REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 671 OF 2017

ATHI RIVER SHALOM COMMUNITY HOSPITAL.....APPELLANT

VERSUS

MNK.....RESPONDENT

(An appeal from the judgment of the HIV and AIDS Tribunal delivered on the 10th day of November, 2017 at HAT Case No. 002 of 2017)

J U D G M E N T

The appellant was the respondent while the respondent was the claimant in proceedings before the HIV & AIDS Tribunal which delivered its Judgment on 10th November 2017. The respondent herein was successful in the said claim and awarded Ksh. 1 million compensation for unlawful testing without her consent contrary to Sections 13 and 14 of the Aids prevention and Control Act.

There was a further award of Ksh.500,000/- against the appellant for giving wrong HIV results to the patient. The respondent was also awarded costs.

Following the judgment of the Tribunal, the High court was moved to adopt the same as the judgment of the court vide Miscellaneous Application No. 99 of 2018. There is a decree in the record of appeal dated 26th June, 2018 to that effect.

This appeal was filed on 20th November, 2018 about five months from the date of the said decree. As can be seen from the record of appeal, the appellant is challenging the judgment of the Tribunal delivered on 10th November, 2017. Both parties have filed submissions and cited several authorities which I have considered.

The first point to consider is that of jurisdiction. That is to say, whether or not this court has jurisdiction to hear and determine the present appeal, notwithstanding the decree issued following Miscellaneous Application No. 99 of 2018.

The decree issued on 26th June, 2018 followed an application presented before the court seeking an order that the award of the HIV and AIDS Tribunal delivered on 10th November, 2018 be recognised as biding and adopted as a decree of this court.

In essence, what the applicant sought was the crystallization of the award of the Tribunal into a decree of this court capable of execution. Once the award of the Tribunal was converted into the decree aforesaid, it is logical to conclude that it became a judgment of this court. Since this court cannot seat on appeal against its own judgment, I am persuaded that the only option available to the appellant herein was to either appeal to the Court of Appeal or apply for a review of the order or decree issued thereunder.

In that case, therefore, I agree with the finding of the court in the case of **Florence Nyaboke Machani Vs Mogere Amosi Ombui & 2 others (2015) eKLR**, where the court held that upon an award becoming judgment of the court of competent jurisdiction, it can only be varied, vacated, set aside or reviewed by the same court or by an appellant court in appropriate proceedings.

I also agree with the decision of the court in the case of **Republic Vs Kajiado North District Land Disputes Tribunal and another, ex-parte, Caroline Wambui Ngunjiri & 2 others (2014) eKLR** where Odunga J, stated as follows: -

> ***"Where a decision of the tribunal has been adopted by the court of law … the former is subsumed in the latter and the former ceases to exist with the result that the only decision that can be quashed is the Magistrate's adoptive decision."***

Where a court holds it has no jurisdiction it cannot go beyond that determination. In line with the case of **Owners of Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) KLR 1**, a question of jurisdiction may be raised by a party or by a court on its own motion and must be decided forthwith on the evidence before the court. In that case, Nyarangi, JA made the following statement that has become a beacon in

the civil justice system in our courts relating to the issue of jurisdiction. He said as follows: -

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there will be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment is holds that it is without jurisdiction."***

The position I take is that if the appellant had moved to challenge the award of the Tribunal before it was adopted as a decree of this court, then the court would have jurisdiction to hear and determine the said appeal. For this court entertain this appeal after the said decree, it would be tantamount to sitting on an appeal from its own decision. In that case, it will have no jurisdiction.

The court must, therefore, down its tools as to go beyond this stage would be an exercise in futility. The end result is that, this appeal is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 7th day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE