REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 169 OF 2012

HENSON NIGEL GRAHAM.....PLAINTIFF

VERSUS

THE STANDARD GROUP LTD.....DEFENDANT

R U L I N G

Outline of facts

1. The suit having been instituted by a plaint dated 17/9/2012 on the 18/9/2012, the defendant filed a statement of defence, (under protest) on the 25/2/2018 but without compliance with the provisions of order 7 Rule 5. That was done when indeed the law had been in place for some two years. It was also filed late and after a default judgment had been entered but was subsequently set aside on 20/9/2013.

2. There was also a preliminary objection on the propriety of the suit which was decided on the 24/02/2017 and a date for case conference set for the 25/4/2017 but did not take place till the 18/9/2017 when it was ordered that the matter proceeds on the basis of the witness statement and bundles of documents filed as at that date.

3. Based on such directions, parties attended court on the 6/12/2017 when the plaintiff's case was heard and closed and the defendant then sought an adjournment because he did not have his witness in court. The advocate on that day notified the court that the defendant had filed an application to review the orders of 18/9/2017. That application had been filed way back on the 1/12/2017 but not served upon the plaintiff. The defendant was granted an adjournment to enable the application be canvassed with court urging parties to try and negotiate the application. That advice seem not to have found favour with the parties because what then followed was responses to the application by way of a preliminary objection which was then ordered to be argued as an opposition to the application.

The application

4. The thrust of the application is that the directions of 18/9/2017 be reviewed and vacated and the defendant be allowed to file and serve witness statements and bundles of documents before the matter can be heard. The basis of that application is that the orders of 18/9/2017 were made in the absence of the defendants counsel occasioned by an oversight of the advocate. There was not explained what the oversight was but the affidavit in support of the application alluded to the fact that it was difficult to get the witnesses statements from the author of the article.

5. The application was opposed by the plaintiff by way of a notice of preliminary objection dated the 12/2/2018 whose gist was that the application did not meet the pre-requisites of Order 45 Rule 3, that the pretrial directions are not subject to review and that the plaintiff having testified and closed his case; to allow the application would prejudice him and lastly that the provisions of Order 3 Rule 2 are couched in mandatory terms.

6. In arguing the application the parties filed respective written submissions on different dates supported with lists of authorities. I have had the benefit of reading those submissions and authorities and from the onset, the defendant seem to have laid overemphasis on its preliminary objection which asserted that the suit as filed does not invoke the court's jurisdiction under article 165(3) of the constitution and that it does not seek the remedies provided under Articles 22 & 23 as much it was not filed pursuant to Rule 4 and 10 of the ' the constitution of Kenya (protection of rights and fundamental freedoms) practice and procedure rules, 2013. I would treat such approach in this matter with the enduring words of Sir Charles Newbold in Mukisha Biscuits Co. Ltd vs West End Distributors Ltd [1969] 696 when the president of the Court of Appeal of East Africa said:-

> **"A preliminary objection is in the nature of what used to be a demurrer. It is raised on a pure point of law which is argued on the presumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or**

if what is sought is the exercise of judicial discretion. <u>The improper raising of point by way</u> of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues this improper practice should stop".

7**.** In urging that point the defendant cited to court the decision of the Court of Appeal in the ***Standard Limited vs Christopher Ndarathi Murungaru [2016] eKLR*** in which the Court of Appeal underscored the need for holistic interpretation of the constitution and that the contention that article 34 limited the jurisdiction of the High Court had no substance absolutely. That decision did very little to support the defendants preliminary objection which seem to suggest that the court's jurisdiction under article 165(3) is only invoked when rules 4 & 10 of the 2013 rules are complied with. That to this court is a pedantic way to look at and interpret the Constitution of Kenya 2010 which has been hailed world over as progressive and rights centered. It cannot be the basis to defect a suit unless one was to shut eyes to the command and dictates of article 159(2) d.

8. More worrying is the submission headed further submissions which assert that there is a preliminary objection that the court lacks jurisdiction to entertain the matter pursuant to article 34(2) of the constitution. Those submissions are a worry to this court in that the defendant had raised that point previously and this court by a ruling dated 24/2/2017 had the same determined. That ruling was not isolated but follows along line of others by the High Court and even the Court of Appeal that article 34 has not sought to limit the jurisdiction of the High Court as provided under the constitution.

9. One reading the written submissions and those offered orally, Cannot help thinking that the purpose is most ignoble and may be intended to confuse issues and derail the court from determining the dispute by blurring its vision by unending objection on the same point. That may as well be seen as abuse of the court process. This court detests such conduct and shall remain steadfast against such attempts. Where necessary it shall take steps to deter such attempts.

10. Now on the merits of the application even though the defendant said very little in support thereof, the only point being asked of the court to determine is whether the defendant has acted in a manner deserving of the courts discretion to go back to its directions intended to fast track the matter now fallen into the category of the cases deemed as overstayed in court.

11. The order sought to be reviewed were made on the 18/9/2017 and it took the defendant a period of upto 1/12/2017 to file the application. That was a period of some 75 days to bring the application. Of note is the fact that the application was prepared and dated the 30/11/2017 some 5 days to a date fixed for hearing the suit.

12. On the 1/12/2017 the court directed that the application be served upon the plaintiff in the usual manner but the defendant did not do so even by the 6/12/2018 when the hearing proceeded with participation of the counsel on record.

12. An application for review is by rules required to be filed without in ordinate delay and must meet the thresholds set under Order 45. Here I hold that the same was filed after inordinate delay and totally fails to meet the prerequisites of grant of review. Being bereft of the fundamentals of review as a judicial remedy, I do find no merit in it and I cannot help but find it wholly mis-concerned with the result that it is dismissed with costs.

Dated and delivered at Mombasa this 28th day of November 2018.

P.J.O. OTIENO

<u>JUDGE</u>