



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 327 of 2002**

**NATIONAL BANK OF KENYA LTD. ....APPELLANT**  
**VERSUS**  
**MAHESH MANUBHAI PATEL.....RESPONDENT**

**RULING**

1. The application before me is a Notice of Motion dated 23<sup>rd</sup> February, 2009, brought under Section 80 of the Civil Procedure Act and Order XLIV Rule 1 of the Civil Procedure Rules. National Bank of Kenya Limited, who is the applicant, seeks an order that the decree dated 13<sup>th</sup> February 2007 be reviewed and substituted by an order that the appeal do proceed to hearing. The decree sought to be reviewed arises from an order issued by Ang'awa J. pursuant to s.79B of the Civil Procedure Act, summarily dismissing the appeal which was lodged by the applicant in this Court, against the order of the Senior Resident Magistrate, delivered in Milimani CMCC No.1342 of 1999, striking out the applicant's suit for want of jurisdiction. The Hon. Ang'awa J. having been transferred out of Nairobi, the mantle has fallen upon me, under Order XLIV Rule 4(1) to determine the application for review.
2. The application is based on two grounds stated on the body of the motion as follows:
  - (i) The power to reject the appeal summarily under s.79B of the Civil Procedure Act should be used sparingly and only where the grounds of appeal cannot possibly succeed. And, that in all other cases the appellant should be allowed to exercise its constitutional rights of appeal.
  - (ii) That the memorandum of appeal raises substantial grounds of appeal in that section 3(2) of the Magistrate's Court's Act gives the Resident Magistrate's Court, jurisdiction throughout Kenya, and the suit was therefore properly commenced and should not have been struck out.

The application is also supported by an affidavit sworn by Zipporah Kinanga Mogaka, the General Manager Legal and Remedial management of the applicant.

3. Mr. Kiragu who argued the appeal for the applicant, submitted that the order summarily rejecting the appeal was made in error, as the Court can only summarily dismiss an appeal after carefully perusing the record, and weighing the appeal. In that regard Mr. Kiragu relied on *Machere vs. Walusala [1986] KLR 503*. Reiterating the proposition that the power of summary rejection of an appeal should be exercised sparingly and only in the clearest of cases, Mr. Kiragu pointed out that in this case the memorandum of appeal showed that there were

arguable points of law raised for determination such as the issue of jurisdiction. In support of his submissions Mr. Kiragu further relied on the following authorities:

- ***Nzioki vs. Kitusa [1984] KLR 487,***
- ***Okello & Another vs. Osonga [1986-1989] 1 EA 445.***
- ***Harbans Singh Soor vs. Fatima Ali Mohammed [2006] eKLR***

4. Mr. Kiragu further submitted that the Court has very wide powers of review under section 80 of the Civil Procedure Act, and Order XLIV of the Civil Procedure Rules, provided the applicant proves an error or mistake apparent on the face of the record, or discovery of new evidence or any sufficient reason. Mr. Kiragu argued that in this case the applicant ought to have been allowed to make submissions on its grounds of appeal before the issue of jurisdiction was determined. Mr. Kiragu maintained that in the circumstances of this case, review of the order of dismissal was a more attractive approach, as it would allow the Court to receive submissions and determine the matter. Finally it was submitted that the order of summary dismissal took away the applicant's constitutionally given right to appeal. The case of ***Ndirangu vs. Commercial Bank of Africa [2002] 2 KLR 603*** was relied upon.

5. In response to the applicant, Malal Limited and Mahesh Manubhai Patel who were the defendants to the suit in the lower Court and the respondents in this appeal, have filed grounds of opposition in which they object to the application on the following grounds:

- (i) the application is bad in law, incompetent, misconceived and an abuse of the process of the Court;
- (ii) there is no error apparent on the face of the record;
- (iii) the applicant has not made up a case of any of the prayers sought;
- (iv) the applicant's grievance falls within the armpit of the appeal;
- (v) the applicant is guilty of inordinate delay;
- (vi) the said application as drawn and filed is entirely without merit by virtue of the matters on record, or at all and ought to be dismissed with costs.

6. Miss Mburu, counsel for the respondent submitted that the application for review had no merit, as no grounds for review had been established. She maintained that there was no error apparent on the face of the record, nor was there any sufficient reason to justify review of the order for dismissal. Miss Mburu maintained that the exercise of discretion of a Judge cannot be a ground for review, as an error or wrong view of the law was a ground for appeal and not review. In support of her submissions, Miss Mburu relied on ***Nyamogo & Nyamogo Advocates vs. Kogo [2001] EA 173***; wherein it was held that an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.

7. Miss Mburu further submitted that the proper way to correct wrong apprehension of the law or the exercise of discretion is to appeal against that decision. In support of that proposition, Miss Mburu relied on:

- ***Eastern and Southern African Development Bank vs. Africa Greenfields Limited and 2 Others, HCCC No. 1189 of 2000***
- ***Njoroge & 104 Others vs. Savings and Loans (Kenya) Limited***
- ***Basco Products Kenya Limited vs. Pitsmen Ltd. HCCC No. 1139 of 2000***

Miss Mburu further submitted that the appellant was guilty of delay as the application was made more than 2 years after rejection. She pointed out that it was not open for a party to invoke both review and appeal.

8. Relying on ***Proteins and Food Processors Ltd vs. Trade Bank Ltd & 2 Others HCCC No. 128 of 2000,***

Miss Mburu argued that the application for review was incompetent, as the appellant had already chosen to appeal against the order, and lodged a notice of appeal. Miss Mburu submitted that although the applicant had a constitutional right of appeal he could not use that right in a way that is an abuse of the Court process. She maintained that reviewing the order and reinstating the appeal, would result in reinstating an appeal which has no chances of success and that would be a waste of judicial time. Miss Mburu contended that the application before the Court was in fact an appeal couched as a review. She therefore urged the Court to dismiss the application. Miss Mburu maintained that the authorities which were cited were distinguishable.

9. In response to Miss Mburu's submissions, Mr. Kiragu pointed out that an appeal in the Court of Appeal is not instituted by the filing of a notice of appeal but a record of appeal under Rule 80 of the Court of Appeal Rules. Mr. Kiragu submitted that the High Court decision of *Protein and Food Processors Limited* (supra) which was relied upon by Miss Mburu is a wrong decision as it was contrary to the Court of Appeal decision of *Yani Harianto vs. E.D. and F Man (Sugar) Limited Civil Appeal No. 122 of 1992*. Mr. Kiragu maintained that the applicant's complaint was not the unfavourable consequences of summary rejection but rather in the circumstances of this case, the appeal ought not to have been rejected summarily. Mr. Kiragu distinguished authorities which were cited by Miss Mburu maintaining that the circumstances in the present case were different, and each case must be considered on its own merit. He maintained that the fact that the memorandum of appeal raised substantial grounds was not negated.
10. I have carefully considered the application, the submissions made by both counsel and the authorities cited. It is evident to me that the application before me being one for review under Order XLIV Rule 1 of the Civil Procedure Rules, the question to be determined is whether there is an error apparent on the face of the record arising from the order which was made by Ang'awa, J. on 13<sup>th</sup> February, 2009 summarily rejecting the applicant's appeal under Section 79B of the Civil Procedure Act.
11. In *National Bank of Kenya Limited vs. Ndungu Njau Civil Appeal No.211 of 1996*, the Court of Appeal had this to say:

***“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 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.”***

In this case, the Judge having perused the appeal for admission in accordance with Section 79B, found that there was no sufficient ground for interfering with the decree, and rejected the appeal summarily. This was a considered decision on the part of the Judge, who even made a note with regard to the jurisdiction of the Magistrate.

12. A perusal of the ruling of the trial Magistrate which was subject of the appeal before the Judge, as well as the memorandum of appeal shows clearly that the bone of contention was the issue of jurisdiction. The Court having taken a position on that issue, there was no apparent error or omission which was self evident. The order of dismissal was a result of the Judge's understanding of the powers conferred under section 79B of the Civil Procedure Act, and the provisions of the law relating to jurisdiction. It is not therefore a decision which can be challenged by way of review. Moreover, the fact that in making the order summarily rejecting the appeal, the Court may have improperly exercised its powers under section 79B of the Civil Procedure Act, or the fact that the Court may have failed to realize that the memorandum of appeal raised substantial grounds of appeal, are matters for consideration on appeal and not review.

13. The submissions made by Mr. Kiragu in support of this application, are submissions which would have been more appropriately argued in support of an appeal against the order rejecting the appeal summarily, and not in an application for review.
14. For the above reasons, I find that the application for review is incompetent and is therefore dismissed with costs.

**Dated and delivered this 26<sup>th</sup> day of January, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ms Mwema H/B for Kiragu for the appellant

Ms Mburu for the respondent

Eric - court clerk