



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE

WINDING UP CASE NO. 1 OF 2011

AFRICA OIL TURKANA COMPANY. LIMITED ..1ST PETITIONER

AFRICA OIL KENYABV.....2ND PETITIONER

AFRICA OIL CORPORATION 3RD PETITIONER

VERSUS

INTESTATE PEETROLEM COMPANY LIMITED ..RESPONDENT

AND

MAOSA KENGARA MONEMA1ST CONTRIBUTOR

ERICK PATRICK ADERO OBAT 2ND CONTRIBUTOR

MOSES ONYANGO OBOYO3RD CONTRIBUTOR

LUCY MUTHONI GATIMU4TH CONTRIBUTOR

EDWARD KINGS ONYANCHA MAINA5TH CONTRIBUTOR

R U L I N G

On 24/3/2016 my brother Justice Githinji allowed an application dated 1/10/2015 by the supporting creditor. The applicant (the 5th contributor) has applied to have the same set aside and or reviewed. He further argued that there were errors apparent on the face of record and that the orders granted were discriminatory. That application dated 30/5/2016 is supported by his affidavit sworn on the same day.

The same has been opposed by the respondents vide the grounds of opposition dated 26/9/16 and 22/8/2016 respectively.

Both respondents argue that the application is frivolous and vexatious and that there is no error apparent on the face of record which this court can deem important and therefore interfere with the impugne decision.

Section 80 of the Civil procedure Act which the applicant has premise his application among other sections of the law provides as follows;

“Any person who consider himself aggrieved -

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(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.”

The above quotation presupposes that no appeal has been preferred against the decree or order. In other words the applicant cannot apply for review yet at the same time prefer an appeal.

In the instant matter it appears that when the ruling was declined the applicant was dissatisfied and he filed a Notice of Appeal dated 24/March 2016.

The parties apparently, including the applicant did not allude to this during the hearing of the application. It follows therefore that the applicant desired to challenge the entire decision at the Court of Appeal. That is a constitutional right.

However he cannot on the same breath apply for setting aside, nullifying or reviewing the said ruling when he has chosen the appeal path. The framers of the rules expected that a party ought to make one definite choice, either appeal or review. In this case the applicant chose to appeal, in fact on the same day. He cannot be allowed the luxury of review.

Consequently and without wasting much judicial time on other issue raised by the parties and given my above observation I do dismiss the application with costs to the respondent.

Delivered this 25th day of October 2016.

H.K. CHEMITEI

JUDGE

In the presence of;

Ayisi for Petitioner/Respondent

and holding brief for Achok for the Defendant

Kirong – Court Assistant