the application together with the affidavits both in support of and in opposition to the same and also the grounds of opposition. I have also given due regard to the submissions filed by the parties.

The applicant herein has sought to review this court's judgement which was delivered on the 17th October, 2019. The law on Review is provided for under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Section 80 provides as follows;

> ***"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 filed; or***
>
> ***(b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of the judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."***

Order 45 provide as follows;

Rule (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, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.***
>
> ***(2) A party who is not appealing from a decree or order may apply for a review of judgement 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 the review".***

From the foregoing, it is clear that an applicant has to show;

a) There has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time

b) There is some mistake or error apparent on the face of the record or

c) That there is a sufficient reason

d) The applicant has also to make the application without undue delay.

The applicant's application is premised mainly on the ground that, there is an error apparent on the face of the record. It is trite law that an error apparent on the face of the record must be obvious and self-evident and the same does not require an elaborate argument to be established. This was the holding in the case of **Nyamogo & Nyamogo Vs Kogo (2001) EA 170** which was cited in the case **of Veleo (k) Limited Vs Barclays Bank of Kenya Limited (Supra) in** which the court held;

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where they may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a positive one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground of review though it may be one for appeal".***

The same principle was also espoused by the court in the case of **National Bank of Kenya limited Vs Ndungu Njau (Civil APPEAL No.21 of 19996) in which the court stated**;

> ***"A review may be granted whenever the court considers that it is necessary to correct an 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 establish. 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 the law. Misconstruing a statute or other provision of law cannot be ground for review."***
>
> ***"……. 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 an Appeal on his own judgement 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".***

The applicant herein has faulted this court allegedly for not considering the Judicial authority of **George Masinde Murunga Vs the Attorney General (1979) eKLR.** The court has perused the Authority in issue and has noted that the relevance for which it was quoted in these proceedings is in respect to the elements of the Tort of Malicious Prosecution and quantum of damages that the Applicant urged the court to award. In this regard I wish to state that the court in its judgement appreciated the fact that the applicant had cited the said decision and went ahead to quote other cases on the same principles of law on Malicious prosecution which are in tandem with the ones in the case of Masinde Murunga. It has not been averred that the said principles in the other cases are wrong or that the court failed to appreciate the said principles. Therefore, the fact that the court is said to have ignored the said Authority is neither here nor there and in any event, it is a High Court Authority and it is not binding on this court being a court of concurrent jurisdiction with the court that passed the judgement in the Murunga case.

This court finds that there was no mistake or error apparent on the face of the record.

On the other grounds, it has not been shown that there was discovery of new and important evidence which after the exercise of due diligence, was not within the knowledge of the applicant at the time the judgement was made. The application was, however, made without undue delay as the same was filed on 28th November,2019 after the court entered judgement against him on the 17th October,2019.

On the ground of any other sufficient cause, the plaintiff avers that the court failed to consider his issues for determination and his submissions on the quantum of damages. As stated earlier in this ruling, the court considered all the issues that were before it for determination and arrived at the conclusion that it did. In paragraph 63 of the judgement, the court has stated that it considered the authorities cited by the Plaintiff on the quantum of damages but found them not to be relevant in this case. If the applicant felt aggrieved by the same, the option he had was to appeal against the judgement and not to seek a review because an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for Appeal. See the case of **Origo & another Vs Mungala (2005**) cited with approval in the case of **Jameny Mudaki Asav Vs Brown Otenge Asava & another (2005) eKLR.**

Before I conclude, the applicant has also taken issue with the 1st Defendant's replying affidavit sworn by KARIUKI KINGORI and filed on the 28th February,2020 and has averred that the same is defective as the deponent did not have authority to sign and swear the same on behalf of Barclays Bank (K) because he has not stated in the said affidavit that he has been so authorised to swear the same. The court has perused the said affidavit and the deponent has stated that he is the legal Manager of the 1st Defendant and he is duly authorised to swear the same. He has not sworn the same on behalf of Barclays Bank and in any event, Barclays Bank is not a party to this suit. The contention by the applicant has no basis.

The applicant also contends that the judgement was not read in open court. The record is clear that the same was delivered in open court and in the presence of the Applicant and therefore, that ground holds no water.

The upshot of the foregoing is that the application lacks merit and its dismissed with costs.

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

.....

LUCY NJUGUNA

JUDGE.

In the presence of

.....the Applicant

..... for the 1st Defendant/ Respondent

.....for the 2nd Defendant/ Respondent