REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 193 OF 2018

IKECHUKWU ANOKE.....APPELLANT

VERSUS

CFC STANBIC BANK LIMITED.....RESPONDENT

RULING

1. In its Ruling that was delivered on 22nd November 2018, this court granted the Appellant an order for stay of execution pending appeal on condition that he deposited a sum of Kshs 3,000,000/= into an interest earning account in the names of his advocates and the advocates of the Respondent herein. He had already filed his Record of Appeal on 22nd June 2018 and in this regard, the court directed the Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division to take all the requisite steps to ensure the speedy disposal of the Appeal herein.

2. On 19th December 2018, he filed another Notice of Motion application dated 18th December 2018 seeking a review of the amount of security from Kshs 3,000,000/= to Kshs 774,283.01. In its Ruling that was delivered on 18th July 2019, this court noted that since he had already deposited a sum of Kshs 1,500,000/= into an interest earning account as aforesaid, he ought to deposit the balance of Kshs 1,500,000/=. In its said decision, it found and held that the grounds he had relied upon for review were not those envisaged under Order 45 (1) of the Civil Procedure Rules, 2010.

3. Thereafter on 15th August 2019, the Plaintiff filed a Notice of Motion dated 14th August 2019 asking this court to review its Ruling of 18th July 2019 that had dismissed his Notice of Motion application dated 18th December 2018 and filed on 19th December 2018 and to consider its Rulings of 22nd November 2019 and 24th January 2019 and find that he had fully complied with the order of 18th July 2019. He swore his Affidavit in support of his application on 14th August 2019.

4. He pointed out that he had previously deposited a sum of Kshs 1,900,000/= with the Respondent herein and a further sum of Kshs 1,500,000/= in the joint names of his advocates and the Respondent's advocates as aforesaid. It was thus his contention that he had already deposited a sum of Kshs 3,400,000/= and consequently, the same was in equity, in excess of the sum the court had directed that he deposit.

5. In opposition to the said application, on 25th September 2019, the Respondent's Legal Counsel, Simon Mwangi, swore the Replying Affidavit on behalf of the Respondent herein. The Respondent averred that the issue of the amount to be deposited by the Appellant had already been canvassed and the present application was thus *res judicata*.

6. It added that this court was aware of the sum of Kshs 1,900,000/= that had been deposited by the Appellant herein when it ordered him to pay an additional Kshs 1,500,000/= and hence, he was asking this court to sit on appeal of its own decision. It pointed out that he had also not disclosed which material facts the court failed to consider at the time it delivered its Ruling on 22nd November 2019.

7. In support of its arguments that this court could still review its orders, the Applicant placed reliance on the case of **Republic vs Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR**. He argued that the matter was not *res judicata* for the reason that the court had not made a ruling on the sufficiency of the security he should deposit, which he stated, is what he was asking it to rule upon once and for all.

8. On its part, the Respondent relied on the cases of **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates vs Salama Beach Hotel Limited & 3 Others [2017] eKLR** and**Francis Njoroge vs Stephen Maina Kamore [2018] eKLR** to support its submissions that the present application was *res judicata* and further that the Appellant had not demonstrated that he was entitled to a review as he had sought respectively.

9. Having considered the submissions by both the Appellant and the Respondent, it was not in dispute that they were in agreement as to the circumstances under which a matter could be deemed to have been *res judicata* and when a court could review its decision under Order 45 Rule 1 of the Civil Procedure Rules. This court set out the grounds under which a court could allow an application for review its Ruling of 18th July 2019.

10. For the avoidance of doubt, it observed that for such an application to be granted, an applicant had to demonstrate that:-

> **"1. There was discovery of new and important matter of 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 order was made; or**
>
> **1. There was an error on the face of the record; or**
>
> **2. There was a sufficient reason; and**
>
> **3. That the application had been made without undue delay."**

11. As was rightly pointed out by the Respondent herein, while the Appellant contended in Paragraph 5 of his Affidavit in support of the present application that the court failed to consider certain material facts before reaching its decision on 18th July 2019, he did not disclose which those material facts were. This could have guided the correct in considering whether it had overlooked certain pertinent facts to his detriment.

12. It was apparent to this court that he was shifting goal posts and seemed to be on a fishing expedition. It appeared that he was trying everything he could to avoid paying the additional sum of Kshs 1,500,000/= as was ordered by the court on 18th July 2019.

13. Notably, in his Notice of Motion application dated 18th December 2019, he asserted that he wanted the amount of security reviewed downwards to Kshs 774,283.01. However, in his Notice of Motion application dated 14th August 2019, he was asking the court to find that he had already met the demand for security in the sum of Kshs 3,000,000/=.

14. Notably, in its decision of 18th July 2019, this court rendered itself as follows:-

> **"This court took the view that in the event the interlocutory judgment was set aside on appeal and the matter proceeded for re-trial and it was established that the Appellant had already paid the entire loan as he had contended, then he would be refunded his money. He would suffer no loss and/or prejudice as the monies would have been deposited in a joint interest earning account in the names of his advocates and those of the Respondent."**

15. It would not be improper or this court to determine even during the hearing of the appeal herein that he had paid the entire amount to the Respondent herein. The mandate of the appeal would not extend to making a finding that he had made the payment of Kshs 1,900,000/=.The question of whether or not the Appellant had paid in excess of what he was required to pay was an issue that could only be ascertained during trial. That trial court had the mandate to order refunds of monies he had made in the event he demonstrated to the court that he owed the Respondent herein no monies.

16. Notably, the issue that had been lodged in the High Court was merely to consider whether or not the Trial Court erred in failing to accord him an opportunity to be heard and not to go into the facts of the case between him and the Respondent herein.

17. Accordingly, it was the considered view of this court that it could not review its decision of 18th July 2019 as doing so would amount to it sitting on appeal of its own decision. The present application was *res judicata* as has been contemplated in in Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) that provides that:-

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

18. In the event the Appellant was not satisfied with the decision of this court, he had an option to appeal against it but not to arm twist it to make a determination of fact that was clearly within the jurisdiction of a trial court. The monies ordered by this court were merely a security and a sum of Kshs 400,000/= in excess of the deposits made by the Appellant herein, if at all, could not be said to have been so manifestly excessive so as to cause him prejudice while his Appeal was being heard and determined and when his case was being heard on merit, if at all it was found that his appeal was successful and the matter proceeded for full trial in the Trial Court.

DISPOSITION

19. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 14thAugust 2019 and filed on 15th August 2019was not merited and the same is hereby dismissed with costs to the Respondent herein.

20. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **11th** day of **May** 2020

J. KAMAU

JUDGE