



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 448 OF 2005

SALIM MOHAMED SALIM BAKHERESSA.....APPELLANT

VERSUS

SHAROK KHER MOHAMED ALI (HIRJI).....RESPONDENT

(Being an appeal from the ruling and order of the Deputy Registrar (Hon. F. Rashid)

delivered on the 23rd day of November 2017 at the High court in Nairobi)

JUDGEMENT

1) The appellant herein, filed an application dated 15th February 2017 in which he sought for an order for review and setting aside of the ruling delivered by the Deputy Registrar on the same date.

2) The Deputy Registrar considered the application and had it dismissed vide the ruling delivered on 23rd November 2017. Being dissatisfied by the aforesaid decision, the appellant preferred this appeal and put forward the following grounds:

i. The learned Deputy Registrar erred in fact and law in the way she weighed the evidence before the court to determine the issue of whether there was an oral set off agreement between the appellant and the respondent settling the decretal amount.

ii. The learned Deputy Registrar erred in fact and law in requiring the appellant to produce the set off agreement yet the said agreement was oral WAS ORAL, which agreement is not capable of being exhibited before this honourable court and its existence could only be deduced from the conduct of the parties, which existence the appellant ably demonstrated.

iii. The learned Deputy Registrar erred in law and in fact by condemning the appellant to pay the taxed costs afresh yet the respondent had conceded under oath on 2 occasions that costs had already been paid to her advocate.

iv. The learned Deputy Registrar erred in law and fact by failing to rectify the error on the face of the record with regard to payment of the costs of the suit to the respondent.

v. The learned Deputy Registrar erred in law and fact by failing to take into consideration the submissions and response by the appellant before she arrived at her decision yet the same were properly on record.

3) When the appeal came up for hearing this court gave directions to have the appeal disposed of by written submissions. I have re-evaluated the arguments presented in support and against the applications dated 15th February 2017. I have also considered the rival written submission.

4) It is the submission of the appellant that the learned Deputy Registrar erred when she required the appellant to exhibit an oral set off agreement. The appellant further argued that he was condemned to pay taxed costs afresh yet the respondent had conceded that costs had already been paid to her advocate.

5) It is also argued by the appellant that the Deputy Registrar erred when she failed to rectify the error on the face of record with regard to payment of costs of the suit.

6) The appellant further argued that the Deputy Registrar failed to consider his submissions. The respondent opposed the appeal stating that the same is incompetent and fatally defective. The respondent pointed out that there is no automatic right of appeal in decisions arising from

an application of review. The respondent argued that the appeal was rendered incompetent for want of leave.

7) It is further the submission of the respondent that the appellant failed to demonstrate the manner in which the Deputy Registrar erred in exercising her discretion. In the application dated 15th February 2017, the applicant sought for inter alia an order to review and set aside the orders given on 15th February 2017 by finding that the entire decretal sum plus costs have been settled by the defendant/ judgment debtor.

8) The respondent opposed the application by filing and relying on a replying affidavit he swore. The learned Deputy Registrar heard the application and came to the conclusion that the appellant had failed to establish the oral set off agreement and therefore proceeded to dismiss the same.

9) Though the appellant put forward a total of five (5) grounds of appeal, it is apparent that those grounds can be disposed of by one main ground that is whether the learned Deputy Registrar erred in dismissing the application for review.

10) I have already set out the rival arguments presented by the parties and the basis in which the learned Deputy Registrar relied on to dismiss the appellant’s application. Under order 45 rule 1(b) of the Civil Procedure Rules, a party who seeks for an order for review must show that he has discovered new and important matter or evidence which was not within his knowledge or could not be produced at the time when the decree was passed or order was made on account of some mistake or error apparent on the face of record.

11) In the application dated 15.2.2017, the appellant stated that there is an error apparent on the face of record, in that it is admitted under oath by the respondent that costs of the suit had been paid and that the set-off agreement between them was oral. The appellant further stated that the oral set off agreement is not capable of being exhibited before the court.

12) It is clear from the ruling of the Deputy Registrar that this ground was considered and found unconvincing. The learned Deputy Registrar was emphatic that the appellant had failed to avail witnesses to establish the oral set-off agreement.

13) With respect, the learned Deputy Registrar cannot be faulted over her decision. The appellant was enjoined by law to establish the oral set-off agreement by summoning witnesses or by filing affidavit evidence. The appellant’s application was therefore properly dismissed.

14) In the end, I find the no merit in this appeal. The same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... **for the Plaintiff**

..... **for the Defendant**