REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 96 OF 2010

JOSEPH GACHENE KAMAU T/A

J.G. SUPPLIERS.....APPELLANT/APPLICANT

VERSUS

NJUE KARURIE.....RESPONDENT

R U L I N G

A. Introduction

1. This ruling is for the application dated 18th April 2019 in which the applicant seeks that the orders given on the 8th day of October 2018 be reviewed or set aside.

2. It is the applicant's case that he had been told by his then advocates on record, which information he verily believed that his appeal was to be disposed by way of written submissions and hence his presence was not mandatory. The applicant further states that he is not soley responsible for the delay of 8 years in prosecuting his appeal as there was no resident judge and getting dates was not easy and also that the file went missing for some time.

3. The applicant further states that he was not aware of the throw-away costs awarded against him as his advocates then on record failed to inform him on the same and he would have paid the same if he was informed.

4. It is further stated that the applicant will suffer irreparably if the instant application is denied whereas the respondent will not suffer any prejudice if the application is allowed. The applicant states that he has an arguable appeal which should be given a chance.

5. In rejoinder, the respondent opposes the application and states that the said application is misconceived, incompetent, frivolous and lacks merit and should be dismissed with costs. The respondent further states that the applicant failed to prosecute his appeal since filing it on the 8th September 2011 and subsequently he applied to have it dismissed which application was compromised by consent of both parties on consent of Kshs. 10,000/= as thrown away costs which the appellant/applicant failed to pay.

6. The respondent further states that the applicant did not prosecute his appeal and he later instructed his advocates to apply for dismissal of the appeal for want of prosecution which was allowed by court on the 8th October 2018. It is thus the applicant's case that there has been undue and unreasonable delay of over 6 months in filing the instant application which delay has not been explained.

7. The respondent further states that the applicant is not being truthful when he claims that this file was missing from the registry whilst relying on a letter filed in the court registry on the 18th March 2019 as the applicant herein filed his bill of costs on or before the 11th March 2019.

8. The respondent also opposes the applicant's claim that his former advocate failed to inform him on the thrown away costs as he has failed to annex an affidavit by his former advocates.

9. The respondent further states that the application does not meet threshold for a grant of orders sought and that he stands to suffer prejudice as he has been waiting for over 8 years to enjoy frits of the judgement delivered by the trial court.

10. The parties disposed of the application by way of written submissions.

B. Applicant's Submissions

11. It is submitted that after the ruling on the respondent's application was delivered, the court file could not be traced prompting the applicant's letter dated 18th March 2019 and that this is prove that he was constantly following up on his case.

12. The applicant submitted that he has annexed evidence in support of his application to show that he made every effort to have his appeal heard but was let down by his advocates and that this evidence was not available when the applicant replied to the application for dismissal filed by the respondent.

13. The applicant further submitted that article 159(2) of the constitution as well as the oxygen rules came to his aid and as such the court should decide the case on its merits and not on procedural technicalities. It is further submitted that the respondent can be compensated by way of throw away costs and this shall do justice to both the respondent and himself.

C. Respondent's Submissions

14. It is submitted that the application herein is bad in law as it is drawn and filed by an advocate who is not properly on record as they have not been served with either a notice of change or notice of appointment of advocate.

15. It is submitted that the instant application does not meet the threshold for granting of orders sought for review or setting aside as he has not submitted that he has discovered any new and important matter of evidence which was not within his knowledge at the time the order was made, or that there was error apparent on the face of the record and finally that the instant application was made with unreasonable delay.

16. It is submitted that the applicant cannot blame his former advocates on record as he went to the extent of perusing the court file from the court record even when he had an advocate on record. It is further submitted that there is no complaint from his advocates on record that the file was missing after the orders sought to be reviewed were made. It is thus submitted that the instant application is an afterthought meant to delay this matter further and meant to defeat the ends of justice.

D. Analysis & Determination

17. In its ruling delivered on the 8th October 2018 this court concluded that the applicant could not convince the court that he was interested in the appeal as on all occasions it was the respondent who had been proactive to have the appeal determined. The court also held that any person who instructs an advocate to file a suit or to lodge an appeal remains accountable to his case or to his appeal and to all matters incidental thereto.

18. The applicant herein seeks to review or set aside the orders issued by this court on the 8th October 2018 that dismissed his appeal for want of prosecution. The applicant blames his advocate for failure to prosecute the appeal as well as on the court registry who he claims failed to trace the file. The applicant further states that he was not aware of the thrown away costs awarded against him as his advocates then on record failed to inform him on the same and he would have paid the same if he was informed.

19. The issue for determination is whether this application has merit. The substantive law regarding review of a judgment or order of the court is to be found in section 80 of the Civil Procedure Act and the procedural law is **Order 45 of the Civil Procedure Rules** which stipulate that:

> ***"Any person considering himself aggrieved-***
>
> ***b. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***c. A party who is not appealing from a decree or order may apply for 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."***

20. In **Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,** the Court of Appeal described an error apparent on the face of the record as follows:

> ***"…In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of 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. This laid down principle of law is indeed applicable in the matter before us."(emphasis mine)"***

21. On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** held that:

> ***"In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court***

dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-

"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."

We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.

We think Bennett J was correct in Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557 when he held that:

"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal"

22. I have carefully considered the reasons given by the Appellant for seeking an order of review. It is my considered view that the applicant has not satisfied the requirements for grant of the orders of review. The issues raised by the appellant/applicant herein were duly raised and addressed by this court in its ruling of 8th October that emanating from the respondent's application dated 28/03/2018.

23. It should be noted that the grounds for review are very specific as discussed herein above. The applicant herein has not demonstrated that he discovered new evidence which was not within his knowledge. Neither has he demonstrated that there was an error apparent on the record. This is a court of justice but not court of convenience such that it has to consider the conflicting interest of the parties. And in so considering, courts have to be guided by the laid down principles of law. The respondent has a decree which he is desirous of executing and it is the court's duty to ensure that the decree is secured pending the determination of the appeal.

24. The appellant is an indolent litigant who may be out to buy time to defeat the execution of the decree for his own benefit. This appeal is nine (9) years old and the applicant is not bothered with its prosecution.

25. The applicant has failed to satisfy the conditions set out in Order 45 Rule 1.

26. It is my finding that the application dated 18th April 2018 is unmeritorious and it is hereby dismissed with costs.

27. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY FO DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence: -

Mr. Kathungu for Respondents

Mr. Momanyi for Oenge for Applicants