



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 72 OF 2009

(Consolidated with Nyeri HCCC No. 5 of 2006)

SURYAKAL KIRIT SHAH PLAINTIFF/APPLICANT
VERSUS
FINA BANK LIMITED DEFENDANT/RESPONDENT
AND
NELION SOAP INDUSTRIES LIMITED APPLICANT

RULING

The applicant's application dated 10th November, 2010 seeks an order to review, set aside and/or vary the orders made by Khaminwa, J. on 2nd September, 2010 and all other consequential orders. The applicant also seeks the costs of the application.

The application was made on the ground that there was an error on the face of the record since the court had no jurisdiction to transfer a suit pending before another court/District Registry for trial before itself.

In an affidavit sworn by **Kapurchand Depar Shah**, a Director of **Nelion Soap Industries Limited**, the applicant, he stated that on 2nd September, 2010 Khaminwa, J. made an order for consolidation and transfer of **Nyeri HCCC No. 5 of 2006** from Nyeri to this court. According to advice given to him by his advocate, **Mr. E.M. Wachira**, the said order is irregular in law and was made without jurisdiction. That amounts to an error on the record, he stated, and urged this court to review and/or set aside the said order.

A replying affidavit was filed by **Christopher Maina Waruru**, the Head, Debt Recovery Unit of the defendant. He stated, *inter alia*, that he had been advised by the defendant's advocate that there was no error on the face of the record because Khaminwa, J. did not order transfer of any suit but only made a consolidation order as sought.

Mr. Isindu for the applicant and **Mr. Mwangi** for the defendant made brief submissions. Mr. Isindu submitted that under **Section 18** of the **Civil Procedure Act** a judge does not have power to order transfer of a case from one High Court station to another. The section provides as follows:

“18(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or on its own motion without such notice, the High Court may at any stage –

- a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
- b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter –
- (i) try or dispose of the same; or
- (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
- (iii) re-transfer the same for trial or disposal to the court from which it was withdrawn.”

The applicant’s advocate further submitted that the defendant had previously made a similar application before the High Court at Nyeri which was dismissed. The application that was made before Khaminwa, J. was therefore *res judicata*, he stated.

Mr. Mwangi for the defendant told the court that there was nothing new and neither was there any error on the face of the record to warrant any review. This is because the application for consolidation that was filed in the High Court at Nyeri had been dismissed for non-attendance of the defendant’s counsel and the subsequent application that was filed in this matter before Khaminwa J. was argued and a considered ruling given. If the applicant was dissatisfied with that ruling the only recourse open to it is an appeal but not a review.

I have considered the affidavits on record and the submissions made by counsel. The only ground upon which a review of the ruling dated 2nd September 2010 is being sought is that there is an error on the face of the record. The alleged error has been stated by the applicant. Khaminwa J. was addressed by both parties before she made the orders now complained about. If the defendant believes that the learned judge erred in law by issuing the aforesaid orders the appropriate thing to do is to appeal against the said decision. In **NYAMOGO & NYAMOGO v MOSES K. KOGO [2001] 1 EA 173**, the Court of Appeal held that a mere error or wrong or an erroneous view of evidence or of law is not a ground for a review but may be a ground for appeal. See also **DAVID OMBEE OMBEE v ISAAC OLUOCH OPI [2000] LLR 7885**. That is indeed the correct position in law.

Even if a judge has misconstrued the law his order cannot be set aside by another judge of concurrent jurisdiction. I have no jurisdiction therefore to interfere with the decision made by my sister judge. The applicant’s only option is to prefer an appeal against that decision. Consequently, the application dated 10th November, 2010 is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2011.

D. MUSINGA
JUDGE

In the presence of:

Muriithi – Court Clerk

Mr. Isindu for the Plaintiff and holding brief for Mr. Wachira in Nyeri HCCC 5 of 2006

Mr. Mwangi for the Defendant