REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 561 OF 2004

RAINBOW MANUFACTURERS LIMITED.....APPELLANT

VERSUS

HARON MONYI MULI.....1ST RESPODNENT

THE HON. ATTORNEY GENERAL

OF THE REPUBLIC OF KENYA.....2ND RESPODNENT

(Being an appeal against the Judgment by Hon. N.A Owino (Mrs) Principal Magistrate in CMCC No. 2288 of 2002 delivered on 4st July, 2004)

RULING

On 7th December, 2016 this court delivered a judgment relating to consolidated appeals from the trial of the lower court. Subsequent thereto, the appellant filed the present application dated 23rd January, 2017 for the substantive order that the said judgment be reviewed or clarified in relation to liability between the appellant and 2nd respondent in view of the judgment of the lower court relating to liability.

It is true that in the judgment delivered by the lower court on 1st July, 2004 the court apportioned liability at 30% on the part of the appellant and 70% on the part of the 2nd respondent. Subsequently however, the lower court revisited the issue of liability and set aside the above apportionment and, in a ruling delivered on 2nd September, 2004, ordered that liability be jointly and severally against the defendants. This was two months after the judgment of 1st July, 2004.

The issue of liability featured in the Memorandums of Appeal of the two consolidated appeals. The fact of the matter is that, after the delivery of judgment on 1st July 2004 the lower court became *functus officio,* and no party could move the court to revisit the issue by way of an application of review. The ruling of the lower court made on 2nd September, 2004 was clearly misplaced.

The judgment of this court made specific reference to the judgment of the lower court delivered on 1st July, 2004 at page 2 thereof. It was observed,

> **"The court found that the appellant herein was liable to the 1st respondent to the extent of 30% while the 2nd respondent was liable to the extent of 70%. Aggrieved by the said judgment the appellant filed this appeal."**

This court did not refer to the ruling that adjusted the said apportionment to the effect that, the two defendants in the lower court were to be held liable to the plaintiff jointly and severally.

In concluding the issue of liability in the judgment at page 5 this court observed,

> **"The apportionment of liability upon the appellant and the 2nd respondent cannot be faulted because of their respective roles in this case."**

When the court declares liability is jointly and severally that cannot be called apportionment. It is clear that this court was referring to the apportionment that appears in the judgment of the lower court delivered on 1st July 2004. I believe this clarifies the issue of liability and no review is necessary in the circumstances of the case. To that extent only, this application succeeds. Each party shall bear their own costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 13th Day of February, 2018.

A.MBOGHOLI MSAGHA

JUDGE