



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 166 OF 2006

KIZINGO DISTRIBUTORS [1984] LTD PLAINTIFF

V E R S U S

1. TIBBETTE & BRITTEN KENYA LTD 1ST DEFENDANT

2. KENYA BREWERIES LTD 2ND DEFENDANT

RULING

1. By a Ruling of 24th February 2012 this Court dismissed the Plaintiff's suit for want of prosecution with costs to the 1st Defendant. The 1st Defendant filed its party/party Bill of Costs and the same was taxed on 21st November 2012 with the full participation of the Plaintiff. When the 1st Defendant however proceeded to execute for those costs the process of execution provoked the Plaintiff to file the Notice of Motion dated 12th July 2013. This is the application under consideration.
2. By that Motion the Plaintiff seeks an order for review or setting aside of the Ruling of 24th February 2012 and the reinstatement of this suit.
3. Order 45 rule 1(1) of the Civil Procedure Rules 2010 under which the Motion is predicated is in the following terms-

“Any person considering herself 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.”***
4. The Plaintiff submitted that it failed to take action in this case for three years because the Court file number was changed from **HCC No. 26 of 2001** to **HCC No. 166 of 2006**. According to the Plaintiff the change of the case number was not disclosed to its Advocate. It is on that ground that

the Plaintiff argued that there was an error on the Ruling of 24th February 2012 and it is on that basis the Plaintiff seeks for the review of that Ruling. The other ground upon which the Plaintiff relies is that it should not be 'banished' unheard. The Plaintiff also stated that review should be granted because its claim was for a large sum of money which will be lost if review is not granted.

5. The main grounds of opposition by the 1st Defendant are that there are no new matters or evidence disclosed in the Plaintiff's application which were not before the Court before it delivered its Ruling on 24th February 2012. That there is no error or mistake apparent on the face of the record nor is there sufficient reason.
6. In order to appreciate what the Court considered when it delivered the Ruling of 24th February 2012 I will reproduce some portions of the Ruling hereinunder-

***“8. In the affidavit of Patrick Muthiora at paragraph 8 he depones that he was advised by his Counsel that the file has been missing since June 2008, and all efforts to trace the same were fruitless. No evidence is given of any such said efforts made by himself or by his counsel. At 10 paragraph he depones that the file was located on or about 11th October, 2011 bearing a different case number unilaterally given by the court registry without notice to the parties. As such, the Plaintiff should not be penalized for the court’s actions or mistakes.*”**

9. ***In the Replying Affidavit of Patrick Muthiora, a Director of the Plaintiff, he depones at paragraph 7 on information from his advocate on record that since the Hon. Justice Sergon left the station-***

“It has been a real hustle to secure a hearing date more so in view of the fact that counsel for the 1st Defendant usually insists on a mutually convenient date which is not easily possible ...”

That statement is, however, not supported by the record.”

7. Order 45 is the subject of various decisions of the Courts. In the case **SHAH -VS- DHARAMCHI [1981]KLR** it was stated-

“1. An application for review can succeed only if the applicant proves; an error or mistake apparent on the face of the record, discovery of new evidence or any other sufficient reason.

2. There is no strict proof of the allegations about the discovery of the new evidence or any other sufficient ground for a review.

3. ***For an application for review to succeed the evidence must only be not new but the applicant must prove that he did not have them in his possession at the time and could not have obtained it despite due diligence.”***

Also in the case **KURIA -VS- SHAH [1990]KLR** the Court held-

“The phrase “any other sufficient reason” has been held to mean other sufficient reason analogous to the discovery of new and important matter of evidence.”

8. The Plaintiff did not bring before the Court any new or important matter or evidence which was discovered after the ruling of 24th February 2012. The Plaintiff relied on the same grounds in both applications that is the one before Court and the previous one the subject of the Ruling of 24th February 2012. The grounds are that the Court file could not be found by the Plaintiff's Counsel because it had been assigned a different case number. The Plaintiff cannot use that evidence in

review. This is because it is not new evidence. Plaintiff also failed to show any error apparent on the face of the record in respect of the Ruling of 24th February 2012 as required under Order 45. The Court of Appeal considered when an error will be sufficient to grant a party a review when it stated-

“The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a 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. Misconstruing a statute or other provision of law cannot be a ground for review.”

That statement was made in the case **NATIONAL BANK OF KENYA LTD -VS- NJAU [1995-98]2 EA.**

9. In that case **NATIONAL BANK OF KENYA LTD -VS- NJAU** (Supra) the Court also stated as follows-

“In the instant case, the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters on controversy and exercised his discretion in favor of the Respondent. If he had reached a wrong conclusion of the law, it could be a good ground for appeal but not review. An issue hotly contested cannot be reviewed by the same court which had adjudicated upon it.”

That statement is relevant to facts before Court.

10. In this case the Plaintiff filed a Notice of Appeal on 12th March 2012.

That Notice of Appeal is directed to the Ruling of 24th February 2012. By filing that Notice of Appeal the Plaintiff has removed itself from the purview of Order 45. That order as reproduced above only allows review where an appeal has not been preferred.

11. The Plaintiff's application is incompetent and seeks what essentially is

an appeal from this Court from the decision of this very Court by its Ruling of 24th February 2012. In that regard I echo the words of Ringera, J (as he then was) in a case which is apt to this case that is

THE EASTERN and SOUTHERN AFRICAN DEVELOPMENT BANK -VS- AFRICAN GREEN FIELDS LTD & 2 OTHERS CIVIL SUIT NO. 1189 OF

2000 where he stated-

“I am tempted to say that although the Plaintiffs application has the face of a review application it has the heart of an appeal.”

12. For the above reasons the Notice of Motion dated 12th July 2013 is dismissed with costs to the 1st Defendant. The stay of execution granted on 15th July 2013 is hereby vacated.

Dated and delivered at Mombasa this 31st day of October, 2013.

MARY KASANGO

JUDGE