REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 137 OF 2015

MESHAK OWIRA OWINO..... 1ST APPELLANT

STEREOMAX GROUP LIMITED..... 2ND APPELLANT

-V E R S U S –

JACKSON OUMA OGEDA ..... RESPONDENT

RULING

1) Jackson Ouma Ogeda, the respondent herein took out the motion dated 29th August 2016 in which he sought for the following orders:

> ***1. That this honourable court be pleased to review, vary, vacate or set aside its ruling and order dated 19th August 2016.***
>
> ***2. That the honourable court be pleased to issue any other order it deems just and equitable in the circumstances.***
>
> ***3. That the costs be in the cause.***

2) The motion is supported by the affidavit of the respondent. When served, Mesack Owira Owino and Steromax Media Group Ltd, the 1st and 2nd appellants filed grounds of opposition to resist the motion. When the motion came up for interpartes hearing, learned counsels beseeched this court to consider the material placed before it and come up with a ruling.

3)The respondent pointed out that there is an error on the face of record which should convince this court to review and vary its decision made on 19th August 2016. The respondent argued that this court made a finding which is to the effect that the respondent had not filed his written submissions at the time of writing the aforesaid ruling yet the same was in the court file and was even served upon the appellant.

4) The appellant was of the view that the application is vexatious and amounts to an abuse of the court process. It is said that there is no ground or basis to sustain an application for review. The appellant further pointed out that the order sought to be impugned has not been extracted and annexed to the application for review.

5) The main ground raised and argued in support of the motion for review is that this court indicated in its ruling that the respondent had not filed his submissions hence the same were never taken into account. According to the respondent, this was an error apparent on the face of record. The respondent attached to his affidavit a copy of the written submissions he allegedly filed in response to the appellant's motion

dated 28.7.2015. It is said that had this court considered those submissions it would have come up with a totally different decision from what it delivered on 19.8.2016. It is true that this court noted that the appellants were the only parties who had filed their submissions. It would appear from the averments and annextures attached to the respondent's affidavit that the respondent may have actually filed and served his submissions. However, the respondent was required to show that at the time of writing this ruling, the respondent's submissions were physically in the court office. It is possible the respondent filed his submissions and the registry staff failed to place the same on the courtrecord. As we speak, those submissions are not on record save for those annexed to the affidavit of the respondent. If this court strictly applied the principles applicable to applications for review, then the current motion cannot see the light of the day. It is obvious that this court did not commit any error on the face of record. Simply put, the respondent's written submissions were not in the court file at the time of writing the ruling delivered on 19.8.2016.

6) However, this court is a court of justice. One of the principles to be considered in determining an application for review is that a party may provide the court any other sufficient reason. This court has been urged to find that indeed the respondent had filed and served his submissions. The appellants did not controvert the respondent's averments made in a sworn affidavit. Basically, the appellants have not denied the respondent's averment that he filed and effected service of his submissions upon them. I am prepared to accept the submission that the respondent filed his written submissions but the same were not put in the court file due to the mistake or omission of the court registry staff. The mistake should not be visited upon an innocent litigant. In broad interest of justice, I hereby reopen the doors of justice by right away taking into account the respondent's submissions and determine whether a different decision could have been reached over the motion dated 28.7.2015.

7) The ruling delivered on 19.8.2016 was the outcome of the motion dated 28.7.2015. It was an application taken out by the appellants whereof they sought for an order for stay of execution pending appeal. The record shows that the respondent gave the appellants financial accommodation to the tune of kshs.2,200,000/= on 17.6.2011. The appellants promised to liquidate the aforesaid amount by monthly instalments of kshs.600,000/=. The appellants failed to fulfil their part of the bargain prompting the respondent to file an action for recovery before the Chief Magistrate's Court, Milimani Commercial Court, Nairobi. Judgement was eventually entered in favour of the respondent. The appellants approached the chief magistrate's court to allow them to liquidate the decretal sum by monthly instalments of kshs.10,000/= with periodic reviews after every six months. The application was heard and dismissed. Being aggrieved, by the dismissal order, the appellants filed this appeal. The appellants contemporaneously with the memorandum of appeal filed an application for an order for stay pending appeal. That application is the motion dated 28.7.2015 which gave rise to the ruling of 19.8.2016.

8) This court took into account the respondent's replying affidavit and grounds of opposition dated 1st September 2015. The submissions of the respondent were taken into account. I now wish to consider those submissions and determine the effect. It is the submission of the respondent that the appellants filed an appeal against the dismissal order of the trial magistrate without obtaining prior leave to appeal. In essence the trial magistrate dismissed the appellants application to be allowed to liquidate the decretal sum by monthly instalments. In my view the question as to whether or not leave to appeal should have been obtained before the filing of this appeal, is a matter which can be determined when the appeal comes up for directions or at the time of hearing of the appeal itself. In my ruling of 19.8.2016, I considered in detail the principle of substantial loss and the question as to whether or not the application was timeously filed. Those issues were ably addressed by the respondent in his replying affidavit and the grounds of opposition which were considered by this court.

9) After taking into account the respondent's written submissions, I have come to the conclusion that even if the same had been presented to this court before the writing of its ruling of 19.8.2015, this court would not have arrived at a different conclusion. In the end I find no merit in the motion dated 19.8.2016. The same is dismissed with costs abiding the outcome of the appeal.

Dated, Signed and Delivered in open court this 10th day of February, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent