REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 39 OF 2018

AFRICAN PROVIDENT LIMITED T/A

REAL (K) LTD ..... APPELLANT/RESPONDENT

VERSUS

CHRISPUS CHENGO MASHA.....RESPONDENT/APPLICANT

(Being an Appeal against the Ruling/Order of the Hon. S. R. Were, PM delivered on the 30th July 2018 in Malindi Civil Suit No. 59 of 2017)

Coram: Hon. Justice R. Nyakundi

Mulanya & Maondo Advocates for the appellant/respondent

Richard O. Advocates for the respondent/applicant

RULING

This is a notice of motion filed by **Chrispus Chengo Masha** challenging the decision of **Mativo J**. dated 21.4.2020 read on 27.4.2020 to have it reviewed, varied and or set aside as regularly obtained in favour of the respondent/appellant **African Provident Limited T/A Real K. Ltd.**

In that appeal African Provident Ltd, herein referred as the respondent had appealed against the Ruling of the Learned trial Magistrate in **Malindi SPMCC No. 59 of 2017** delivered on 30.7.2018 granting an injunction sought by the applicant in the instant notice of motion.

The matter found its way to this Court by way of a notice of motion dated 24.8.2020 and filed in Court on 27.8.2020 seeking leave and exercise of discretion to review the aforesaid Judgment pursuant to Order 45 Rule 182 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The affidavit of **Chrispus Chengo Masha** in support of the application was also filed on 27.8.2020. The respondents opposed the notice of motion by virtue of a replying affidavit of **Elvis Kitaa** dated 16.9.2020. The applicant in his affidavit avers that he is in possession of fresh evidence namely;

> ***(a). Receipts which show that the loan of Kshs.2,130,840/= has been fully paid with an overpayment of over Kshs.408,460/=.***
>
> ***(b). That given the discharge of injunction the appellant has taken steps to instruct Rarega Auctioneers to proclaim and attach motor vehicle registration number KBW 902J.***

He further deponed that motor vehicle in question is the subject matter in Malindi CMCC No. 59 of 2017.

The respondent's affidavit evidence was in opposition to the applicants' application. According to the respondent the fresh evidence referred to be adduced and admitted with regard to the status of the loan agreements does not qualify as agreed for to review and set aside the Judgment of the Court. It was further deponed that the alleged receipts annexed to the application based on the terms of the loan agreement equally do not offset the loan due and outstanding. The respondent further avers that the contention on new information was improper for being out of time and in the second place annexed statements of accounts demonstrate the loan still remains unpaid.

Considering the foregoing, Learned Counsel for the applicant submitted basically grounded under Order 45 Rule 182 of the Civil Procedure Rule. He contends that therefore the new evidence confers review jurisdiction to set aside the Judgment entered by the Court. Learned Counsel cited and place reliance on decisions in **Kenya Power & Lighting Company Ltd v Benzene Holdings Ltd T/a Wyco Paints {2016} eKLR, Republic v National Transport Services Authority ex-parte Extra Solutions Ltd {2017} eKLR, Republic v Public**

Procurement Complaints Review and Appeals Board HCMA 365 of 2006, matter of the estate of George Mmboroki Meru, HC Succession Cause No. 357 of 2004, Kenya Bus Services Ltd v A. G. & others {2005} 1 EA III to fortify the legal proportions for such a Judgment entered against the applicant to be set aside. The respondents counsel **Mr. Mulanya** submitted that the applicant has failed to satisfy the test under Order 45 Rule 182 of the Civil Procedure Rule. In support of the arguments, the respondents provided detailed account of the principles in **Kenya Power & Lighting Co. Ltd (supra)** with these Learned Counsel urged the Court to decline the remedies applied for by the applicant.

Analysis

Taking all these submissions and the notice of motion it is manifest that this Court has to exercise jurisdiction under Order 45 Rule 1& 2 of the Civil Procedure Rule which reads:

> ***"An application for review of a decree or order of a Court may be varied or set aside upon some ground other than the discovery of the new and important matter or evidence or error apparent on the face of the decree."***

The application for review in the instant motion was based on the ground of discovery of new and important evidence namely receipts on accounts of payment of the loan amount dated 27.4.2020 by **Mativo J** be granted.

This matter presents considerations clearly set out in the case of **James Kingaru & 17 others v J. M. Kungari & Muhu holdings Ltd {2005} eKLR,** which I find relevant in the present application rendered as follows:

> ***"Applications on this ground (review) must be treated with caution. The applicant must show that he could not have produced the evidence in spite of due diligence that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of trial."***

This being an application for review against a valid decision of the Court it would be good practice not to interfere with the Judgment or order unless it can be shown that the errors involved or the discovery of new evidence was to be placed before that Court it could have directly impacted on the final determination.

What I hear the applicant telling the Court is that he is acknowledging having filed the necessary documentary evidence but out of an oversight some material on receipts of payment were missing. Consequently, the Learned Judge of the High Court in exercising discretion an appeal erred and arrived at a wrong decision altogether. Suffice it to say under Order 45 Rule 1 & 2 of the Civil Procedure Rules one need not seek review or rectification of a Judgment or order unless there exist an error apparent on the face of the record, or discretionary of view or evidence in **Angelo Mpanju Kaiza CA No. 225 of 2008 {2009} eKLR:**

> ***"It is not every new fact that will qualify for interference with the Judgment or decree sought to be reviewed."***

The grant or refusal of an application for review is a matter of judicial discretion to be exercised not subjectively but in accordance with the laid down principles similar to Order 45 Rule 1 & 2 of the Civil Procedure Rules is Rule 29 of the Court of Appeal. The principle expounded in **Mzee Wanje & 93 others v A. K. Saikwa {1982 – 88} 1KAR 462** stipulates the appropriateness of adducing new evidence which was not available before the trial Court or in this case on appeal, the Court set out the parameters of Rule 29 which are consistent with Order 45 Rule 1 & 2 of the Civil Procedure Rule in the following passage:

> ***"This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for purposes of removing lacunae and filling in gaps in evidence. The appellate Court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case, in appeal, 'in this case on review.' There would be no end to litigation if the Rule 29 were used for the purpose of allowing parties to make out a fresh case or to import their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting new evidence."***

In the Judgment of the High Court, the following issues for determination were framed as follows:

> ***(a). That the Learned trial Magistrate erred in Law and fact by allowing the application yet it did not meet the requirements for grant of an injunction in the circumstances.***
>
> ***(b). That the Learned trial Magistrate erred in Law and fact in finding that there was a dispute as to how the figures were computed yet no such alleged dispute was pleaded nor proven.***
>
> ***(c). That the Learned Magistrate erred in Law and in fact in finding that the respondent and established a primafacie case yet the documents presented before the Court clearly showed that the loan account was in arrears thereby indicating that the respondent was in breach of the loan agreement.***
>
> ***(d). That the Learned trial Magistrate erred in Law and fact by allowing the application yet the respondent had conceded in his pleadings that he was in arrears and therefore in breach of the loan agreement.***

The appellate Judge then embarked on an examination of the material and evidentiary aspect towards satisfying himself as to the correctness of the impugned ruling of the trial Court. The Judge took note of the Submissions by both Counsels and founded the following decision on

appeal:

> ***"That the Learned Magistrate erred in Law in finding that the application satisfied the tests for granting the information sought. Accordingly, I set aside the Ruling dated 30.7.2017 and substituted with an order dismissing the respondents notice of motion dated 31.7.2017 with costs."***

The grounds upon which the applicant has based his notice of motion as deduced in the affidavit is the fact of the matter that a new and important matter of evidence discovered was not made available to the Court at the time of passing Judgment on 27.4.2020. That evidence shows not to have been produced was set of receipts for payment of the loan, a fact in dispute before the trial Court. As to whether the appellate Court in considering the evidentiary aspects and matters of Law appeal failed to take into account the receipts meant to show repayment of the loan in my view is a moot question. The velacity of that documentary evidence and genuiness of it certainly should be kept within the jurisdictional limitation of the trial Court.

I cannot overemphasize that under review jurisdiction there must be discovery of new and important matter of evidence which was not within the knowledge of the applicant or within his or her reach at the time of the decree.

In the instant application both in the affidavit of the applicant and submissions by counsel I am afraid that burden has not been discharged to warrant grant of the review remedy. The principle thus conveyed is in tandem with the holding in **Autodesk Inc v Dyason No. 2 {1993} HCA 6 {1993} 176 CLR 300** thus held interalia:

> ***"That the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court, not is it to be exercised simply because the party seeking a re-hearing has failed to present the argument in all aspects or as well as it might have been put. The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cases."*****(See also Aribam Sharma v Ariban Pishak Sharma {1979} 45 CC, 389 {1979 (II)} 300 SC).**

With respect to the applicant, what appears to be advanced as something wholly new which can perhaps alter substantially the Judgment of the High Court is nothing but a kind of anticipatory referral of the readjudication of the issues presented to the trial Court.

In so far as the plea by the applicant for the Court to consider additional new evidence, it forcibly contested by the respondent that such character aspects of the evidence annexed cannot pass the test of authencity and legality at this stage. It is pertinent to observe that the applicant non-advertence to the particular evidence to be held to be a ground to seek a review is not without challenge from the respondent. It is well settled that the rules of procedure and evidence cannot preclude the respondent from cross-examining the appellant as to the nature of the purported new evidence or material. It is impossible to doubt that if this Court was to grant the remedy for review without admissibility of the new evidence in the criminal proceedings for the respondent to be heard on it, the perpetuation is likely to occasion prejudice and an injustice.

It was also contested and further averred by the respondent that the receipts admissibility and reliability in the backdrop of the decisions of the Court ought to be scrutinized again in regard to the loan agreement.

In sum the contours of review jurisdiction in terms of Order 45 Rule 1 & 2 of the Civil Procedure Rules on ground of the scope of discovery of new matter or evidence to alter the Judgment of the Court is not sufficient to accord the relief in favour of the applicant. I am with respect in agreement with the comparative dictum in **Sow Chandra Kante & another v Sheikh Habib {1975} 1 SCC 674** that:

> ***"A review of a Judgment is a serious step and reluctant resort to it is proper only where glaring omission or patent mistake or like grave error has crept in earlier judicial fallibility. A mere repetition, through different counsel, of old and overrated arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."***

The tenor and effect of the High Court Judgment is clear from its language in the final order arising out of an appeal in **SPMCC No. 59 of 2017** in a Ruling delivered on 30.7.2018. That is to say regarding the appeal the Judge exercised discretion and good conscience in circumstances that grounded his decision.

Whether the purview of Order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act.

I have searched in vain on both words of imminence importance on the formulation under the aforesaid provisions on review no element tends to lean towards the application by the applicant.

For these reasons the application dated 24.8.2020 is devoid of merit. Its good for dismissal with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF OCTOBER 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Wafula advocate for the appellant/respondent