REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 332B OF 2014

RAMESH SERVICES STATION LTD)

JOSEPH NDICHU KAMAU)….....APPELLANTS/APPLICANTS

VERSUS

STEPHEN MAINA MACHARIA …….....RESPONDENT

RULING

1. By a Notice of motion dated 26th January 2016 and filed in court on 1st February 2016, the appellants/applicants seek from this court orders that:

1. Spent

2. Spent

3. That this court be pleased to review its ruling delivered on 21st January 2016 and give an order that the whole security deposited by the appellants do remain in court until the appeal herein is heard and determined.

4. That costs of the application be provided for.

2. The application is predicated on the grounds that:

a) The orders of this court made on 21st January 2o16 were to the effect that ¾ of the security deposited in court be released d to the respondent.

b) That the appellant's were dissatisfied with the said ruling and order and are seeking for a review of the same.

c) That the applicant/appellants complied with all the orders of the court save for extraction of a decree which has delayed and which delay is not due to their fault.

d) That they had always been ready to prosecute the appeal and their record of appeal was prepared and filed on 2nd June 2015.

e) That the security deposited in court includes the respondent's advocate's costs in the primary suit which they will be unable to recover in a successful appeal.

f) That the respondent had claimed loss of earning capacity and if the security is released then the appellants will not recover the many in case of a successful appeal.

g) That the appellants will suffer irreparable loss if the court does not intervene.

h) That it is in the interest of justice and fairness.

3. The application is further supported by the affidavit sworn by Wahome Njagi advocate on 26th January 2016 reiterating the grounds on the face of the application, while explaining that they complied with the order of 10th March 2015 and prepared the record of appeal within 90 days by 2nd June 2015 and took steps to have the appeal mentioned to take directions but that in their record of appeal they advertently forgot to include a certified copy of the decree and on 27th October 2015 they were granted extension of 14 days to file to supplementary record of appeal to include the certified decree which they thought would be sufficient time; That they then wrote to the Executive Officer and Deputy Registrar in order that they way facilitate the transfer of the primary file to this court and sought to open joint account with family bank since parties had an existing joint account there; and the bank informed them to do a letter signed by both parties for them to open another joint interest account on the meantime the finds should be remitted to the existing account that they had. That they further wrote to the Deputy Registrar requesting for transfer of the funds to the existing joint account as ordered and send a letter to the respondent requesting them to append their signature on a letter addressed to Family Bank but they refused and returned the letters unsigned. That a follow up letter of 4th November 2015 elicited no response; That they paid the thrown away costs to the respondents in the sum of shs 30,000 but that efforts to get certified copy of decree had not seen successful. That there is no affidavit of means from the respondents who only filed grounds of opposition and that therefore if the ¾ of decretal sum is paid, they are not guaranteed a reimbursement should the appeal succeed hence they will suffer irreparable loss since the respondent claimed that he lost earning capacity and that delay in extracting decree is beyond their control.

4. The respondents opposed the application and filed grounds of opposition dated 8th February 2016 through their counsel Ms Obaga & Company Advocates filed on 9th February 2016 maintaining that the application is incompetent, misconceived and otherwise an abuse of the court process and that the application does not satisfy the conditions for review under Order 45 Rule 1 of the Civil Procedure Rules. That the allegation that the court did not consider certain facts in the ruling and order of 21st January 2016 can only be considered as a ground of appeal and not review; That the ruling of 21st January 2016 was made after the court considered all the facts presented to it by the parties in terms of compliance of orders of 27th October 2015. That there is no new matter, the court considered all issues raised and canvassed by the parties and that this court should therefore not sit on an appeal of its own ruling and order; That the order of 27th October 2015 were clear that they were to lapse where the conditions were not complied with, the respondents have been denied their lawfully obtained judgment, the application is intended to defeat the overriding objective of the law, there is no demonstration of interest to prosecute the appeal and that the respondent would suffer prejudice if this application is granted. The parties advocates agreed to have the application argued by way of oral submissions.

5. The application was heard before me interpartes on 1st March 2016 with Mr Wahome advocate representing the applicant and Ms Obaga Rose representing the respondent.

6. In his brief submissions, relying on the grounds and supporting affidavit, Mr Wahome argued that they were aggrieved by the order of 21st January 2016 affecting HCCA 332A and 332B of 2014. That the court did not take into account one of the core issues which is the issue of the ability of the respondent to recompense to the applicant the ¾ of the decretal sum since nowhere in the said

grounds did the respondents show that they were capable of refunding any of the decretal sum if the appeal is successful.

7. Further, that the respondents were awarded damages for loss of earning capacity and loss of earning which the appellant had disputed albeit they pleaded so they would not be in a position to earn any money and refund. In addition, it was submitted by Mr Wahome that they were unable to extract decree and that the delay was very much regretted hence they prayed for review of the order of 21st January 2016.

8. In opposition to the application, Miss Obaga submitted relying on her 14 grounds of opposition filed on 9th February 2016 contending that the application was Otiose. That what the appellant /applicant was seeking was for this court to sit and reconsider facts presented earlier and arrive at a different decision which is the role of an appellate court. That there are no new grounds presented to this court in the application, that were not presented on 21st January 2016. That Order 45 of the Civil Procedure Rules is clear as to when the court can interfere with its own decision. That there was no new and important matter discovered and that there was no mistake on the face of the record and there was no sufficient reason explained; That the applicants keep coming to court pleading as if they had been disadvantaged yet the court had been very lenient to them. That the issue of decree was presented to the court on 21st January 2016 hence it cannot be a new matter for this court to review.

9. On the issue of earning capacity and refund , it was submitted that it could not be raised now since the court had already made an order for compliance, In addition, counsel for the respondent's submitted that decree had been filed subsequent to the order sought to be reviewed and therefore there was no justification for review.

10. In a brief rejoinder, the appellant's counsel Mr Wahome submitted that they had approached the court within Order 45 of the Civil Procedure Rules and complied with conditions for review; that if the court had considered the issue of recovery in case of a successful appeal, then the ruling would have been different. He urged the court to allow the application and apply the ruling in this matter to HCCA 332A of 2014.

11. This ruling was to be delivered on 29th March 2016 which regrettably fell on a recess day after the Easter weekend hence it had to be given another date but parties were not served by the registry and on each occasion when the matter appeared on the cause list for delivery of the ruling, only one party would be in attendance hence the delay.

12. I have conscientiously considered the application by the appellant/applicant, the grounds in support thereof, the supporting affidavit, annextures and submissions by the applicant's counsel. I have also considered the grounds of opposition filed by the respondent's counsel and the submissions in court.

13. The law applicable for review is Section 80 of the Civil Procedure Act as supplemented by Order 45 of the Civil Procedure Rules. Under Section 80 of Cap 21, ***any person who considers himself aggrieved;***

> ***a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***b) By a decree or order from which no appeal is allowed by this Act;***
>
> ***May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order therein as it thinks fit.***

14. The procedural law under Order 45 Rule (1) of the Civil Procedure Rules is clear that :

Any person considering himself aggrieved:-

By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

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 stay 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.

15. With the above law in mind, and having perused the record in this matter, the application, grounds, supporting affidavit, grounds of objection and the rival submissions made by both parties counsels on record, the key question for determination is whether the applicant's application for review has merit.

16. Before I determine that issue, it is important to provide some background that culminated into this application for review.

17. By a notice of motion dated 30th July 2014 brought under certificate of urgency and under the then High Court Vacation Rules, under the Judicature Act, the applicant herein (appellant sought from this court orders for stay of execution of decree of the lower court in Milimani CM CC 6346 of 2012 pending hearing and determination of this appeal on its merits. The duty judge Honourable Waweru J did certify the matter as urgent and granted an interim stay of execution for 7 days.

18. The matter was later slated for hearing on 16th January 2015 before me and on that date of 16th January 2015 I did grant an interim stay conditional upon the appellant depositing the decretal sum into court within 14 days pending interpartes hearing of the application on 11th February 2015. The parties agreed that as the appeal herein and HCCA 322 B/014 are similar, orders that are made in one file be applicable to HCCA 332A/2014.

19. On 11th February 2015 when the parties' advocates Mr Wahome for the appellant and Ms Obaga counsel for the respondent appeared before me, they sought for time to negotiate a settlement and asked for a mention dated to confirm status of negotiations. This court accorded the parties time to negotiate for a settlement if any and on 10th March 2015 the matter was again up for mention when the advocates for the parties dictated to the court a consent which they duly endorsed in the following terms, compromising the application dated 10th December 2014:-

1. There be stay of execution of the judgment and decree of Milimani CMCC 7065/2012 pending hearing and determination of the appeal herein.

2. That the money deposited in court be transferred into a joint interest earning account in the names of counsels for the parties within 30 days from the date hereof.

3. The appellant to prepare, serve and file a record of appeal and do all that is necessary to prepare the appeal ready to be heard within 90 days from the date hereof.

4. In default, execution to issue.

5. Costs of the application shall be in the appeal.

6. Mention on 9th June 2015 to confirm compliance.

20. Thereafter, on 27th October 2015, the matter again came up before me for mention when Miss Obaga reported that the applicants were in breach of the orders recorded by consent on 10th March 2015. She nonetheless conceded that the applicants could be given 14 days to comply. On the said date, Mr Wahome advocate for the applicant informed the court that it was an oversight on their part. That they thought they had complied with the orders.

21. The court then granted the applicant 14 days from 27th October 2015 to comply with the orders and specifically, to file and serve a supplementary record of appeal which was to include a decree from the lower court. The applicants were also granted 14 days to ensure funds deposited into court are released into the parties' advocates' joint account to be opened at Family Bank and in default execution to proceed. The applicant was also condemned to pay to the respondent kshs 15,000 on each of the two appeal files HCCA 332A/2014 and 332B/2014. I also directed the Deputy Registrar to call for the lower court file and I fixed the matter for mention on 17th November 2015.

22. On 17th November 2015 this court was indisposed hence the matter was placed before Ms Wangila Deputy Registrar. Parties advocates attended the mention and the Deputy Registrar set it for mention on 26th November 2015 on which latter date the court was not sitting hence the parties fixed the matter for 21st January 2016 for directions. On 21st January 2016, Ms Obaga and Mr Wahome appeared before me and Ms Obaga submitted that as the orders of 27th October 2015 had not been complied with, the sums of money deposited in court should be released to her clients. Mr Wahome on the other hand responded that indeed they had not complied with because if he challenges they had been experiencing. He stated that they had complied by paying costs of shs 15,000 as ordered and that they had also written asking for the primary file to be availed to the court. That they had also experienced challenges availing decree to enable them file a supplementary record of appeal. On the issue of depositing of the money into a joint interest earning account with Family Bank, Mr Wahome submitted that the bank had advised that since there was another account with them they could use the same account, which prompted Mr Wahome's firm to write to the court to release the money to the said account. Further, that despite personal visits to the lower court, they had not been able to get a decree. He therefore stated that he needed more time to get a certified copy of decree and urged that the monies deposited in court remain in court as they deal with the issue of a certified copy of decree and record of appeal.

23. In rejoinder, Ms Obaga contended that the appellant had failed to comply with orders of 27th October 2015 which were in addition to the ones of 10th March 2015 and that her firm had prepared a draft decree and send to Mr Wahome's firm for approval but that from 2nd November 2015, there had been no response or approval. She also denied ever being aware that the money was to be deposited in another account relating to a totally different matter. She denied being given any account opening forms by the appellant's counsels.

24. In the brief ruling delivered on the same day of 21st January 2016 at 2.30pm, and having considered the parties' advocates submissions that morning. I made the following orders:-

1. That the time for filing of supplementary record of appeal is hereby enlarged by a further 21 days from the date hereof .

2. That the respondents shall be paid ¾ of all the decretal sum already deposited in the court forthwith.

3. The balances thereof to be retained by the court until the appeal is heard and determined.

4. That this ruling and order shall and hereby applies to HCCA 332B of 2014.

25. It is the above orders that prompted the applicant to file this application dated 26th January 2016 seeking for review of my said orders on account that the court did not take into account the respondent's inability to repay the decretal sum should the appeal herein succeed, and that therefore the appellant shall suffer irreparable loss and the appeal shall be rendered nugatory if the ¾ of the decretal sum in both appeals is paid out to the respondent before the appeal is heard and determined.

26. The big question therefore, based on the above chronology of the facts as exemplified on record is, would this court be seized of the jurisdiction to review its orders of 21st January 2016 on account that it did not take into account or consider the issue of recovery in case of a successful appeal and that had the court considered that issue then the ruling would have been different?

27. The applicant's grounds and supporting affidavit as submitted on heavily state that the respondent has no means and that he did not swear any affidavit of means yet he was awarded loss of earning capacity and loss of earnings which was disputed by the applicant.

28. The power to make orders reviewing its own orders is an unfettered discretionary power of this court. However, from the onset, I must explicitly state that the applicant's right to seek review of this court's orders cannot be successfully maintained on the basis that the decision of the court was wrong either on account of wrong application of the law or due to failure to apply the law or at all.

29. Failure by this court to consider the issue of the capacity of the respondent to repay the decretal sum should the money be paid to him and the appeal succeeds, is not and does not fall in any of the categories of conditions to be fulfilled for a review to be allowed. It would be an erroneous conclusion of evidence. (see **Pancras T. Swai V Kenya Breweries Ltd [2014] e KLR.**

30. The Court of Appeal in the **National Bank of Kenya Ltd V Ndungu Njau CA 211/96** had this to Say concerning review:-

> ***" 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 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 ground for review". ……The learned judge made a conscious decision on matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it would be a good ground for appeal but not for review. Otherwise we agree that the learned judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

31. In **Francis Origo & Another V Jacob Kumah Mungala (CA 149/2001** the Court of Appeal considered a matter where the High Court had 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 that in any case, the applicants had filed an appeal which was struck out before filing of the applications for review. The Court of Appeal pronounced itself as follows:-

" 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 no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."

32. In **Abasi Belindar Fredrick Kangwana & Another [1963] EA 557** Bennet J (cited with approval) by the CA in **Pancras T. Swai** (supra) case 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 a law is not a ground for review though it may be a good ground for appeal."

33. In the instant case, it is very clear to my mind that the applicant is basing its application for review on this court's failure to consider evidence that the respondent was a man of straw and therefore he could not pay back the decretal sum were the appeal to succeed. It will however be noted that the issue of whether or not the respondent was a man of means was compromised by the consent order of stay recorded on 10th March 2015. The parties opted not to argue the application and agreed on terms which this court adopted. They were also emphatic in their consent that in default, execution to issue. Again when they appeared before me on 27th October 2015 they agreed to enlarge the period for compliance of the orders of 10th March 2015 to 14 days. Nowhere in the cause of proceedings herein, not even in the parties advocates submissions made on 21st January 2016 did Mr Wahome allude to the respondent's inability to pay the decretal sum should the court order that the said decretal sum be paid to the respondent as urged by Ms Obaga counsel for the respondent.

34. This court was not seized of the jurisdiction to resuscitate an issue which the parties had and were conscious of when they entered into the consent of 10th March 2015 providing for themselves timelines being conditions for stay and even providing for the consequences of non compliance with the said conditions. It therefore follows that what Mr Wahome is asking this court to do is to sit on its own appeal. It is also clear to this court that the appellant is asking this court to reconsider the consent of 10th March 2015 by reopening the parties positions before the consent was recorded.

35. It was expected that where there is default in complying with court orders within the agreed or set timelines, the applicant would be beseeching this court to enlarge time within which compliance should be met. Instead, in their application and submissions, the applicant is asking the court to review and set aside its order of 21st January 2016 that ¾ of the decretal sum be paid to the respondent and that instead, the court should order that the whole of the decretal sum be retained by the court and the appellant pursue the issue of the filing of decree by way of a supplementary record of appeal.

36. This court did indeed grant by consent of both parties advocates enlargement of time for filing of decree and for depositing of the monies into the bank account to be opened by both parties advocates. However, when it became clear that the applicant was not interested in complying with the court orders and was instead taking the respondent and indeed this court in circles, this court had to make the orders that it did make on 21st January 2016 to give effect to its orders of 10th March 2015 and 27th October 2015. The applicant has not set out in their application or even submissions by counsel, any of the conditions necessary for the grant of review under Order 45 Rule 1 of the Civil Procedure Rules. Mr Wahome simply submitted that they had complied with the conditions/principles for review. There was no submission that there was an error apparent on the face of the record and no error of fact was ever pointed out by the applicant's counsel. It was also not mentioned or submitted that there was a new and important matter which after exercise of due diligence, was not within its knowledge or could not be produced at the time when the order was made.

37. The applicant's counsel has not submitted on what they consider to be sufficient reason for consideration by this court. Failure to consider an issue which was part of the initial arguments for stay pending appeal is not sufficient reason for this court to review its orders of 21st January 2016. This court is aware that any other sufficient reason, it has been held, need not be analogous with the other grounds set out in the rule under Order 45 of the Civil Procedure Rules(see **Wangechi Kimata & Another V Charan Singh CA 80 of 1985.** Besides the claim that this court failed to consider evidence of the respondent's incapacity to repay the decretal sum, the applicant did not advance any other sufficient reason, yet the orders of 10th March 2015 and 27th October 2015 were made by consent of both parties with a default clause that in default, execution was to proceed, thereby fully compromising the application for stay. In addition, failure to consider evidence is not an error apparent on record or a new and important matter. That error is only amenable to an appeal and not a review.

38. For all the above reasons, I find no merit in the application for review as filed and urged by the appellants and accordingly I proceed to dismiss the application by the applicant dated 26th January 2016 with costs to the respondent. This ruling shall apply to HCCA332A of 2014 as agreed by the parties.

Dated, signed and delivered in open court at Nairobi this 18th day of July, 2016.

R.E ABURILI

JUDGE

In the presence of:

Mr Wahome for the appellants/applicant

Rose Obaga for the Respondent

Court Assistant: Adline