REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 276 OF 2003

IN THE MATTER OF: KENYA PORTS AUTHORITY STAFF PENSION SCHEME

BETWEEN

DOCK WORKERS UNION.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

R U L I N G

1. The application I am called upon to determine just like the suit itself has indeed a chequered career. Chequered because having been filed way back in the year 2003, some 15 years ago and by way of an originating summons, known to be designed for determination of simple and straight forward questions, it is yet to find a resolution. The application itself was filed way back in mid 2007 some twelve years ago and still begging determination. That notwithstanding, the application seeks orders of review of the ruling made on 9/2/2007 by which the originating summons was ordered dismissed for raising weighty and complex issues rather than being converted into a plaint.

2. The grounds set out to justify the application are given to be that the matter as filed revealed serious issues and not mere frivolity nor vexation and that dismissal on account wrong procedure adopted was to abdicate the courts duty to do substantial justice in favour of technicalities and that the matter having been dismissed prior to merits being investigated and on technical grounds, it would have been just to order no orders as to costs. That prayer on cost is clearly made as an alternative.

3. The application was opposed by the Grounds of opposition 14/2/2019 and filed in court on 18/2/2019. The essence of the opposition is that the threshold of review have not been met and established in that the application faults the judge for having made an incorrect exposition of the law and reached an erroneous conclusion of both law and on award of costs. It was also asserted that the plaintiff's remedy if any laid on a fresh suit as adverted to by the judge or just pursuing an appeal but not review.

4. Based on those papers as filed, both parties filed and exchanged written submissions. The submissions on the Applicant are dated 29/4/2019 and filed the same day while those by the respondent are dated 6/5/2019 and filed the next day.

5. The summary of the submissions by the Applicant is to the effect that the striking out of pleadings drives a litigant from the seat of justice and is known to be draconian and should not be upheld where the same is solely grounded upon a technicality as to form of approaching the court. It was stressed that there was an error in the court refusing to exercise its unfeltered discretion in converting the originating summons into a plaint. It was equally submitted that the application met the prerequisites of grant of orders for review in that the need to facilitate the just, expeditious, proportionate and affordable resolution of court disputes was at the core of administration of justice and enshrined in the constitution itself.

6. The applicant therefore cited to court the court of appeal decision in ***National Bank of Kenya Ltd vs Ndungu Njau CACA No. 211 of1996*** for the yard stick on when orders for review would issue. The decision in ***Abdiraham Abdi vs Safi Petrolium [2011] eKLR*** and ***Patni vs DPP [2015] eKLR*** were cited on the application of the overriding objectives of the court in the administration of justice.

7. On the court's power to covert an originating into a summon, the decisions in this file on setting aside was relied on it being underscored that wherever a mistake occurs courts are ready and willing to correct the mistake so that no litigant is exposed to suffer undue prejudice. It was pointed out that at the time of institution of the matter, the advocate took the view that the question was one simple and straight forward befitting determination by way of the originating summons and that when it became apparent that the matter was complex, the same should not have been struck out but instead converted into a plaint. It was pointed out that Sergon J, himself had in the ruling of 24/9/2010 expressed the position that when he made the subject ruling his attention had not been drawn to the wide discretion granted to court under the then Order XXXVI Rule 10.

8. The decisions in ***Kemunya vs Muchiri [2015] eKLR*** were cited to court for the proposition that if in the case of hearing an originating summons the dispute turns out to be complex and not simple, the court has the jurisdiction to convert it into a plaint, and give parties the chance to lead viva voce evidence. ***Mhaki vs Macharia [2005] 2 EA 206*** was cited for the exposition of the law that the right to be heard is a valued one and that it is against all notions of justice for a party to be denied an opportunity to be heard. Those same submissions were highlighted orally in court by Mr. Gikandi who then urged the court to allow the application, review the orders of 9/2/2007 and order that the originating summons be converted into a plaint.

9. For the respondent, the submissions were to the effect that the application faults the judge for having not properly exposed the applicable law and that the court cannot order review on such grounds as the remedy lies on appeal only. It was also pointed out that the suit was dismissed and not struck out after the parties were given the right to be heard and that therefore the court having delivered itself on the merits has become *functus officio* and cannot revisit the merits of the matter.

10. It was additionally submitted out that the jurisdiction to review only exists where there is a slip and an error apparent on the face of the court records. The decisions in ***Chacha Muita vs Baya Tsuma Baya [2017] eKLR*** and ***Telkam Kenya Ltd vs Odanda [2014] eKLR*** were cited on the application of ***functus officio*** doctrine as a way of saying litigation need to be brought to finality. National Bank case (supra) was also cited for the proposition of law that merely that another judge would have arrived at a different conclusion is not a ground for review. It was then stressed that incorrect exposition of law is not a ground for review but an appeal because the court is deemed to know the law and the fact that parties and counsel have failed to serve the court well is no ground to review. For that proposition the respondent relied on and cited ***Pancras T. Swai vs Kenya Breweries Ltd [2014] eKLR***.

11. On invitation of the wording objectives of the court, counsel submitted that was improperly done as substantive justice must be administered within the law and not upon caprice. It was then underscored that the provision in the then Order XXXVI Rule 10, 11 & 12 and No. 37 Rule 18, 19 & 20 donated to court a discretion exercisable within the law which discretion was duly exercised by the judge by reliance on the binding decisions cited to him on conversion of the summons into plaint. Counsel submitted that while the law allowed the same, that can only be done prior to hearing and not after the hearing takes place and a merits based decision arrived at.

12. I have had the benefit of reading the record of the file, the ruling sought to be reviewed and the papers filed including submissions and I am not in doubt that the only question for determination by the court is whether or not an order for review is available as sought. To answer that sole question on has to establish if the application has been brought within the legal parameters set by section 80 and order 45, Civil Procedure Act. As crafted there is neither specific allusion to an error apparent on the face of the record nor discovery of a new and important matter of evidence. The application as it is must be thus seen to assert that there are sufficient reasons to order review. The expression sufficient reason has been interpreted by the court of appeal several to mean any reason that would sit in tandem with the purpose of the court to do justice, avoid hardships and abuse of the court process. The reason must qualify as meeting and answering to the demands for justice.

13. In ***Official Receiver & Liquidator v. Freight Forwarders Kenya Ltd, (2000) eKLR,*** *the court of appeal in defining what the phrase means and must be Taken to mean, observed:-*

> ***"Indeed, these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot, without at times running counter to the interests of justice, be limited to the discovery of new and important matters or evidence, or the occurring of a mistake or error apparent on the face of the record."***

14. In this matter the applicant's grievance and reason for seeking review is that the judge fell into an error in dismissing the originating summons on the technical basis that the matter was complex was drastic because the law allowed the court to convert the same into a plaint. The court is further faulted for having dismissed the summons with costs rather than ordering each party to bear own costs.

15. I view those grievances to fault the judge for having improperly exposed and applied the law. That to me would have been a good ground of appeal rather than review. An error on a point of law is never a sufficient reason for review. This is what the court of appeal has established to be the law in innumerable number of its decision. In **National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR** the court delved deeply into the jurisdiction to review and said in very firm exposition as follows:-

> **"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".**

16. I hold the view that I cannot allow the application without saying that my brother judge was wrong in his determination on how to treat an originating summons it turns out that the matter is complicated and need *viva voce* evidence. That is a pronouncement that is beyond me unless I was to invite the impression that I am sitting to question the merits of a court of concurrent jurisdiction. I decline to do so but find that the application as filed asks more than can be considered and granted on review and thus lacks merit is thus dismissed. I award the costs thereof to the respondent as the successful party.

Dated and **signed** at **Mombasa** this **29th** day of **November 2019.**

P J O Otieno

Judge

Delivered and **signed** at **Mombasa** this **29th** day of **November 2019.**

Dorah Chepkwony

Judge