REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 394 OF 2012

LOCHAB BROTHERS LIMITED.....APPELLANT

-VERSUS-

TOBIAS OWINO.....RESPONDENT

RULING

This ruling seeks to determine an application dated 16th November, 2017 filed by the Appellant under the provisions of Order 45 Rules 1 and 2 and that the time period be extended to enable the Appellant file its record of Appeal and fix the matter for directions. The orders sought to be reviewed required the Appellant to file a Record of Appeal within 15 days and to fix the Appeal for directions within 15 days of filing the Record of Appeal.

In support of the Application, the applicant relied on the grounds on the face of the application and the Supporting Affidavit sworn by CHRISTINE ADHIAMBO ORARO, the Appellant's Advocate in conduct of the matter. Since the orders were issued, the Applicant, as it emerged from the Application and the Supporting Affidavit, was not able to trace the lower court file as a result of which Counsel was not able to prepare the full Record of Appeal due to unavailability of the typed Proceedings, judgment, decree and exhibits. The Appellant has annexed copies of letters to the Executive Officer and the Deputy Registrar of this Court seeking their intervention to have the lower Court file availed. It has been deponed in the affidavit that the Appellant has already filed a Record of Appeal which does not include the documents sought from the lower Court and once the same is traced, the Appellant will file a Supplementary Record of Appeal.

The Respondent filed Grounds of Objection dated 4th December, 2017 opposing the Application. He has relied on the grounds that the Application is a gross abuse of the court process, it is misconceived, lacks merit and it's bad in law.

The application was canvassed orally on 6th December, 2017. Mr. Olale appearing for the Appellant submitted that their efforts to trace the lower Court file have not borne any fruits. He told this court that the application has merits and that they have established sufficient cause and urged the court to grant the application. Mr. Ombati appearing for the Respondent argued that the orders sought to be reviewed were granted after lengthy hearing and submissions. He urged this court to dismiss the Application and further submitted that the Appellant has not met the conditions stipulated under Order 45 of the Civil Procedure Rules.

The remedy of review is provided for in Order 45 Rule 1 of the Civil Procedure Rules which provides:-

"1. (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 judgment to the court which passed the decree or made the order without unreasonable delay."

The effect of this rule is to provide an avenue for a party to seek review before the Court that passed an order or decree. A close reading of that provision shows that there are some conditions which should be met to warrant a review.

I have carefully considered the application and the submissions before this Court. On one hand is an Appellant whose appeal is being frustrated by factors beyond its control whereas on the other hand, is a Respondent a decree holder who is desirous to have the suit disposed of as soon as is possible.

This Court in making its determination will have to consider the competing interest of both parties.

In the case of **J M K v M W M & another [2015] eKLR,** in which the Court of Appeal was confronted with a similar issue held:-

> ***"The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In ONYANGO V. ATTORNEY GENERAL (1986-1989) EA 456, Nyarangi, JA asserted at page 459:***
>
> ***"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."***

At ***page 460*** the learned judge added:

> ***"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."***

And in ***MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206***, at page 210, this Court stated as follows:

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."***

The Appellant has been able to demonstrate that the time limit of 15 days was not adequate to file the Record of Appeal as the lower court file was missing. The Application was filed timeously as it was filed before the lapse of the 15 days. In the circumstances, the Application is allowed to the extent that the time for filing the full Record of Appeal, and setting the matter down for directions is extended by a further 90 days from the date of this ruling.

It is so ordered

Dated, Signed and Delivered at Nairobi this **25th** Day of **January, 2018.**

…….

L. NJUGUNA

JUDGE

In the Presence of

……. For the Appellant

……. For the Respondent