



REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 184 of 2011

SAMUEL OGODO WAGAAPPELLANT

VERSUS

FISH PROCESSORS (2000) KTDRESPONDENT

RULING

By a Notice of Motion dated 3rd September 2012 the Applicant prays that the judgment dated 26th July 2012 be reviewed, varied and set aside and the applicant be granted an Order to be paid his claim. The application is supported by the affidavit of the Applicant sworn on 3rd September 2012.

The applicant grounds are that this court while delivering the Judgment on 26th July 2012 failed to capture several issues which had it done so it will have arrived at a decision in favour of the applicant. Part of the issues which the applicant contents that they were not captured included the fact that the plaint at the trial court was defective and that the same ought not to have been allowed to remain on record. The said plaint according to the applicant did not meet the requirements of Order 4 Rule 1, Sub Rule 4 and 6 of the Civil Procedure Rules.

The application was opposed by the respondent who argued that the application did not meet the threshold set by Order 45 of the Civil Procedure Rules. **Mr. Onyari** argued that the decree or Order which was being asked to be reviewed was not attached to the application as required.

After listening to both parties oral submissions as well as their respective pleadings the issue to determine is whether the application falls within the provisions of Order 45 (1) (a) and (b) of the Civil Procedure Rules which states:-

“1(i) 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”.

The appeal in question dwelt on the application by the applicant to amend his defence and

counterclaim. The same was allowed with some limited conditions,. The applicant did not fulfill the same but instead fled the appeal which I disallowed.

Having carefully perused the application, I respectfully disagree with the application. There is no new issues which he has raised that the Judgment did not touch. The issue he is advancing regarding a plaint being defective or otherwise are issues which were within his knowledge during the prosecution of the appeal. In any case those are issues including limitation element which the appellant ought to raise at the trial in the lower court.

Further the applicant has not attached the impugne decree or order as required by Order 45 (1) of the Civil Procedure Rules. Attaching the Judgment as he has done is insufficient. his is fatal as it is always necessary to know which decision the court ought to review.

For the foregoing reasons I do not see any merit in the application. The best the applicant would have done if he was not happy with the judgment was to file an appeal at the court of Appeal. The application is otherwise dismissed with costs to the respondent.

Dated, signed and delivered at Kisumu this 31st day of October 2012.

**H.K. CHEMITEI
JUDGE**

In the presence of:

In person for the appellant

Onyango for the respondent

HKC/aa0