REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 169 OF 2012

BENSON NIGEL GRAHAM.....PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED.....DEFENDANT

R U L I N G

1. By a Notice of Motion dated 9th March 2019 the Defendants seeks from court an order that the court be pleased to review its orders given on 18/9/2017 and allow the defendant to file and serve list of documents and witness statement and to recall the plaintiff for cross examination on the alleged new evidence obtained.

2. The grounds disclosed to premise the application are that after the plaintiff gave evidence and closed his case the defendant discovered new and important evidence of the fact that the plaintiff was charged in Mombasa CR. CASE NO. 1507 OF 2013 whose proceedings the defendant applied to be supplied with and was so supplied with on 22/01/2019 on which proceedings the defendant seeks to cross examine the plaintiff. It was then added that it is just that leave be granted to the defendant to present the new evidence in that no prejudice would be occasioned to the plaintiff as the application has been made timeously and without undue delay.

3. The plaintiff opposed the application by the Replying Affidavit sworn on the 22/3/2019 and filed in court the same day. In that Affidavit the plaintiff accuses the defendant of belated application designed at delay and obstracting the just finalisation of the suit.

4. It was in particular pointed out that there was a similar application dated 30/11/2017 which was heard and a ruling delivered on 28/11/2018 dismissing the same and that no appeal was preferred against the said order. On the proceedings and judgment in CR. Case No. 1507 of 2013, the plaintiff took the position that in those proceedings he was acquitted way back in 2014 and that the fact has always been in public domain ever since hence it cannot form a new and important matter of evidence just as much as the fact that he was acquitted cannot be evidence in support of the defendants case.

5. The deponent then contended that the present application amount to seeking an order of review upon a decision on review which is not permitted in law and that the application was designed to upset a date set for determination being on the 15/5/2019.

6. When parties attended court to urge the application both sides relied on the Affidavit filed without more. Not even a provision of the law or a decision of the court was cited by either sides.

7. From the papers filed, the sole issue for determination is whether a case has been made out for the court to review its orders of 18/9/2017 by which the court gave directions as follows:-

> **"This case shall proceed on the basis of the witness statements and documents filed as at today. At triat only the witnesses who have filed witness statements shall give evidence and produce the documents already filed. Hearing on 6/12/2017"**

8. On the 1/12/2017, some five days to the date fixed for hearing, the defendant filed an application dated 30/11/2017 and sought an order that the court reviews its orders of 18/9/2017. That application was heard *interpates* and by a ruling dated 28/11/2018 the same was dismissed when the court said:-

> **"The order sought to be reviewed were made on the 18/9/2017 and it took the defendant a period of upto 1/12/2017 to file the application. That was a period of some 75 days to bring the application. Of note is the fact that the application was prepared and dated the 30/11/2017 some 5 days to a date fixed for hearing the suit.**
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> **On the 1/12/2017 the court directed that the application be served upon the plaintiff in the usual manner but the defendant did not do so even by the 6/12/2018 when the hearing proceeded with participation of the counsel on record.**

An application for review is by rules required to be filed without in ordinate delay and must meet the thresholds set under Order 45. Here I hold that the same was filed after inordinate delay and totally fails to meet the prerequisites of grant of review. Being bereft of the fundamentals of review as a judicial remedy, I do find no merit in it and I cannot help but find it wholly mis-concerned with the result that it is dismissed with costs".

9. It is overly clear to me that whether or not to review the directions of 18/9/2017 was the subject matter of an earlier application which was heard and determined. To entertain this application would be to breach the principle of law on *resjudicata* which seeks to give finality to court orders while underscoring the fact that litigation ought to come to an end. See ***Uhuru Highway Developers vs Central Bank of Kenya Ltd [1996] eKLR***.

10. The second reason the application cannot be seen to have any merit is the legal prohibition upon the court given under Order 45 Rule 6. That Rule provides:-

"No application to review an order made on an application for review of a decree or order passed or made on review shall be entertained".

11. Even though the prayers before me are not directed at the orders of 28/11/2018, the truth of the matter is that I cannot set aside or review the orders of 18/9/2017 without reviewing the orders made on the 28/11/2018.

12. In my view, the Defendant in this application furthering the very thing it has sought to do always, present applications which cannot escape the accusation of merely intended to forestall the expeditious and timely disposal of the dispute here. Such a party deserves no favours by courts judicial discretion being exercised in his favour.

13. I do find that the application dated 9th March 2019 lacks merit, is untenable in law and must fail. I order that it be dismissed with costs.

Dated and delivered at Mombasa this 6th day of May 2019.

P.J.O. OTIENO

JUDGE