



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 256 OF 2008

REPUBLICAPPLICANT

VERSUS

CO-OPERATIVE TRIBUNALRESPONDENT

TELKOM KENYA LIMITED1ST INTERESTED PARTY

GILGIL COMMUNICATION

INDUSTRIES LIMITED2ND INTERESTED PARTY

Ex-parte

MAWASILIANO CO-OPERATIVE

SAVINGS & CREDIT SOCIETY LIMITED

RULING

The application that presents itself for the consideration of this court is the notice of motion dated 16th July, 2012. It is brought under sections 1A, 3, 3A, 27, 63(e), 80 and 99 of the Civil Procedure Act (Cap 21); and Order 45 Rule 1 and Order 51 rules 1 and 3 of the Civil Procedure Rules.

In the application the main order sought by Telkom Kenya Limited and Gilgil Communication Industries Limited is:

“That this Honourable Court be pleased to review, vary and or modify the orders issued herein on 9th December, 2011 pursuant to the judgement of the court and order that the costs herein be paid by the Respondent.”

The applicants also pray for costs of the application.

An introduction of the parties and a brief history is necessary at this stage. The applicants herein are the interested parties in the substantive judicial review proceedings. The core Respondent to these proceedings is the Co-operative Tribunal (the Tribunal) which was also the respondent in the substantive proceedings. A peripheral Respondent is Mawasiliano Cooperative Savings & Credit Society Limited (Mawasiliano). It was the ex-parte Applicant in the main proceedings. I say it is a peripheral respondent

since the outcome of this application will not affect its rights in any way. It, however, vigorously opposed this application. As is the norm in judicial review proceedings, the Republic was a passive Applicant. For the purpose of this application, I will refer to the Tribunal as the 1st Respondent and Mwasiliano Co-operative Savings and Credit Society Limited as the 2nd Respondent. Telkom Kenya Ltd (Telkom) and Gilgil Communication Industries Limited (GCIL) will be the 1st and 2nd applicants respectively.

The genesis of this application is a claim that was filed before the Tribunal by Mwasiliano. Telkom and GCIL were named as the 3rd and 4th defendants in that matter. The case was struck out with costs. Telkom and GCIL thereafter proceeded to tax a bill of costs using High Court scales. Mwasiliano objected to this move but the objection was dismissed by the Tribunal. Mwasiliano then moved to this court and sought judicial review orders to quash the said taxation. On 9th December, 2011 Gacheche, J delivered a judgment in favour of Mwasiliano and concluded that:

“I do allow this application and grant the Society orders of certiorari and prohibition in line with its prayers 1 and 2 above.

The Society shall also have the costs of this application.”

Thereafter Mwasiliano proceeded to file a bill of costs for taxation by the Deputy Registrar and that is when Telkom and GCIL brought the instant application.

The application is supported by the grounds on its face, to wit:-

- “a) In the judgement delivered on 9th December, 2011, the honourable court found the tribunal/respondent to have acted without jurisdiction and this allowed the ex-parte applicant’s prayers.**
- b) That the honourable court did not establish any wrong doing on the part of the interested parties.**
- c) That consequently it was only fair, proper and logical that the court orders that the Respondent/Tribunal bears the costs of this suit.**
- d) That there is therefore an apparent error on record of the judgement of the court as the court did not specify that the respondent was to bear the costs.**
- e) That it is in the interest of justice that the honourable court reviews and varies the judgement herein to state that the respondent/tribunal shall bear the costs of the suit.**
- f) That if the applicant is allowed to continue with the taxation of the bill of costs dated and filed on 17th January, 2012 but served upon the interested parties on 15th June, 2012, the interested parties will suffer great prejudice and irreparable harm.”**

Mwasiliano filed a statement of grounds of opposition dated 9th August, 2012. In summary, Mwasiliano’s case is that the application is incurably incompetent and a review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules is not available in the circumstances of this case.

On the issue of the incompetence of the application, Mwasiliano submitted that no decree has been drawn and a review under Order 45 of the Civil Procedure Rules is not available to the applicants. It also submitted that the application is defective since the applicants moved the court under its inherent jurisdiction (Section 3A) of the Civil Procedure Act and yet the rules have provided a remedy. Mwasiliano asserts that where there is a clear remedy provided by the law, the inherent jurisdiction of the court should not be invoked.

The question to ask is whether the actions of the applicants have prejudiced the respondents. The respondents cannot be said not to have known that the applicants are seeking a review of a particular portion of the court's judgement. The respondents have not suffered any prejudice in the way the application was presented to the court. In my view, if there is anything wrong with the application before this court, the same does not go to the substance of the matter and Article 159 (2) (d) of the Constitution would apply in the circumstances. I therefore reject Mawasiliano's argument that the application be dismissed for being defective.

I will now proceed to consider the substance of the matter. The applicants' assault on the judgement is twin-pronged. In the first instance, the applicants claim that the judgment contains mistakes and errors which can be corrected under Section 99 of the Civil Procedure Act. The said Section provides that:

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

A perusal of the provision clearly shows that correction of a judgement under this section is limited to what I would classify as obvious human errors. These are the kind of errors which any reader of the judgment can identify and agree that there is indeed a mistake. The judgment being challenged does not fall into this category. Section 99 will therefore not come to the aid of the applicants.

What remains to be considered is whether the judgment can be reviewed under Order 45 Rule 1(1) of the Civil Procedure Rules 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 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.”

For one to successfully move the court to review a decree or order under the said rule, it is necessary to establish:

- a. That an applicant has discovered new and important evidence which was not available to the applicant at the time the decree or order was passed; and/or
- b. That there is a mistake or error apparent on the face of the record; and/or
- c. That there is any other sufficient reason.

The applicants do not contend that they have come across new and important evidence that was not available to them at the time the decree or order was passed. There is therefore no reason to interrogate the 1st ground under which a review of a decree or order may be made.

The 2nd ground for review requires a mistake or error that speaks for itself. The mistake or error should be one that does not require a lot of explaining. I agree with Mr. Ombete for Mawasiliano that the Court of Appeal captured the applicable principle in the case of **MWIHOKO HOUSING CO. LTD V EQUITY BUILDING SOCIETY [2007] 2 KLR 171** when it stated that:-

“It is trite law, and we reiterate, 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. It will not be a sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review..."

That is the principle of review applied by Justice Marta Koome (as she then was) when allowed an application for review in **HANNAH CHERONO KOSKE v SIMON A ROTICH & ANOTHER [2006] eKLR**. In the decision, which was cited by Ms Mbaabu for the applicants, the learned Judge observed that:

"Having carefully examined the proceedings, I have noted some anomalies for instance, there is no indication what application was before the judge."

That according to the learned Judge was an error on the face of the record.

Is there such an error in the judgment delivered on 9th December, 2011? The judge clearly stated that the society (Mawasiliano) would have the costs. It is the applicants' contention that since they were not found to be at fault, then it would be obvious that the tribunal should bear the costs. I agree that the learned Judge did indeed find that **"the tribunal acted without jurisdiction, and that in attempting to tax the bill under Schedule VI of the Advocates Remuneration Order, it usurped the powers of the High Court."** The applicants contend that costs follow the event and the Tribunal ought to have borne the costs. In essence the applicants are saying that the Judge proceeded on the wrong principles of law when she awarded costs in favour of Mamwasiliano against them and the Tribunal. That in my view is not an error or mistake apparent on the face of the record. The challenge goes to the root of the decision of the Judge on the issue of costs and the applicants' solution lies with an appellate court. Anybody reading the judgement would conclude that the costs were awarded against the applicants and the Tribunal jointly and severally. I am thus not convinced that the applicants have established grounds for review of the judgement for mistake or error apparent on the face of the record.

There were no submissions filed on behalf of the Tribunal and there was no appearance for the Tribunal at the hearing of the application. The Tribunal opposed the application through a notice of preliminary objection in which the only ground is that the suit offends the provisions of Section 6 of the Judicature Act (Cap 8). The Section provides that:

"No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it."

I do not know why the Tribunal cited Section 6 of the Judicature Act. I am therefore not in a position to make any comments on the preliminary objection.

Is there any other sufficient reason for the review of the judgement? I do not see any and neither have the applicants advanced any other reason in support of their application.

The end result is that Telkom and GCIL's application fails and the same is dismissed with costs to the Tribunal and Mawasiliano.

Dated, signed and delivered at Nairobi this 5th day of December, 2013

W. K. KORIR,

JUDGE OF THE HIGH COURT