REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 38 OF 2007

STONECREST LIMITED.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK (K) LIMITED.....DEFENDANT

R U L I N G

1. The Notice of Motion dated 12/4/2019 and filed in court on the 17/4/2019 seeks an order that I do review the decision and ruling dated 22/02/2019 and order that the summons to enter appearance in this suit were issued illegally, unlawfully or wrongfully and thus *void ab initio* and ought be expunged and suit struck out.

2. The grounds advanced to premise the application were that the court did not factor in its said ruling the grounds raised in the Preliminary Objection even though the same were acknowledged. That it was therefore in the interest of justice that the order be reviewed to enable the court fully determined all the issues raised in the Preliminary Objection.

3. When served, the plaintiff/respondent opposed the application by a Replying Affidavit of one Mcmillan E. Jengo which took the position that the application was incompetent and incurably defective for failure to disclose any grounds for review as known in law; that the purpose was actually to achieve the rehearing of the Notice of Preliminary Objection while relying on technicalities and lastly that the application was an abuse of the process of the court merely meant to delay the hearing and determination of the real dispute between the parties.

4. When parties appeared for the hearing of the application they sought to rely on the submissions filed to the Notice of Preliminary Objection and upon which the court had delivered a ruling. In brief oral submissions offered the Defendant/Applicant took the view and position that the issue of summons was never dealt with. His grievance was that the fact that the summons were issued on 14/8/2008 when the plant was lodged on 30/10/2007 made the suit incompetent and subject to being struck out. He made reference to order 4 Rule 1, 2, 3 & 5 of the Civil Procedures Rules.

5. For the plaintiff/respondent very short submission were offered to the effect that the Defendant/Applicant was simply seeking a rehearing of the preliminary objection and to issue orders the court had declined to grant. To the counsel that was the realm of appeal not review. He argued that it would be improper for this court to grant the orders sought unless the court sets out to sit on appeal of own decision.

6. Having read the papers filed and the submissions offered my mandate seems cut out and must entail a determination whether the applicant has brought itself within the province of review as known to law.

7. I understand the realm of review to be confined and available only where there is:-

a. Discovery of a new and important matter or evidence which could not be obtained by the applicant, that was never in the knowledge of the Applicant, due diligence notwithstanding, and could not be produced at the time the decision was made.

b. A mistake or error apparent on the face of the record.

c. Any other sufficient reason.

8. From the Application filed, it is clear that there is no specific limb of the Order 45 Rule 1 disclosed. However, in his submissions the counsel adverted to an oversight on the part of the court in failing to handle a portion of preliminary point. That may suggest an error or mistake. That mistake, if anything, is a mistake in appreciating the law. That is never a ground for review but for an appeal. The truth of the matter is that I did consider the preliminary objection in full and delivered a determination. If that determination turns out to aggrieve any of the parties it cannot be an excuse that I rehear the same matter. It is not an excuse because once a court delivers itself on a point it becomes

functus officio. It is not open to seek an order for revision because I party sought several reliefs but the court did not consider one of the prayers. A prayer that is sought but not specifically granted is deemed dismissed[1].

9. Whether the court is right or wrong in its appreciation and exposition law is never a reason for review. In **National Bank of Kenya Ltd vs Ndugu Njau[1997] eKLR the Court of Appeal** said:-

> **"A review may be granted wherever 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"**.

10. In this matter the court in fact did not proceed obliviously of the full tenure and purport of the preliminary objection but appreciated all it sought. That is what the court must be seen to have done at paragraph 11 & 12 of the ruling of 22/02/2019. I decline to revisit a question I have delivered myself upon and leave it to the party to do what is right. Challenge my findings in the appellate forum. On the merits turning on parameters for review the application fails and is ordered dismissed.

11. However, and purely gratis, I will seek to answer the question whether the preliminary objection was merited to assert that the failure to lodge the summons to enter appearance with the plaint wholly and inevitably invalidated the suit and merits it being struck out as of course!! The record of this file reveal that the plaint was indeed filed on the 30/10/2007 and the summons to enter appearance reveal to have been issued on 14/8/2008.

12. There is however nothing in the summons to show when they were lodged. That of course would require evidence and thus negate the point as a pure point of law[2]. When served the Defendant entered an unconditional appearance and filed a statement of defence without any reservations wayback In September 2008. The Notice of Preliminary itself was never filed till 12/06/2017, about 9 years later.

13. The complaint is not that no summon were ever lodged and served. Rather, the complainant is that the summons to enter appearance were indeed lodged but lodged late. To determine the objection, even if one had evidence of the date of lodgment one must appreciate the purpose of summons to enter appearance. In my learning the only purpose and goal of a summons to enter appearance, as disclosed on its face, is to notify the defendant of the suit, give him a timeline within which to enter appearance and administer the caution that in default of appearance the plaintiff may proceed with the suit and judgment may be entered against the defendant. That to me is the weight to be given to a summons to enter on appearance. To me the summons to enter appearance is not in itself a pleading for it asserts no right. It remains a summon and its purpose is served when the defendant enters appearance. That purpose simply put, is founded on the right to be heard before a decision is made.

14. Put in the context of this matter, I have said that the defendant was indeed served and within the month of the summons. It not only entered appearance unconditionally but equally filed an unreserved defence. I see no justifiable cause intended to further the objectives of substantial justice capable of being achieved by the preliminary objection. It is the type that qualified to be seen as exalting the rules, beyond their intended pedestal, to the alter of worship as the substance of the matter is pushed to the back burners. I was never told that as a result of the alleged infraction any prejudice had visited the defendant.

15. It is the kind to have been addressed by the Court of Appeal in its decisions as summarized in the case of ***Nicholas Kiptoo Arap Korir Salat vs IEBC & Others [2013] eKLR*** when expounding on the purpose, tenure and application of the overriding objectives provisions under the Civil Procedure Rules. The court while quoting its previous under decisions said:-

> **"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.**
>
> **The general trend, following the enactment of Sections 1A and 1B of the Civil Procedure Act, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution, is that courts today strive to sustain rather than to strike out pleadings on purely technical grounds as will shortly be demonstrated"**.

16. I get the Court to say that only infractions which occasion prejudice to the opposite party and derogate from the norms, purpose and dictates of justice need to be seen to invalidate proceedings by court and papers filed by litigants and that justice dictates that disputes be heard on the merits and not defeated by defeatist interpretation of the Rules of procedure.

17. Being so guided when I delivered my ruling, now sought to be upset, I considered the objections on summons to have lacked merit. I still hold the same view and now conclude by saying that this application having been based on the pursuit of a misconceived objection was itself overly mis-concerned. It is dismissed with costs to the plaintiff.

18. I now direct that parties to attend court on the 5.2.2020 for case conference.

Dated and delivered at **Mombasa** this **28th** day of **November 2019**.

P.J.O. OTIENO

JUDGE

---

[1] Explanation 5 of Section 7 Civil Procedure Act

[2] Mukisa Biscuits vs West End Distributors Ltd [1969] EA