REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL SUIT NO. 160 OF 2011

LABANSON MAINA MUTUGI................APPELLANT/APPLICANT

VERSUS

PETER MUTAHI GEORGE..RESPONDENT

RULING

On 22nd March, 2015 the applicant's appeal was dismissed for want of prosecution. By a motion dated 31st March, 2016 the applicant moved this honourable court to set aside the dismissal order and reinstate his appeal for hearing on merits. For reasons expressed in its considered ruling delivered on 20th December, 2016 this Honourable Court allowed the motion but on two conditions; first, the appellant was directed to deposit the decretal sum in a bank account in the joint names of counsel for the judgment-creditor and judgment-debtor and, second, he was directed to take necessary steps to fix the appeal for directions within 30 days of the date of the ruling. If the appellant defaulted in both or any of these conditions then his appeal stood dismissed with costs.

As it later turned out, the applicant did not meet any of these conditions; instead, he moved this court by a motion dated 22nd March, 2017 for review and setting aside of its order of 20th December, 2016 on the grounds that he has a receiving order which he obtained on 12th March, 2012 and therefore his estate is under the management of an official receiver; in any event, he was unable to raise the decretal sum and deposit it in court as directed. The motion was stated to have been brought under Order 12 rule 2 and Order 12 Rule 7 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act. It is this motion that is the subject of this ruling.

The affidavit which he swore in support of the motion has nothing more than an escalation of the grounds upon which the motion is based.

The respondent opposed the application and deposed in his replying affidavit that the applicant is a man of means but who applied for voluntary bankruptcy to frustrate execution of the decree obtained against him. In any event, so the respondent deposed, the applicant has been pursuing his appeal despite the fact that he had obtained a receiving order.

The Official Receiver, though not party to this appeal, filed a 'replying affidavit' but which for all intents and purposes supports the applicant's motion. According to that affidavit, a receiving order was made against the applicant on 12th March, 2012 in this Court sitting at Nairobi in Bankruptcy Cause No. 4 of 2012 and therefore following this receiving order the applicant's estate is vested in the Official Receiver.

He further argued that by virtue of section 9 and 11 of the Bankruptcy Act cap. 53 (repealed) a receiving order operates as a stay of all proceedings against the debtor. Accordingly, the official receiver should have been made party to these proceedings as a trustee of the applicant's estate because he is the only person who has the right to proceed with the appellant's appeal on his behalf. In any event, the parties to this appeal ought to have obtained leave of this Court before proceeding with this appeal. For these reasons, the Official Receiver urged that the orders of this Court granted on 20th December, 2016 be reviewed and set aside.

This motion, as noted was made under, inter alia, Order 12 Rule 7 and Order 17 Rule 2 of the Civil Procedure Rules. Order 12 deals with hearing of suits and consequences that follow non-attendance; these include entry of judgment or dismissal of a suit. Rule 7 provides that where a judgment has been entered or a suit has been dismissed the court may set aside or vary the judgment or order upon such terms as may be just.

Order 17 Rule 2, on the other hand, deals with prosecution of suits and specifically provides that in any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, it may dismiss the suit.

The motion before the court has nothing to do with setting aside a judgment or dismissal of a suit. It has also nothing to do with any notice by this court to parties to show cause why a suit should not be dismissed. It follows therefore that Orders 12 and 17 of the Civil Procedure Rules are inapplicable in the present circumstances and to that extent the applicant's motion is misconceived.

Sections 3 and 3A of the Act are omnibus provisions which are ordinarily invoked where there is no specific provision or rule that addresses a particular issue before court. In them, the Court finds and invokes its inherent powers to make such orders or give directions as are necessary in order to meet the ends of justice.

An application for review is specifically provided for under Order 45 of the Civil Procedure Rules and in my view it is the appropriate rule that ought to have been invoked; it provides as follows:

> ***1. (1) Any person considering himself aggrieved—***
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> > ***(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.***

It is clear from this rule the conditions or the grounds upon which an application for review may be made are:-

> a) A discovery of a new and important matter of evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the material time; or
>
> b) there is a mistake or error apparent on the face of the record; or
>
> c) for any other sufficient reason.

Any of the three grounds is sufficient for an application for review by an applicant who considers himself aggrieved by a decree or order; however, the application must be made without undue delay regardless of which of the three grounds it is based upon.

The applicant did not make any submissions despite the fact that all parties had been directed to file their submissions in written form. Only the Official Receiver and the respondent complied and filed their submissions.

It must be noted that although the applicant is seeking a review of the orders of this court, his motion did not expressly state in any specific terms any of the grounds for review on which his motion is based. The Official Receiver, on the other hand, has submitted in defence of the applicant's application but like the applicant, he has also not stated in no uncertain terms which of the grounds for review he is relying on. I am left to speculate that either the applicant together with the Official Receiver are proceeding on the premise that there's an error apparent on the face of record or there is a discovery of a new matter of evidence which would otherwise have influenced the mind of the Court when it made the orders of 20th December, 2016.

Whichever the grounds that the applicant is relying on, it must be understood that the orders of 20th December, 2016 were made on the application and at the instance of the applicant. Lest we forget, the orders were made on the applicant's application dated 31st March, 2016 and which was filed in court the following day, the 1st April, 2016.His application was, for all intents and purposes, allowed except that it was allowed on terms. Although it has been submitted that the applicant had, by then, obtained a receiving order, nowhere in that application or in the affidavit in support thereof did the applicant ever mention that he had sought for and obtained a receiving order. He essentially proceeded as if he had the capacity to prosecute his application; on its part, the court had no reason to doubt his capacity and treated him as if he was in good stead to pursue his appeal.

I am minded that in his response to the applicant's application, the respondent mentioned that the applicant had obtained a receiving order but in the same breath, he proceeded to state that he had sought to have the order revoked or rescinded. Thus the status of the order was not as clear; in these circumstances, it was up to the applicant to inform the court of the status of his estate. As matter of fact, if he had a receiving order in his favour as at 1st April, 2016 he ought to have filed an application to stay his own appeal pending the conclusion of the bankruptcy proceedings instead of filing an application for reinstatement of an appeal which had been dismissed almost a year before.

The second issue is that even if the order of 20th December, 2016 is reviewed and set aside, the earlier order of 22nd June, 2015 dismissing the appellant's appeal still stands. As of to date no application has been made either by the Official Receiver or the applicant himself to review or set aside that particular Order. In short, a review of the order of 20th December, 2016 while the order of 22nd June, 2015 is in place, is an exercise in futility.

The final and what I consider as the most important question is that whether this Court should have heard the parties on the applicant's application dated 31st March, 2016 and delivered the ruling of 20th December, 2016 is a question of law rather than of fact. Nowhere is this clearer than in the Official Receiver's own submissions. Of particular note, he has invoked sections 9 and 11 of the Bankruptcy Act cap 53 (repealed) to argue that the appellant's appeal ought not to have been pursued by the appellant himself or the respondent. By the same token, the Court cannot of its own motion taken any step against the appellant without any reference to the Official Receiver. The Court has, effectively, been faulted for not addressing itself to these provisions in its ruling of 20th December, 2016.

The Official Receiver may be absolutely right but the question that immediately follows is whether this Court can now sit on appeal of its own decision and correct what I understand the Official Receiver to be saying is a misapprehension of the law. I doubt it can.

Failure to take any provision of the law into account or misinterpretation of such a provision or provisions

in a court's decision is not an error apparent on the face of record, assuming that is the ground upon which the applicant and the Official Receiver are seeking review.

I had occasion to deal with this question in **High Court Civil Suit No.12 of 2014 Eco Bank Limited versus David Njoroge Njogu & Another** where I was of the humble view that where a party aggrieved by an order or a decree is of the conviction that the order or the decree was based on a misapprehension of the law, the correct course would be to appeal against that decree or order rather than file an application for review. In this regard, I relied on the decision in **Abasi Balinda versus Fredrick Kangwamu & Another (1963) E.A 558** where a court was asked to review its order on costs on the ground that the court is said to have taken an erroneous view of the evidence and of the law relating to the question of whether a returning officer was a necessary party to an election petition. The court (Bennet, J.) appreciated that **section 83** of the Uganda Civil Procedure Ordinance (equivalent to **section 80**of our **Civil Procedure Act**) conferred upon the court jurisdiction to review its own decisions in certain circumstances and **order 42** (which is equivalent to **order 45** of our **Civil Procedure Rules**) prescribed the conditions subject to which and the manner in which the jurisdiction should be exercised. In interpreting that jurisdiction and in the process dismissing the applicant's application, the court cited with approval a passage from **Commentaries on the Code of Civil Procedure by Chitaley & Rao (4th Edition), Vol. 3 page 3227,** where the learned authors explained the distinction between a review and an appeal and had this to say;

> ***"a point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or law is no ground for review though it may be a good ground for an appeal"***

The Court of Appeal explained this notion in **National Bank of Kenya Ltd versus Njau (1995-1998) 2EA 249 (CAK)**; at page 253 of the judgment, the Court said: -

> ***"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 of 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 the law cannot be a ground for review."(Underlining mine)***

Following the footsteps of the learned judges in these decisions, it is my humble opinion that if I was wrong in the ruling I delivered on 20th December, 2016 an appeal against it, rather than an application for review, would have been the appropriate course. For these reasons, I reject that applicant's motion dated 22nd March, 2017 with costs to the respondent.

Signed, dated and delivered in open court this 9th day of May, 2018

Ngaah Jairus

JUDGE