REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 181 OF 2017

FRANCIS NJOROGE.....APPELLANT

-VERSUS-

STEPHEN MAINA KAMORE.....RESPONDENT

RULING

This ruling seeks to determine a Notice of Motion dated 18th December, 2017 filed by the Appellant under the provisions of section 80, 63 (e) and 3A of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules seeking a review of the Court's Orders issued on 15/11/2017 and that the Appellant be allowed to deposit the sum of Kshs. 300,000 as security in a joint interest earning bank account within 60 days.

In support of the instant Application, the Appellant relies on the grounds on the face of the application as well as on his Supporting Affidavit. Basically, the Appellant contends that he made every effort to secure half of the decretal sum as ordered by the court but all efforts have borne no fruits, that the application has been filed without unreasonable delay and it is in the interest of justice that he be given a chance to prosecute his Appeal and be allowed to deposit Kshs 300,000 as security for costs.

The application was opposed by the respondent who filed a Replying Affidavit sworn by STEPHEN MAINA KAMORE, who deponed that the issue of the Appellant's financial problem was raised during the hearing of the application dated 9th June, 2017 and in the circumstances the same is res judicata. That there is no sufficient reason given for the orders sought, that a court in exercise of its jurisdiction under Order 42 Rule 6 of the Civil procedure Rules 2010 is not dependent upon what the applicant is willing to offer as security and that courts make decisions based on law and not pity.

The application was canvassed orally on 31st January, 2018. I have considered the Application together with the Affidavits on record. The orders sought to be reviewed were issued pursuant to an application dated 6/6/2017 seeking stay of execution of a decree awarding the Respondent herein the sum of Kshs. 1,650,215/=. In the said application, the Appellant pleaded on his financial difficulties as the subject motor vehicle was his source of income and as such sought the courts lenience whilst making an order on security. The Court considered the matters raised in the application and ordered the Appellant to deposit one half of the decretal sum in a joint interest earning account to be operated by the parties' Advocates.

This application is brought under the provisions of section 80, 63 (e) and 3A of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules which provide that:

> **"Section 80. Review**
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> *Any person who considers himself aggrieved—*
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> *(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
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> *(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."*
>
> **Section 63 (e)**
>
> *In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.*
>
> **[Order 45, rule 1.] Application for review of decree or order.**

"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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment 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"

Therefore, Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist:-

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay.

The pertinent issue for determination herein, therefore, is whether the Appellant has established any of the above grounds to warrant an order of review

In **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,** the Court of Appeal described an error apparent on the face of the record as follows:

"…In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law 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 long drawn process of reasoning or on points where there 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 possible one, it

cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."(emphasis mine)"

On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR**held that:

*"In **Francis Origo & another v. Jacob Kumali Mungala** (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-*

"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."

We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.

*We think Bennett J was correct in **Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557** when he held that:*

"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal"

I have well considered the reasons given by the Appellant for seeking an order of review. It is my considered view that the Appellant has not satisfied the requirements for grant of the orders of review. One of the key elements a court is bound to consider when granting an order for stay is the security given by the Applicant for the due performance of the decree. And it is upon such consideration that a court of law will make a determination on the same. This court well considered the Appellant's arguments on the same and made an order for the Appellant to deposit one half of the decretal sum in a joint interest earning account. This order was made after considering the arguments by the Respondent that he has a decree which he would like to execute versus the Appellant's plea that he was in financial difficulties. Indeed, if parties were allowed to seek review of decisions on grounds that they are not in a position to carry out the orders sought to be reviewed, or rather that the orders are not convenient to them, then a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review.

It should be noted that the grounds for review are very specific as discussed herein above. The Appellant herein has not demonstrated that he discovered new evidence which was not within his knowledge, neither that there was an error apparent on the record. He just feels that depositing the ordered sum is too much for him and he wants the orders reviewed so that he can deposit the amount of money which he can conveniently raise. This is a court of justice but not court of convenience such that it has to consider the conflicting interest of the parties. And in so considering, courts have to be guided by the laid down principles of law. The Respondent has a decree which he is desirous of executing and it is the court's duty to ensure that the decree is secured pending the determination of the Appeal.

It is my finding that the application is unmeritorious, the appellant has not established any ground for review of the orders and the Applications is therefore dismissed.

It is so ordered. No orders as to costs.

Dated, Signed and Delivered at Nairobi this 8th day of March, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

……. For the Appellant

……. For the Respondent