



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CIVIL APPEAL NO. 37 OF 2009
(CMCC NO. 1031 OF 2004)

RIFT VALLEY BOTTLERS (LTD).....APPELLANT

VERSUS

ROBERT K. LIMO.....RESPONDENT

RULING

The application is brought under Order 4 rule (1) of the Old Civil Procedure Rules, which is now Order 45 Rule (1) of the New Civil Procedure Rules. The application is also brought under Section 80 of the Civil Procedure Act.

The Applicant being aggrieved with the judgment in Eldoret CMCC No. 1031 of 2004 filed an appeal in the High Court Civil Appeal No. 37 of 2009.

On the 1st September 2010 the appeal was summarily rejected under Section 79B on the grounds that the appeal did not disclose **“sufficient grounds of complaint.”**

The Applicant filed this application to review the said order made on the 1st September, 2010 on the grounds that it was a mistake on the part of the judge to summarily reject the appeal when the appeal raised serious grounds of law and should have been determined on merit.

The Applicant referred the court to the Court of Appeal decision of **PHILIP ORERO –VS- AMBROSE SEKO [1984] KLR 238**. Counsel also referred the court to the other authorities of **NZIOKA –VS- KITUSA [1984] KLR 487** and **TIMSALES LTD –VS- STANLEY NJIHIA MACHARIA HCCA NO. 14 OF 2005**.

The authorities were in support of his arguments. That appeals that were arguable and had merit should not be summarily rejected.

Counsel submitted that the appeal had merit and raised substantial grounds in law which were enumerated as follows:

(1) Burden of proof.

(2) Corroboration.

(3) Proof of negligence.

That the same should not have been summarily rejected.

Counsel further submitted that there was no undue delay in filing the application herein, as it was filed immediately upon discovery that the appeal had been summarily rejected.

Counsel urged the court to exercise its judicial discretion by allowing the application for Review, as appeal was arguable and had merit should.

The application was opposed by Counsel for the Respondent who submitted that the court after careful perusal of the Record of Appeal, properly exercised its discretion by summarily rejecting the appeal under Section 79B.

Counsel submitted that a review of the order by this Honourable court would be tantamount to sitting on appeal. That the Applicant being aggrieved should have proceeded to the Court of Appeal.

That the Judge was empowered to reject the appeal summarily and also the award granted by the lower court for general damages was so negligible, to warrant re-opening.

Counsel urged the court to dismiss the application with costs.

I have heard the arguments of both Counsel for the Applicant and Counsel for the Respondent.

An appeal process is a broader procedure for curing errors of evidential fact and law, whereas a review process is a narrower process of curing defects. This was held in the Court of Appeal decision of **WILLIAM KARAN & 4 OTHERS –VS- MICHAEL WAMALWA KIJANA & OTHERS CA NO. 43 & 153 OF 1986** (Consolidated)

The defects curable by the review process are outlined in Order 45.

Review may be sought on the grounds that there is a mistake apparent on the face of the Record. It may also be sought on the grounds that there is new and important matters or evidence which after due diligence was not within the Applicant's knowledge. It can also be sought for any other sufficient cause.

Order 45 empowers this court to review an order provided the judge who made the order is no longer in the station.

The Order provides that the application seeking for review should be brought without unreasonable delay. I find that the application herein was brought timeously and without undue delay.

Counsel for the Applicant submitted that the appeal filed was arguable and meritorious.

I have perused the Notice of Motion and in particular grounds (e) (f) and (g). I have perused the Record of Appeal and in particular the evidence adduced by DW1 one **ELIZABETH ACHIENG NYAWADE**. Lastly I have perused the grounds of appeal numbers 3, 4 & 5 as contained in the Memorandum of Appeal.

After perusing the Record of Appeal I find evidence that the Applicant was the manufacturer of the product. I find no evidence of attempts made by the Applicant to call for, secure or take custody of the product for purposes of examination and/or independent analysis. I find no evidence of intervening acts of interference by a third party. This evidence was crucial to the case and would have laid a basis in support of the appeal.

I would have reviewed the order summarily rejecting the appeal if there was such evidence that would have enabled the Applicant to exonerate itself.

I find no sufficient cause to warrant review of the Order made by the court on the 1st September, 2010.

I am satisfied that the court exercised its discretion properly and judicially in summarily rejecting the appeal under Section 79B for the reasons stated above.

CONCLUSION:

I find that the application for review lacks merit and I decline to grant the order for review.

The application is dismissed with costs to the Respondent.

Dated and delivered at Eldoret this 29th day of March 2012.

A.MSHILA

JUDGE

Coram:

Before: Hon. A. Mshila J

CC: Collins

Counsel for the Appellant.....

Counsel for the Respondent.....

A.MSHILA

JUDGE