REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO 660 OF 2012

SAMSON KISOMO PIUS

(T/A SAM MAMI SUPERMARKET)….....APPELLANT

VERSUS

RAMESH CHANDRA N SHAH.……..……...…..…..RESPONDENT

R U L I N G

1. The Appellant has applied by **notice of motion dated 28th January 2013** brought under **Order 45, rule 1** of the **Civil Procedure Rules, 2010** (the **Rules**) seeking the main order of review and setting aside of the **order made herein on 20th December 2012** (Ang'awa, J). **Section 3A** of the **Civil Procedure Act, Cap 21** has also been invoked. By the said order the court, following a preliminary objection by the Respondent, struck out the Appellant's appeal herein upon the ground that the same was incompetent and not properly before the court. The specific point of law raised in the preliminary objection was that the Court lacked jurisdiction to entertain an appeal from a decision of the ***Business Premises Rent Tribunal*** (the **Tribunal**) emanating from a complaint.

2. The main grounds for the application appearing on the face thereof are –

(i) That the decision to strike out the appeal did not take into account the provisions of the ***Constitution*** which outlaws decisions based on technicalities.

(ii) That the learned Judge had no jurisdiction to strike out the appeal as what was before her was an application for stay of execution.

(iii) That the Appellant has since "discovered" that under the provisions of the ***Constitution*** he has a right of appeal against the decision of the Tribunal.

The application is supported by the affidavit of the Appellant sworn on 28th January 2013.

3. The Respondent has opposed the application by his **replying affidavit sworn on 4th and filed on 5th February 2013**. Grounds of opposition emerging therefrom include –

(i) That the application is fatally defective and incompetent in that the order sought to be reviewed has not been extracted or attached to the application.

(ii) That the Appellant has not satisfied the legal requirements for review, and that therefore the application has no merit.

4. By his order of 20th February 2013 the ***Chief Justice*** directed that the application be heard by the present bench of two judges. We heard arguments on 28th May 2014. We have considered the submissions of the learned counsels appearing, including the one case cited.

5. ***Mr. Mutemi***, learned counsel for the Appellant, in his submissions relied on the grounds for the application on the face thereof and the supporting affidavit. He added, tellingly, that Ang'awa, J **erred in law** by entertaining the preliminary objection that led to the order striking out the appeal when the matter before the learned judge was the Appellant's application for stay of execution. The Appellant was thus ambushed, though Mr Mutemi quickly added that he had been accorded sufficient time to prepare his answer to the preliminary objection. He submitted further that a preliminary objection on jurisdiction of the court must in any event be raised by way of formal application. He sought to rely on the case of ***Mukhisa Biscuit*** **Manufacturers Ltd –vs- West End Distributors Ltd [1969] E.A. 696.**

6. It was Mr Mutemi's further submission that the appeal raised serious constitutional issues and should have been allowed to be heard on its merits instead of striking it out prematurely on, in his words, "flimsy technicalities". While conceding, again tellingly, that the arguments that he was now making before us **could have been made before Ang'awa, J** he nevertheless submitted that there was a new and important matter which he put as ***"disregard of the Constitution of Kenya, 2010"***. That "disregard" in his view was Ang'awa, J's failure to exercise the supervisory jurisdiction of the High Court over lower courts and tribunals, which the Judge would have done in the present case by hearing the appeal on merit.

7. Mr Odawa, learned counsel for the Respondent, in reply submitted that no new and important matter or evidence has been disclosed in the application. He noted that a notice of preliminary objection had been filed and served together with a list and bundle of authorities. It was that preliminary objection that Ang'awa, J dealt with and struck out the appeal. The Appellant was thus not ambushed. He further submitted that the preliminary objection was on a pure point of law, that is, jurisdiction, which could be raised at any time and did not require a formal application. Mr Odawa then embarked on argument on the legal merits of the decision of Ang'awa, J to strike out the appeal, arguing that the learned Judge was correct in law. As will appear below, that argument was misplaced. We cannot in the application before us concern ourselves with the legal question whether or not Ang'awa, J erred in law in striking out the appeal.

8. Mr. Odawa also submitted that instead of applying for review the Appellant should have sought judicial review because the issue before Ang'awa, J was not a constitutional matter on whether or not certain parts of the ***Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap 301*** were unconstitutional for barring the right of appeal.

9. We must at the outset reject the argument that the application before us is incompetent because a copy of the formal order sought to be reviewed has not been annexed to the application. That is a mere technicality that is no longer tenable in our new constitutional dispensation (**Article 159(2) (d)** of the **Constitution of Kenya, 2010**), not to mention **sections 1A** and **1B** of the Act. We have the original court record before us which contains the original order sought to be reviewed. In any case there is no dispute regarding the contents of the order itself.

10. We must also at the outset set out the limits of our jurisdiction in review in the application before us. That jurisdiction is no greater than Ang'awa, J would have were the learned Judge hearing the present application herself. All three of us are Judges of the High Court with co-ordinate jurisdiction. We are not sitting, and cannot sit, in appeal over the decision of Ang'awa, J. We simply do not have that jurisdiction and thus cannot correct any alleged errors of law committed by the learned Judge. That is a function of the ***Court of Appeal***.

11. Our jurisdiction in review is conferred by Order 45, rule 1(1) of the Rules under which the application has been brought. The said 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."**

12. The Appellant must thus satisfy any of the following in order to succeed in the present application -

(i) that he has discovered a 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 preliminary objection was canvassed before Ang'awa, J; or

(ii) that there is some mistake or error apparent on the face of the record; or

(iii) that there is some other sufficient reason for the review sought.

13. Let us recall the three main grounds for the application appearing on the face thereof. They are –

(i) That the decision to strike out the appeal did not take into account the provisions of the ***Constitution*** which outlaws decisions based on technicalities.

(ii) That the learned Judge had no jurisdiction to strike out the appeal as what was before her was an application for stay of execution.

(iii) That the Appellant has since "discovered" that under the provisions of the ***Constitution*** he has a right of appeal against the decision of the Tribunal.

14. As for the first two grounds, they allege **errors of law** on the part of Ang'awa, J. Those alleged errors of law are that the learned Judge did not take into account the constitutional edict that justice shall be administered without undue regard to procedural technicalities (Article 159(2) (d) of the ***Constitution***) and that in any event the Judge exercised a jurisdiction she did not have as what was before her was an application for stay of execution and not an application to strike out the appeal.

15. As we have already stated, we have no jurisdiction to correct Ang'awa J's alleged errors of law. That is a function of the ***Court of Appeal***. But we may nevertheless observe that it is trite that preliminary objections on points of law can be raised at any time and informally in the course of proceedings; and if such challenge involves an issue of jurisdiction of the court to deal with matter before it, the court must resolve that issue first without taking any further step in the matter. It is not correct, as urged by learned counsel for the Appellant, that a formal application must be lodged in order to properly raise an issue of jurisdiction.

16. A notice of preliminary objection is a proper and accepted way of raising such issue, primarily in order to give notice to the other side so that they are not ambushed and can prepare to meet the challenge. That was what happened in the present case. But even without notice a preliminary objection can be raised by counsel or party on his feet, or even by the court itself *suo moto*. The opposite advocate or party can then seek time in order to prepare to argue the point. The case of ***Mukhisa Biscuit Manufacturers Ltd –vs- West End Distributors Ltd*** relied upon by the Appellant does not support his case; it actually supports the Respondent's case.

17. The third ground for the application is that the Appellant has since discovered that under the provisions of the ***Constitution*** he has a right of appeal against the decision of the Tribunal. We must here again caution that we are not dealing with the **legal** merits whether or not Ang'awa, J was correct in law in striking out the appeal. We simply do not have that jurisdiction. But we must point out that ignorance of the law (because that is what "discovered" here represents) is not in law a defence.

18. We must also observe that the notice of preliminary objection by the Respondent to challenge the jurisdiction of the Court to hear the Appellant's appeal was filed on 11th December 2012; the Court heard the preliminary objection on 17th December 2012; it then struck out the appeal on 20th December 2012. That therefore means that when the preliminary objection was raised, canvassed and decided the ***Constitution of Kenya, 2010*** was already in place (having been promulgated on 27th August 2010). So, what is alleged to have been "discovered" subsequently was already there and could have been laid before Ang'awa, J when the issue of competency of the appeal was argued.

19. The Appellant prepared for and responded to the preliminary objection when it was raised. He did not raise the grounds that he now seeks to rely on. As provided in the law, the new grounds that can be relied on to justify an order of review must be on matters of evidence. What the Appellant is relying on in the present application are matters of law and not matters of evidence. Review does not afford him a chance to advance grounds he could have brought forth but failed to when the preliminary objection was canvassed. As was held in ***Pancras T Swai –v- Kenya Breweries Limited, Civil Appeal 275 of 2010 [2014] eKLR*** -

> **"The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45...) relate to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to."**

20. We do not find that there has been discovery of any new or important matter or evidence which could not, after due diligence, have been placed before Ang'awa, J. We also do not find any mistake or error apparent on the face of the record, or any other sufficient reason, to entitle us to review the order of 20th December 2012 by which the appeal was struck out. It is quite clear to us that what the Appellant is urging in this application is that Ang'awa, J erred **in law** in striking out the appeal. We have no jurisdiction to interfere with the learned Judge's legal decision.

21. In the event we must refuse the application by notice of motion dated 28th January 2013. It is dismissed with costs to the Respondent. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF AUGUST 2014

H P G WAWERU

JUDGE

L A ACHODE

JUDGE

DELIVERED AT NAIROBI THIS 13TH DAY OF AUGUST 2014