



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 164 OF 2016

CAPE SUPPLIERS LIMITED.....APPELLANT/APPLICANT

-VERSUS-

TREADSETTERS TYRES LIMITED.....RESPONDENT

RULING

1. The appellant/applicant herein took out the Notice of Motion dated 29th April, 2019. The same stands supported by the grounds set out on its body and the facts deponed in the affidavit of Peter Kinaro. The applicant is seeking for an order for the review, varying and/or setting aside of this court's judgment delivered on 28th March, 2019.
2. The respondent filed grounds of opposition to resist the application.
3. This court directed the parties to file written submissions. On its part, the applicant contends inter alia, that the burden of proving issuance of the disputed invoices at all times lay with the respondent and should not have been placed on itself. It further submitted that its driver, Mr. Patrick Maina, denounced various exhibits tendered before the trial court and this court ought to have taken these factors into consideration but did not.
4. In the alternative, the applicant has argued that should this court find that its application is better suited as an appeal, then it would be fair and just to grant the applicant leave to file an appeal against this court's decision.
5. The respondent is of the submission that the grounds set out in the application do not warrant issuance of an order for review under Order 45 of the Civil Procedure Rules. The respondent further argued that the applicant ought to have instead filed an appeal against the decision being challenged.
6. This court has considered the grounds on the face of the motion; the facts deponed in affidavits in support and against plus the grounds of opposition. I have also considered the rival submissions and the authorities relied upon.
7. A brief background of the matter is that the respondent had filed a suit against the applicant in Chief Magistrate's Court vide Nairobi CMCC NO. 8389 OF 2007 seeking to be paid the sum of Kshs.621,114.34/= together with interest at the rate of 17% and costs of the suit for unpaid amounts on various motor vehicle supplies issued to the applicant by the respondent. The applicant put in its statement of defence, essentially denying the averments made in the plaint.
8. The suit proceeded for hearing and eventually, the trial court entered judgment in favour of the respondent in the sum of Kshs.576,114.37/= plus interest at 17% p.a. as well as costs and interest on the suit.

9. Being aggrieved by the above decision, the applicant lodged an appeal with this court, and put forward six (6) grounds of appeal. Parties recorded a consent to have the appeal disposed of by written submissions. In the end, this court dismissed the said appeal with costs.

10. The application now before this court is for review. The applicable principles in determining an application for review are set out under **Order 45** of the **Civil Procedure Rules, 2010** and are as follows:

a) the discovery of new and important matter or evidence,

or

b) some mistake or error apparent on the face of the record,

or

c) any other sufficient reason.

11. The above provision also provides on the filing of such applications without unreasonable delay. The application before this court was filed slightly over one (1) month from the date of delivery of judgment by this court, hence the same was timeously filed.

12. The appellant/applicant has challenged this court's analysis of the invoices relied upon by the respondent as well as the subject of the driver who is said to have purported to have collected the goods in question on behalf of the applicant.

13. A careful perusal of the court record will show that the above issues were not only raised on appeal but were addressed and determined conclusively by this court.

14. There is no indication that the applicant has either presented new evidence before this court or pointed out an apparent error or mistake. Similarly, the applicant has not offered any sufficient reason that would warrant a review of this court's judgment.

15. The principles to be taken into account in an application for review were restated by the Court of Appeal case of **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** inter alia as follows:

“In National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported)) this Court, with respect, correctly held:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. 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 provision of law cannot be a ground for review.”

“...An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”

16. In view of the foregoing, I am of the view that the applicant's attempts at revisiting issues that have already been determined by this court would essentially be calling for an appeal by this court against its very decision.

17. If anything, the grounds brought forth by the applicant are more suited as grounds of appeal rather than for review. I therefore have no basis on which to review the decision already in place.

18. The applicant has urged this court to in the alternative grant it leave to file an appeal against this court's decision. I have perused the orders sought in the Motion and I note that the order for review was sought but the prayer for leave was not. I therefore have no reason to consider or grant the same.

19. In the end, the Motion lacks merit, it is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 18th day of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant/Applicant

.....for the Respondent