REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 69 OF 2014

PATRICK MIANO……..…….……...…. APPELLANT

VERSUS

MATHIRA COFFEE FARMERS HOUSING

COOPERATIVE SOCIETY LTD…...……...…..…...RESPONDENT

(Appeal from the ruling and order dated 3rd February, 2015 in Karatina Principal Magistrate's Court Civil Case No. 111 of 2007 (Hon. S. Mwayuli, Resident Magistrate)

BETWEEN

MATHIRA COFFEE FARMERS HOUSING

COOPERATIVE SOCIETY LTD…….....…..….....PLAINTIFF

VERSUS

PATRICK MIANO……...…. DEFENDANT

JUDGMENT

On 27th November, 2007, the respondent sued the appellant in the magistrates' court for a sum of Kshs 51,000.00 which was stated in the respondent's plaint to have been the outstanding rent in arrears owed to the respondent and due from the appellant. The basis of the respondent's suit against the appellant was that the latter had been its tenant in the respondent's business premises referred to as LR Karatina Municipality Block II/121. The appellant paid a monthly rent of Kshs 1,500.00; between the months of January, 2000 and October 2002 when he apparently vacated the premises, he defaulted in payment of rent and the sum claimed was the total amount accrued as at that date.

The appellant denied the claim and filed a statement of defence to that effect; the statement of defence had only four paragraphs the first of which admitted the description of the parties in the plaint and provided the address of service of the court process in respect of the claim against him. The last paragraph admitted the jurisdiction of the court while the rest of the two paragraphs constituted denial of liability; they were expressed in the following terms:

> ***2. The defendant while admitting that he was a tenant of the plaintiff avers that the tenancy was terminated in 1999 hence he was not a tenant for the period 2000 to 2002 as pleaded and puts the defendant to strict proof thereof.***

3. The defendant specifically denies liability to pay the Ksh. 51,000 as pleaded in paragraph 5 of the plaint or any other sum or at all and puts the plaintiff to strict proof thereof.

The case proceeded for hearing and the respondent's representative testified and produced evidence in proof of its claim. The record shows that he was cross-examined by counsel for the appellant. The appellant did not testify and therefore there was no evidence from his side.

In its judgment delivered on 26th of June 2009, the subordinate court found for the respondent and entered judgment in its favour for the sum claimed.

By a motion dated 4th August, 2014, filed in court under **Order 45 Rule1** of the **Civil Procedure Rules,** amongst other provisions, the appellant sought to have the judgment and the subsequent decree reviewed and set aside. In the same prayer, he sought to have the suit which gave rise to this judgment struck out allegedly because the trial court did not have jurisdiction to determine the respondent's claim against the appellant.

The application was dismissed by the court in its ruling delivered on 17th September, 2014. It is this ruling and order that the appellant has appealed against. The appellant listed five grounds in his memorandum of appeal all which, in my own assessment, revolve around the question of jurisdiction. It is the appellant's view that the subordinate court lacked the requisite jurisdiction to determine the dispute between him and the respondent and that the appropriate forum in which the dispute ought to have been resolved was the Co-operative Tribunal which has been established for this purpose under **section 76** of the Co-operative Societies Act.

The appellant followed this argument through in the submissions filed on his behalf by his counsel. According to him, he was either a current or a past member of the respondent society and the dispute between them was, in the words of **section 76(1)** of Co-operative Societies Act, a claim for a debt or demand due to the society from a member or past member. That being the case, the dispute concerned the business of a co-operative society which could only be adjudicated upon by the Co-operative Tribunal. To support this submission, counsel for the appellant relied on the High Court decision in **Adero & Another versus Ulinzi Sacco Society Ltd (2002) 1KLR 577.**

Incidentally, the respondent's counsel relied on the same decision for the proposition that a Co-operative Tribunal can only deal with the disputes on debts between the society and its current or past members. The claim against the appellant, so counsel submitted, was not such debt as contemplated under **section 76** of the Act, but was rent arrears arising out of a purely landlord-tenant relationship. In any event, the appellant did not provide any evidence to prove that he was either member or past member of the respondent society.

I have had the opportunity to consider this decision which, being a decision of a court of coordinate jurisdiction, is of persuasive value only. In that case Ringera, J., as he then was, held that since the dispute between the parties was a dispute between a registered cooperative society and its members, it ought not to have been filed in the High Court but rather in Co-operative Tribunal in accordance with **section 76** of the Co-operative Societies Act. There is no doubt that this is the correct position in law but before coming to this position the court had established as a fact and indeed it was common ground between the parties in that case that the plaintiffs were members of the defendant society. As a matter of fact, the only reason why the plaintiffs filed the suit in the High Court was not because they were not aware that the dispute ought not to have been filed before the Co-operative Tribunal but it was because the tribunal had not been constituted. They were however, overruled and the court held that;

"…jurisdiction either exists or does not ab initio and that non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacks jurisdiction." (See page 579).

While I entirely agree with the decision of the learned judge, I find that it is of little assistance to the appellant for two reasons; first, as earlier noted, the appellant did not testify and therefore no evidence

whatsoever was laid before the court for proof of the fact that the appellant was either a member or a past member of the respondent society. Second, even if the appellant was to prove his current or past membership of the respondent society, the dispute between them did not arise out of such membership; it was purely a tenancy dispute between a landlord and a tenant. The appellant admitted as much in his own pleadings and, at the very least, he was bound by those pleadings. In these circumstances, there was absolutely no basis for the appellant to invoke **section 76** of the **Co-operative Societies Act** for the argument that the Co-operative Tribunal, and not the subordinate court, was seized of the jurisdiction to preside over and resolve the dispute between him and the respondent society.

Besides lack of merits, an interrogation of Order **45** of the **Civil Procedure Rules,** the primary provision in an application for review which the applicant invoked in his application would show that the application was obviously misconceived. This rule provides as follows: -

> ***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.***

I understand this rule to say that the conditions or the grounds upon which an application for review may be made are:-

> a) A discovery of a new and important matter of evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the material time; or
>
> b) there is a mistake or error apparent on the face of the record; or
>
> c) for any other sufficient reason.

Ordinarily, any of these three grounds is sufficient to launch an application for review by any person who considers himself aggrieved by a decree or order; however, regardless of which of the three grounds it is based upon, the application must be made without undue delay.

The judgment which the applicant sought to review was delivered on 26th of June 2009 but it was not until the August, 2014, more than five years later, that the appellant made an application for review. I was anxious to know why it took the appellant such a long time to file the application but as far as I can gather from the record, no reason was given for the delay. A delay of five years was, by any stretch of imagination, inordinate and unreasonable. The absence of any sort of explanation for the delay did not help matters. On this ground alone the application was bound to fail.

More importantly, the ground of lack of jurisdiction by the subordinate court is not reflective of any of the grounds prescribed by **order 45** of the rules. To be specific, the question of jurisdiction which could have appropriately been raised and determined as a preliminary issue in the substantive suit cannot be said to be a discovery of a new and important matter of evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be urged by the applicant at the material time; indeed, the question of jurisdiction is not a question of evidence but rather a question of law. This same issue of jurisdiction would not fit what would amount to a mistake or error apparent on the face of record.

Even if the appellant's argument that the trial court lacked jurisdiction was to be accepted as plausible and

therefore it either misapprehended the law or misdirected itself in that regard when it proceeded to hear and determine the dispute before it, that cannot be a ground for review. As always, a difference of opinion on the interpretation of the law or a legal principle cannot be a ground for review. I have previously stated elsewhere **(HCCC No. 12 of 2014(Nyeri) Ecobank Ltd versus David Njoroge Njogu and Ann Wanjiru Njogu)** that where a party aggrieved by an order or a decree is of the conviction that the order or the decree was based on a misapprehension of the law, the correct course would be to appeal against that decree or order rather than file a review application which, in my humble view, puts the judge or the magistrate who made it in a somewhat awkward position of explaining or defending the order or the decree.

In **Abasi Balinda versus Fredrick Kangwamu & Another (1963) E.A 558** a court was asked to review its order on costs on the ground that the court is said to have taken an erroneous view of the evidence and of the law relating to the question of whether a returning officer was a necessary party to an election petition. The court (Bennet, J.) appreciated that **section 83** of the Uganda Civil Procedure Ordinance (equivalent to **section 80** of our **Civil Procedure Act**) conferred upon the court jurisdiction to review its own decisions in certain circumstances and **order 42** (which is equivalent to **order 45** of our **Civil Procedure Rules**) prescribed the conditions subject to which and the manner in which the jurisdiction should be exercised. In interpreting that jurisdiction and in the process dismissing the applicant's application, the court cited with approval a passage from **Commentaries on the Code of Civil Procedure by Chitaley & Rao (4th Edition), Vol. 3 page 3227,** where the learned authors explained the distinction between a review and an appeal and had this to say;

> ***"a point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or law is no ground for review though it may be a good ground for an appeal"***

Again, our own Court of Appeal explained this much better in **National Bank of Kenya Ltd versus Njau (1995-1998) 2EA 249 (CAK)**; at page 253 of the judgment, the Court said: -

> ***"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. <u>It will not be a sufficient ground for review that another judge could have taken a different view of the matter.</u> <u>Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review</u>." (Underlining mine)***

It is clear from these decisions that a court may correct its own error which is apparent on the face of the record; usurping of jurisdiction, assuming the appellant was right, is not such an error. It does not also matter that any other magistrate would have not heard the matter for want of jurisdiction. It is trite that being mistaken on correct interpretation of the law is not a ground for review.

Although the learned magistrate did not interrogate whether the appellant's application met the threshold of an application for review under order 45 of the Civil Procedure Rules, I agree with her that the application was bound to fail. In the ultimate I hold that the appellant's appeal is not merited and it is hereby dismissed with costs.

Signed, dated and delivered in open court on 28th July, 2017

Ngaah Jairus

<u>JUDGE</u>