



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 413 OF 2011**

**FRANCIS DRUMMOND INVESTMENT BANK LTD.....APPLICANT**

**VERSUS**

**JUSTUS M'INOTI M'MWAMBIA.....1<sup>ST</sup> RESPONDENT**

**OBADIA MUTAI T/A BROND INSURANCE AGENCIES.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application dated 24/11/2020 principally seeks orders that: -

**There be a temporary stay of execution of the orders issued by the Honourable court on 26<sup>th</sup> October, 2020 directing the Appellant to pay the 1<sup>st</sup> Respondent throw away costs in the sum of Kshs. 50,000 within days (30) from the date of the ruling delivered on 26<sup>th</sup> October, 2020 pending the hearing and determination of the Appeal filed in the Court of Appeal.**

2. Secondly that: -

**THAT this Honourable court be pleased to review, set aside, and/or vary its orders made on 26<sup>th</sup> October, 2020 directed to the Appellant to pay throw away costs of Kshs. 50,000 to the 1<sup>st</sup> Respondent and substitute the same with an order directing that the amount of the said costs await taxation upon determination of the Appeal to be filed in the Court of Appeal.**

3. The Preliminary Objection dated 11/12/2020 is based on the following grounds: -

**1. THAT the Notice of Motion Application aforesaid offends the mandatory provisions of Section 80 of the Civil Procedure Act and order 45(1)(2) of the Civil Procedure Rules 2010.**

**2. THAT as a consequence of the foregoing, the instant Application is hopelessly incompetent, fatally defective and inadmissible and the same ought to be dismissed forthwith.**

4. Both the Preliminary Objection and the application were canvassed simultaneously. This ruling is therefore in respect of both the Preliminary Objection and the application.

5. The application is premised on the grounds set out in the application and the supporting affidavit. It is stated that orders were made herein on 26/10/2020 directing the Applicant to pay the 1<sup>st</sup> Respondent throw away costs in the sum of Kshs. 50,000/= within 30 days. That the orders were issued following the reinstatement of the Appeal herein which had been dismissed for non-attendance on 10/6/2019. It is contended that the Respondents had not asked for payment of throw away costs and that the Applicant had on 3/2/2012 deposited the decretal sum as security for the due performance of the decree.

6. The Applicant has further averred that there are errors apparent on the face of the record. That the Applicant is aggrieved by the ruling herein and has filed a Notice of Appeal. That the Appeal herein has high chances of success but stood dismissed automatically on 26/11/2020 when the orders issued herein lapsed. The court was urged to enlarge the time within which the Applicant can comply with the orders herein as the Applicant stands to be prejudiced. It is further stated that the sum of Kshs. 50,000 throw away costs is manifestly high.

7. The application is opposed by the 1<sup>st</sup> Respondent. It is stated in the replying affidavit that the application at hand is defective as it seeks the review of an order in respect of which the Applicant has already served a Notice of Appeal. That the Appeal herein stood dismissed on 26/11/2020. That the application has been brought after inordinate delay and that there are no sufficient reasons given to warrant the orders

herein being stayed. It is further deponed that the orders complained of are matters of costs which fall within the discretion of the court and that there is no error on the face of the record.

8. I have considered the application, the response and the submissions filed.

9. The orders of stay of execution that are the subject of the instant application were issued on 26/10/2020 for a period of 30 days. The orders lapsed before they were complied with and the Appeal stood dismissal. The instant application was filed on 26/11/2020, the day the said orders were expiring. It has not been explained why the Applicant waited up to the 11<sup>th</sup> hour. It is noteworthy that the stay of execution orders were issued herein on 16/12/2011. In the ruling that is the subject of the instant application, the court directed the Appellant/Applicant to file written submissions by the 9/11/2020 in order to expedite this matter. None were filed and there is no explanation given. This connotes lack of diligence on the Applicant's side.

10. **Order 45 (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.**

**(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review**

11. On matters review, the Court of Appeal in **National Bank of Kenya Limited Vs. Ndungu Njau [1997] eKLR** held: -

**“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.”**

12. This court exercised its discretion when the orders were made herein for the payment of Kshs. 50,000/= throw away costs. There is no error apparent on the face of the court record.

13. The Applicant has already filed a Notice of Appeal. The Applicant cannot seek a review of the orders herein while he is still pursuing his right of Appeal.

14. With the foregoing, I agree with the submissions by the 1<sup>st</sup> Respondent that the sword of Justice is double edged and that it cuts both ways. The Applicant's right of appeal must be balanced against the Respondent's right to enjoy the fruits of the Judgment. In the upshot, I find no merits in the application and dismiss the same. The Preliminary Objection is upheld. Costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF JUNE, 2021**

**B.THURANIRA JADEN**

**JUDGE**