REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 673 OF 2005

FREDA STORES LIMITED…….....….....PLAINTIFF

VERSUS

NATIONAL OIL CORPORATION OF KENYA LIMITED…..DEFENDANT

RULING

1. The plaintiff has brought this application pursuant to Order 45 Rule 2 of the Civil Procedure Rules as read together with Section 3A of the Civil Procedure Act. It is an application for review of the judgement dated 4th March 2015.

2. The plaintiff contends that the trial court failed to make a finding on one aspect of its claim. That aspect arose from the plaintiff's claim for Kshs. 951,751/-, which was the stock available at the time when the plaintiff handed over the petrol station to the defendant.

3. It is the plaintiff's case that the hand-over notes which were executed by the parties, provided proof of the said stock.

4. The plaintiff also said that the defendant did not dispute that claim. Therefore, in the opinion of the plaintiff, the trial court ought to have granted judgement in favour of the plaintiff, for the sum of Kshs. 951,751/-.

5. When canvassing the application, the plaintiff made it clear that the application was based on the ground that there is sufficient cause or reason to warrant the court having a second look at its findings.

6. In other words, the plaintiff was not asserting either that it had discovered a new and important matter, or that there was an error apparent on the face of the record.

7. The plaintiff submitted that;

> **"There is consensus in the pleadings and by the parties oral evidence in court, that the stock available at the time of handover of the fuel station was of that value (Kshs. 959,751/-). Further, there is no dispute by the parties that that stock belonged to the plaintiff and to its credit. It remained behind on hand-over and the plaintiff is entitled to the value of the stock?.**

8. A perusal of the court records reveals that the suit was first scheduled for trial to commence on 11th

November 2013.

9. When the case was called out by the court, both parties indicated that they were ready to proceed. The court then slated the trial to start at 11.00 a.m.

10. Later, at 11.10 a.m, Mr. Nzavi, the learned advocate for the plaintiff, made an oral application to re-amend the plaint. The proposed re-amendment was in the following terms;

> **"Kshs. 959,751/- being costs of the products at the station at the time hand-over, making a total of Kshs. 17,979,052.60?.**

11. That pleading was to be included in paragraph 5. As the defendant did not object to the proposed amendment, the learned trial Judge allowed it. The consequence of the re-amendment was that paragraph 5 would now read as follows;

> **"The defendant in fragrant breach of the said agreement, entered into the plaintiff's restaurant Freda Corner Club, and forcefully evicted the plaintiff ejecting and removing some of the plaintiff's property from restaurant.**
>
> **PARTICULARS OF BREACH**
>
> **i) Failing to ascertain and address delivery product losses claimed by plaintiff.**
>
> **ii) Failing to ascertain the double banking claims by the plaintiff relating to supplies by defendant.**
>
> **iii) Failing to determine the plaintiff level of investment.**
>
> **iv) Failing to remit buyout/goodwill.**
>
> **v) Failing to advance agreed sum of Kshs. 2,000,000/-.**
>
> **vi) Kshs. 959,751/-.**
>
> **And the plaintiff claims sum of Kshs. 17,979,052/60 relating to the above and tabulated in letter dated 27th April 2006?.**

12. Although the Plaint claimed that the defendant ejected the plaintiff forcefully, from the fuel station, the plaintiff's evidence, through **DIOMEDES KARUIRU KIHUMBA THEURI (PW1)** was that the plaintiff not only agreed to vacate the premises, but also that there was a handing-over process.

13. At paragraph 30 of the judgement I made the finding that the plaintiff agreed to hand over the petrol station on 1st May 2005.

14. The plaintiff submitted that the trial court did not consider or make a finding on its claim for Kshs. 959,751/-.

15. A reading of the judgement shows that the court did not make a specific finding in that respect. Therefore, the plaintiff requested me to proceed to make a finding now. And the finding which the plaintiff invites me to make is that it is entitled to the sum of Kshs. 959,751/-.

16. The defendant urged the court to strike out the application because it was defective. The alleged defect in the application is the plaintiff's failure to annexe to the application the Decree or Order which it wants the court to review.

17. In **WILSON SAINA Vs JOSHUA CHERUTICH T/A CHERUTICH COMPANY LTD (2003)**

eKLR Visram J. *(as he then was),* stated as follows;

> **"In order to succeed on an application for review under Order XLIV of the Rules (presently Order 45), one must show that he is aggrieved by a decree or order. This cannot be done without annexing the decree or order for the court to determine the point. I therefore, agree with my learned sister the Honourable Lady Justice Jessie Lesiit's conclusion <u>in Gatimu Farmers Ltd Vs John Njoroge Ndungu, Nakuru</u> <u>Hccc No. 197/2001,</u> that failure to annex the order or decree sought to be reviewed renders the application fatally defective. On this conclusion alone, I do not see the need to consider the Defendant's application further, as no useful purpose will be achieved thereby?.**

The court proceeded to strike out the application.

18. J.M. Mutungi J. expressed a similar view in **JULIUS MUKAMI KANYOKO & 2 OTHERS Vs SAMUEL MUKUA KAMERE & ANOTHER [2014] e KLR,** when he said;

> **"The plain reading of the above provision (Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which review is sought. In essence Judgement and/or Ruling. Thus where an applicant fails to annexe the decree or order sought to be reviewed, such an application is defective. In the defendant's present application the order that the defendants sought to be reviewed was not annexed, with the result that the Defendants application was fatally defective. I agree that a formal decree and/or order is a pre-requisite before an applicant can bring himself/herself within the ambit of Order 45 of the Civil Procedure Rules as relates to review of the decree and/or order?.**

19. In the case before me, the plaintiff did not annex a copy of the Decree or Judgement sought to be reviewed. On the strength of the authorities above-cited, the application ought to be struck out.

20. In the case of **SULEIMAN MURUNGA Vs NILESTAR HOLDINGS LIMITED & ANOTHER NBI ELC SUIT No. 1549 of 2013,** the learned Judge concluded that the application for review was fatally defective. However, the court, nonetheless, proceeded to give due consideration to the merits of the application. I am minded to do the same, lest it be thought that the determination of this application was made on the basis of technicalities, rather than the substance thereof.

21. Of course, I am not suggesting that the striking out of applications for review, when the decrees or orders sought to be reviewed were not annexed, were wrong.

22. Secondly, I hold the view that such determinations ought not to be construed as being based on technicalities.

23. Statutory provisions and rules are provided so as to bring about orderliness. They enable both parties and also the court to know the ingredients which must be met, for the court to grant the relief sought.

24. I now move on to consider the merits of the application.

25. In the judgement in issue, I had addressed myself thus;

> **"77. In civil cases, it is not enough for a party who was laying a claim to a judgement to do so on the strength of the defendants's failure to answer to the claim.**
>
> **78. The party seeking a remedy from the court is obliged to prove his said claim. If proof is made available to the court, but the defendant fails to offer a sufficient answer to the evidence tendered, the court would grant judgement in favour of the plaintiff.**
>
> **79. On the other hand, if the plaintiff does not provide sufficient evidence to prove his case,**

then the defendant is under no obligation to offer any answer. In effect, when the plaintiff does not prove his claim, he would not be entitled to judgement just because the defendant did not respond to the claim?.

26. Having set out my understanding of the burden of proof, I later concluded thus;

"118. In the result, I find that both parties placed figures in the face of the court, but did not thereafter advance evidence to prove their respective claims?.

27. As the claim for Kshs. 959,751/- was one of the claims put forward by the plaintiff, it was one of the claims which the trial court found to have lacked evidence to prove it.

28. In effect, the trial court did give due consideration to that claim, among others, and then decided that all the claims were not proved, as the respective parties failed to advance evidence to prove their claims.

29. If, as the plaintiff now says, there was uncontroverted evidence to prove the claim for Kshs. 959,751/-, that would imply that the court erred when it concluded that no evidence was advanced to prove that claim.

30. In my understanding, when a court misconstrued either the law or facts in a case, and by so doing reached an erroneous decision, that cannot be the basis for a review of the decision. A wrong conclusion is a good ground for an appeal.

31. Otherwise, if the trial court were to re-visit its own decision and then remedy the wrong conclusion previously made, that would be tantamount to the court sitting on an appeal over its own decision. Such action is neither contemplated nor permissible in law.

32. In the result, I find no merits in the application for review. It is therefore dismissed, with costs to the defendant.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **25th day** of **January** 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Mutuku for Nzavi for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk.