REPUBLIC OF KENYA

IN THE HIGH COURTOF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 95 OF 2013

BETWEEN

ERASTUS MAINA MURAYA.....APPELLANT

VERSUS

KIPLEGE ZOCHIN KHURE.....RESPONDENT

(Being an appeal from the judgment and decree of R. Nyakundi,

CM prepared on 10th January, 2012 and read by J.K. Ngeno, CM

on 1st February, 2012 in Kakamega CMCC No. 94 of 2007)

R U L I N G

The Application

1. By the Notice of Motion dated 23.04.2016 and brought under Sections 3 and 3A of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and all enabling provisions of the law, the appellant/applicant(hereafter referred to as the applicant) seeks orders;-

a. THAT this honourable court be pleased to review its judgment delivered on 29.2.2016

b. THAT cost of this application be provided for.

2. The application is premised on grounds that there is an error apparent on the face of the record; that the honourable court did not conclusively determine the issues raised in the appeal; that the Honourable court did not consider the applicant's cross –appeal and finally, that the application for review is the only remedy available to the applicant. The application is also supported by the sworn affidavit of Susy Ekesa Rauto filed together with the application. It is to be noted that the deponent's affidavit is not dated. The main grounds raised in the supporting affidavit are that this honourable court's Judgment delivered on 29.02.2016 did not consider and make a finding on the applicant's cross appeal and secondly that unless the said judgment is reviewed, the applicant's cross-appeal stands undetermined with no chance of being heard again. The deponent opines that this honourable court is mandated by law to review its own Judgment. The applicant is represented by the firm of M/S Rauto & CO. Advocates.

Response to the Application

3. The 1st Respondent, who is represented by M/s P.K. Kamau & CO. Advocates filed Grounds of Opposition dated 16.6.2016 to the effect;-

1. THAT the application is misconceived in as far as it seeks to have this court sit on its own appeal.

2. THAT an error apparent on the face of the record should be such a one that is so trivial that the court can correct suo motto

3. THAT what the applicant seeks is to have the court go back on its own proceedings to "conclusively determine the issues raised in the Appeal" and "to consider the applicant's cross-appeal"

4. THAT what this Honourable Court is being asked to do is not to correct an error on the face of the record; it is to sit afresh and correct its own alleged errors that go to the rest of its own judgment.

Submissions

4. The application proceeded by way of written submissions. The applicant's submissions are dated 25.7.2016 but filed on 27.07.2016. The applicant relies on the finding of the Court of Appeal in **National Bank of Kenya Ltd – vs – Ndung'u Njau** being **Nairobi C.A Civil Appeal No. 211 of 1996**. **(Kwach, Akiwumi & Pall JJA**) as applied in **Edward Kings Onyancha Maina T/A Matra International Associates – vs – China Jiangsu International Economic Techinical Co-operation Corporation [2001] eKLR** at page 3 thereof where the court, inter alia, stated that "……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."[Emphasis is mine.]

5. The respondent's submissions are dated 13.09.2016 and filed in court on the same day. Relying on the **National Bank of Kenya** case (above), the respondent submitted that the instant application does not establish that there is an error apparent on the face of the record to warrant the issuance of the orders sought, and urged the court to dismiss the application with costs. Reliance was also placed on the case of **Evans Omari Siang'o – vrs – Nation Media Group Limited [2011]eKRL – Kisii Civil Appeal No. 135 of 2008.** The respondent also relied on the case **of Martha Wambui – Vrs – Irene wanjiru Mwangi & another [2015] eKLR Nairobi High Court Civil Appeal No. 286 of 2014** to push its argument that the applicant's application has no merit.

The law

6. The applicable rule in this case in Order 45 Rule 1 of the CPR which provides that

"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 reasons, 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. [Emphasis is mine]

2 A party who is not appealing from a decree or order may apply for a review of judgment

notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when, being respondent, he can present to the appellate court the case on which he applies for the review."

Analysis and Determination

7. After carefully considering the application as filed, the grounds upon which it is premised, the grounds in opposition, case law and the provision of Order 45 Rule 1 of the CPR, the only issue that arises for determination is whether in light of all the above the applicant has satisfied the conditions set out under Order 45 Rule 1 of the CPR. In other words, has the applicant demonstrated to this court that;-

i. There is discovery of new and important matter or evidence.

ii. Such matter or evidence could not be produced by him at the time when the appeal was heard or when the decree or order was passed inspite of the exercise of due diligence;

iii. There is some mistake or error apparent on the face of the record

iv. There is some other sufficient reason to support the prayers sought?

8. In my considered view, the applicant has not met the threshold of the above stated requirements. First and foremost, the grounds in support of the application speak for themselves. Grounds (b) and (c) thereof are of special mention. The applicant wants this court to review its judgment delivered on 29.02.2016 because "The Honourable Court did not consider the Applicant's cross Appeal."

9. Clearly these two grounds are not covered by Order 45 Rule 1 of the Civil Procedure Rules. In the **National Bank of Kenya Ltd Case** (above), an authority cited by both parties in this application, the Court of Appeal defined what an error apparent on the face of the record is by stating, inter alia, that "…….The error or omission must be self-evident and should not require an elaborate argument to be established. 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 the law. Misconstruing a statute or other provision of law cannot be a ground for review."

10. In the instant case, the applicant does not infact raise the issue of error apparent on the face of the record, nor does he even attempt to adduce evidence to the effect that there is discovery of new and important matter or evidence that has come to light after delivery of this court's judgment on 29.02.2016. It is also not clear from the applicant's submissions that there is any other sufficient cause that would move this court to grant the orders sought. What the applicant is asking this court to do is to rehear at the appeal conclusively. That means that this court must revisit the arguments made by parties on both the appeal and the cross-appeal and thereafter write another conclusive judgment. I am afraid, that what the applicant is asking this court to do is a matter for the Court of Appeal, and if I were to grant the orders sought, I would be sitting on appeal on my own judgment. This court is clearly functus officio on such a matter.

11. It is my further considered view and in light of the plethora of case law on the subject of review, it is only a higher court that can make pronouncements on the issues raised by the applicant herein. This court cannot venture into those issues without appearing to sit on appeal on its own decision. The attack on this court's judgment and whether or not the attack is justified is a matter for the Court of Appeal.

12. It was stated by the Court of Appeal in **Pancras T. Swai- vrs – Kenya Breweries Ltd [2004]eKLR**, an authority cited by the respondent in its submissions, that " A point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal. ……. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions

that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio”

13. I entirely agree with the Court of Appeal (**GBM Kariuki, Kiage and J. Mohammed JJA)**

Conclusion

14. In light of the above findings, I can do no more than to make a finding that the Notice of Motion dated 23.04.2016 is devoid of any merit. I accordingly dismiss it with costs to the respondent

Orders accordingly

Ruling delivered, dated and signed in open court at Kakamega this 13th day of October 2016

RUTH N. SITATI

JUDGE

In the presence of

……Mr. Anziya holding brief for Rauto……..Applicant

……Mr. Nyikuli for P.K. Kawai (present)……Respondent

……Mr. Okoiti……Court Assistant.