



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 34 of 2010

DAVID K. TALLAM

.....**APPLICANT**

VERSUS

**MOSES OMOIT DOKORIA
CHRIS HARRY EGOLET T/A ROCK PETROLEUM
DISTRIBUTORS.....RESPONDENTS**

RULING:

The application is made by way of Notice of Motion and is brought under the provisions of Order 45 Rules (1) and (5) of the Civil Procedure Rules and Sections 80, 63, 1A and 1B of the Civil Procedure Act and all enabling provisions of law.

The Applicant seeks to review the Judgment entered on the 3rd August, 2012. The Applicant relies on the grounds on the face of the application and the Supporting Affidavit made on the 7th August 2012 by **DAVID TALLAM**, the Applicant herein.

The Applicant contends that in its Judgment, this court considered the ruling in the Application dated the 26th October, 2009 which gave rise to the ruling dated the 3rd December, 2009. Where the Appellant had preferred an appeal against the ruling dated the 11th March, 2010 which arose from the application dated the 22nd January, 2010.

The Applicant avers that there was clearly an error/mistake on the face of the Record and urged this court to review its Judgment. The Applicant averred that the application was made in utmost good faith and the Respondents would suffer no prejudice.

The Applicant had not annexed a copy of the Judgment to the application but relied on the case of **JULIA WAGACHA NJUNGE & ANOTHER -VS- HFCK AND ANOTHER (2005)**.

The Application was opposed by Counsel for the Respondents who relied on the Grounds of opposition dated the 31st August, 2012.

Counsel argued that the application was incompetent and bad in law, because Order 45 Rule (1) (a) only provides for review of a decree or an order of court. Counsel further submitted that the aforesaid Order made no provisions for the reviewing of a Judgment and that the Applicant ought to proceed by way of an Appeal.

Counsel submitted that the order or decree sought to be reviewed ought to have been annexed to the application.

By failing to extract and annex the Order or decree, the application was deemed to be incompetent. The case of **FIDELITY COMMERCIAL BANK** was cited by Counsel in support of this submission.

Counsel further submitted that the error must be apparent on the face of the record and no elaborate explanation was required.

The Applicant urged the court to find the Applicant incompetent and that it be dismissed with costs.

After hearing the submissions of both Counsel the court finds the following issues for determination.

- a) Review of a decree/order
- b) Review of a Judgment
- c) Costs.

The Applicant was aggrieved by the Judgment of this Honourable Court delivered on the 3rd August, 2012 and seeks to have the said Judgment reviewed together with costs.

The provisions of Order 45 Rule (1) and (2) reads 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.

(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.

The above rule clearly states that a decree or order must have been passed or made and this court concurs with the submissions of Counsel for the Respondent that it is a prerequisite that the Order/Decree be extracted and annexed to the application for review. Reference was made to the Court of Appeal case of **G. M JIVANJI -VS- M. JIVANJI & ANOTHER (1930) 12 KLR 44** where it was held that failure to extract a formal decree was fatal to the application for review.

Counsel for the Applicant referred to persuasive authorities on this issue, whereas Counsel for the Respondent referred to the above Court of Appeal decision which is binding to this court.

A decree of a court is derived from a judgment. If the resultant decree has errors apparent on the face of it, which could be typographical in nature or a wrongly drawn or drafted decree, and if that decree causes legitimate grievances then a court may review the decree. This court is of the opinion that such a decree or court order may be subjected to review.

On the second issue, a court may fail to consider issues and the Judgment may be erroneous or the

court may arrive at a wrong conclusion. The position taken by the court however incorrect cannot be a ground for review but may be a good ground for appeal.

This court concurs with the submission of Counsel for the Respondent. That failure by this court to consider any issue, or any relevant issue or an error of law can only be corrected on appeal and not through review.

In addition substantive omissions or substantive errors where evidence and evaluation of a Judgment is required cannot be a basis for review Refer to **NBK -VS- NDUNGU NJAI CIVIL APPEAL 211 OF 1996.**

This court finds that if the Applicant was aggrieved by the Judgment delivered by this court on the 3rd August, 2012 he ought to have filed an appeal.

For these reasons, this application is disallowed. The Respondent shall have costs. It is so ordered.

Dated and Delivered at Eldoret this 22nd day of January 2013.

A.MSHILA

JUDGE

Coram:

Before Hon. A Mshila J

CC: Oscar

Counsel for the Applicant: Nyamweya

Counsel for the Respondents: No appearance.

A.MSHILA

JUDGE