



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS SUIT NO.259 OF 2018

PETER GICHUKI MWANGI.....PLAINTIFF

VERSUS

THE KENYA COPYRIGHT BOARD.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL OF KENYA.....2ND DEFENDANT

ANTHONY GITHIAKA KIAL.....3RD DEFENDANT

HIGH FLYER SERVICES AND PUBLISHERS LTD.....4TH DEFENDANT

R U L I N G N O . 2

1. The Applicant/Plaintiff through a Notice of Motion dated 30th October 2018 pursuant to Article 45 Rule 1 Civil Procedure Rules, Section 80, Section 3, 3A of Civil Procedure Act seeks the following orders:-

a) This Honourable Court be pleased to review its Ruling delivered herein on 27th September 2018 by this Honourable Court unconditionally and the Plaintiff/Applicant be allowed to file suit against the 2nd Defendant out of time and also against the other Defendants whose suit is still within time.

b) The cost of this Application be provided for.

2. The application is premised on the grounds on the face of the application Nos. 1 – 3 and is supported by an affidavit sworn by Peter Gichuki Mwangi sworn on 30th October 2018.

3. The application is opposed through 3rd defendant's grounds of opposition dated 24th January 2019 setting out 4 grounds of opposition.

4. The Applicant filed skeleton submissions in support of application for review of this court's ruling dated 27th September 2018. The 3rd defendant has filed submission in opposition to the Applicant's application dated 25th February 2019.

5. The brief facts of this matter is that by Notice of Motion dated 4/6/2018 and filed on the same day, the Applicant/Plaintiff sought orders for extension of time to file suit against the Respondents for malicious prosecution. That the application was served upon the 3rd Respondent who appeared and sought to be heard. The application was heard and a ruling issued on 27th September 2018 dismissing the application. That the Applicant being aggrieved by the court's ruling now seeks review.

6. An application for renew is provided for under **Order 45 Rule 1 of Civil Procedure Rules** which provides:-

"(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."

7. I have considered the grounds relied upon for seeking review of the court's orders. None of the grounds set out in the application meets the criteria set out under order 45 Rule 1 of Civil Procedure Rules; there is no assertion of the Applicant having made a discovery of new and important matter or evidence which, after 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 made or on an account of some mistake or error on the face of the record; or for any other sufficient reason; though the application, I find, have been filed without unreasonable delay.

8. In view of the aforesaid I find the Applicant/Plaintiff has not set out or presented any of the grounds required to be pleaded and proved under order 45 Rule 1 of Civil Procedure Rules. The grounds set out in the application, that the trial Judge erred into considering when the limitation period was to expire as against the Attorney General or the trial Judge misdirected himself in stating when the case thereon arose in an intended suit of malicious against the 3rd and 4th Defendant, in my view is not one of the grounds for which a review can be sought but in my view is a matter for appeal. I am in my considered view, of the view that an application for review cannot be successfully maintained on such grounds nor on the grounds that the trial Judge was wrong either on account of applying wrong application of the law or due to a failure to apply the law applicable nor on purported exercise of his discretion wrongfully.

9. In the case of **Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) vs Kariuki Marega & Another eKRL [2018]** in defining what constituted an error apparent on the face of the record relied on the holding in **Nyamogo & Nyamogo vs Kogo [2001] EA 174** in which it was held that;

"...There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal."

10. In this court's ruling, it stated under paragraph 13 of the ruling partly as follows;

"...Section 27 and 28 of the Limitation of Actions Act (Cap 22) Laws of Kenya, a claim for damages based on malicious prosecution is not included. The extension of time is limited to the nature of claims for damages limited under Section 27 of the Limitation of Actions and no other. This court cannot act beyond the express provisions of the law and extended the period of filing suit out of time for which the law do not allow...."

In view of the court's ruling, it pronounced itself clearly and its ruling if it aggrieved any part, the best option would have been to appeal as the court clearly stated its understanding of the law. The court in this application is faulted on misdirection on the points of law and if the court was to sit on its own decision on points of law, would amount to sitting on appeal on its own ruling, as I have already found already the application has not been brought as espoused under order 45 Rule 1 of Civil Procedure Rules.

11. The Applicant urges the court was in error in not hearing the application *ex parte*. This fact was considered by the court during the hearing of the application and in its ruling. The court stated in its ruling under paragraph 16 as follows:-

"In any event, albeit the plaintiff has an unfettered right to seek a review, that right cannot be successfully maintained on the basis that the decision of the Hon. Waweru Judge was wrong either on account of wrong application of the law relating to award of special damages or due to Respondent's submissions".

It is the Applicant/Plaintiff who served the 3rd defendant with the application and who in the interest of justice took part in these proceedings. That notwithstanding, allowing the 3rd Respondent to take part in the proceedings is in my view not one of the goods for review.

12. In the case of **Mohamud vs Muhammad Kahiye [2015] eKLR** the Court held as follows:

"In any event, albeit the plaintiff has an unfettered right to seek a review, that right cannot be successfully maintained on the basis that the decision of the Hon. Waweru Judge was wrong either on account of wrong application of the law relating to award of special damages or due to failure to apply the law thereof applicable in claims for future medical expenses, that could only have been a good basis for an appeal.

See **National Bank of Kenya Limited vs Ndung'u Njau Court of Appeal 211/96 (UR)** where the Court of Appeal made it clear that **"....Misconstruing a statute or other provision of law cannot be a ground for review".... "The Learned Judge made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the Learned Judge would be sitting in appeal on his own judgment which is not permissible in law...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 provisions of law cannot be a ground for review."**

13. Further in **Pancreas T. Swai vs Kenya Breweries Limited 2014 eKLR** the Court made it clear that:

"If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which Court decisions that ought to be examined on appeal would be exposed to attacks in the Courts in which they were made under the guise of review when such Courts are functus officio and have no appellate jurisdiction. The power to review the decisions on appeal is vested in appellate Courts. Order 44 Rule 1 (now Order 45 Rule 1 of the Civil Procedure Rules 2010) gave the trial Court discretionary power to allow review on the three limbs therein stated or "for any sufficient reason." The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted..."

14. I have considered the Applicant's application, I am satisfied that the Applicant's application has not raised issues as espoused in order 45 Rule 1 of the Civil Procedure Rules but has raised grounds which can only be determined by an appellate court but not by this court, as by doing so, would amount to sitting on an appeal on its own decision. Good grounds of appeal cannot be a basis for review by the trial court. A trial court if it reaches a wrong decision or misconstrues points of law, that cannot be used as a license to seek review but the aggrieved party can only consider an appeal but not to move the same court for review. The law is clear and as such I find no basis for interfering with the earlier ruling.

15. The upshot is that the Applicant's application dated 30th October 2018 is without merit and is dismissed with costs.

Dated, signed and delivered at Nairobi this 2nd day of May, 2019.

J .A. MAKAU

JUDGE