REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HIGH COURT CIVIL APPEAL 81 OF 2016

(1) HASHIM JAF

(2) LIMITLESS DESIGNS LIMITED

(3) HASSAN NOOR MAALIM

(4) DEEPA ENTERPRISES LIMITED

(5) ABDULKARIM ABDULLAHI

(6) AM & AM'S LIMITED

(7) SADRUS CAFE.....APPELLANTS

VERSUS

(1) NAIROBI HOMES (MOMBASA) LIMITED

(2) T.S.S. INVESTMENTS LIMITED.....RESPONDENTS

R U L I N G

"It will not be sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law…..if he had reached a wrong conclusion of the law, it could be a good ground for appeal but not for review".

Outline

[1] The court has before it an application by the defendant dated 18/7/2016 and seeking that the court reviews its orders issued on 11/7/2016 and to direct that the preliminary objection be heard first.

[2] The application is grounded on 4 grounds but I consider ground 2 to be the gravamen. That grounds is worded thus:-

> **"2: The said orders indicate a manifest mistake and error apparent on the face of the record because:-**
>
> **(a) As at the date of making the order, the Respondent had filed and served a Notice of**

Preliminary Objection dated 4/7/2016 questioning the jurisdiction of the court to hear and determine the matter.

(b) The court is always bound to decide the jurisdictional issues as a preliminary point before making any other step. If the court had found that it had jurisdiction, it could have heard the matter. If it had found that it lacks Jurisdiction, it cannot have jurisdiction to transfer a nullity.

(c) ……..

(d) ……..

[3] This file was before the court on 11/7/2006 when Mr. Nyongesa appeared for the plaintiff/applicant while Mr. Mohammed held brief for Mr. Kongere for the defendant/respondent.

[4] When the matter was called out Mr. Mohammed addressed the court and informed the court that Mr. Kongere had file a preliminary objection to the suit and was ready to urge the prelimary objection. Mr. Kongere was however at that time engaged before Emukule J and requested for time allocation.

[5] Mr. Nyongesa, on his side did not oppose the request for time allocation but equally pointed out that the matter could as well be placed before the Environment and Land court as the objection was on jurisdiction of the court. The court then rendered itself as follows:-

"Due to the workload, this matter cannot be heard today. However, as Mr. Nyongesa is not opposed to this matter being heard by the E&L Court, it is by consent directed that it be transferred to that court for hearing and disposal. E.O extended".

This is the order the defendant now wants reviewed on the grounds disclosed as quoted above.

[6] In my understanding the application faults the court for transferring a matter the defendant considers a nullity. That to the court means that the court did not appreciate that a matter filed before a court without jurisdiction is a nullity in law. If that be the line of attack then it is a very ground for an appeal but never for review.

[7] The Civil Procedure Act and the Rules made there under grant the court discretion to grant orders of review but such can only be exercise within the confines permitted by the law. Granted that the applicant says that there is an apparent error on the face of the record, such an error is not every error. It must be an error of fact not one of law. I did listen to the applicant submit and cite to court the decided case in this sphere of the law.

[8] No attempt was made to demonstrate the error of fact but the attempt made was that the court was wrong in its appreciation that it had no jurisdiction to transfer a matter filed before a court allegedly bereft of jurisdiction. The result to this court is that the application does not satisfy the bill for one for review.

[9] I have anxiously wondered what the ultimate aim of the application is and whether it would be billed intended to meet the just, timely and proportionate determination of the dispute between the parties.

[10] Before I conclude, it is important to highlight the gist of the so called Preliminary Objection. The objection filed before the court was to the effect that:-

"The Honourable court is denied jurisdiction to entainthe application by Articles 162 (2) 6, 162 (3) and 165 (5) of the constitution of Kenya and section 15(1) 4 of the Landlord and Tenant, Shops Hotels and Catering Establishments Act Cap 301".

[11] The objection was simply saying that the appeal ought not to have been filed in this court but at the Environment and Land Court.

[12] The law as I understand it is that the moment a court of law Discerns that it lacks jurisdiction it downs its tools. On the 11/7/2016 this court ordered that the file goes to the Environment and Land Court which is not presided by the judge who made the order. In effect that judge declined the power to deal with the file and upon that order being effected, it ceased to be siezed of the matter. One wonder if the court did not accede to the Respondents contention that it is the Environment and Land Court and not his court which should entertain the matter.

[13] In the context of the circumstances now prevailing, the file having been directed to go before the Environment and Land Court, what would be the fears or interests of justice for the Respondent that must be redressed by an application before the court that has declined jurisdiction rather than the Environment and Land Court.

[14] In his submissions, Mr Kongere was tacit that the appeal was a nullity and could not be transferred. What he did not come out to say was that the court ought to have said that it lacked jurisdiction and struck out the appeal.

[15] My reading of the decisions on the subject of jurisdiction and what a court is bond to do should it find that it has no jurisdiction is that court downs its tools. To this court downing the tools is not synonymous with striking out. If that was the desire of the Respondent that the appeal be struck then I take the view that it is a view that would ran counter the spirit of the constitution that lays emphasis on substantive rather than mechanical disposal of legal disputes. In my view no substantial justice would have been served by such an order other than escalate costs and pile up unnecessary additional work for the court as an institution. That to this court would be an *autithesis to* the purpose of the court as envisioned under **article 159**; ***'to administer justice by protecting and promotion the purposes and principles of the constitution'***.

[16] With regard to the administration of justice, principle of the constitution is that legal disputes must be determined in a timely manner, costs of litigation must be kept reasonable in order to enhance access to justice and a determination by courts must be kept proportionate. I hold the view that to strike out the appeal on the basis of the objection would not determine the dispute between the parties. It would leave the dispute live and maybe raw and escalated in that if time to lodge an appeal shall have lapsed, the Appellant would be entitled to make an application for leave to appeal out of time before filing an appeal.

[17] Such would be undertaken at extra costs to the litigants and at grave and underserved employment of judicial time in handling two additional cases rather than one already in court. To me that would be most undesirable and a pedantic lens with which to look at the purpose of justice. I think judicial time has been wasted in handling this application so far and good counsel would have avoided the waste.

[18] Ultimately I find the application dated the 15/7/2016 to be lacking on merits and I dismiss it with costs.

[19] I reiterate that this file needs to be transferred to the Environment and Land Court forthwith and in any event within 48 hours of the delivery of this ruling.

Dated, signed and delivered at Mombasa this 30th day of September 2016.

P.J.O. OTIENO

JUDGE