



IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.17 OF 2011

(Appeal from the Judgment in Kericho CMCC No.335 of 2010

by Hon. H. I. Ong'udi – CM delivered on 7th April 2011)

SAMWEL K. ROTICH - APPELLANT

VERSUS

JULIUS KIPROTICH TOROITICH - 1ST RESPONDENT

K-REP BANK LIMITED - 2ND RESPONDENT

RULING

The subject matter of this ruling is the Motion dated 22nd July 2013 taken out by the Respondents in which they sought for the following orders:

1. THAT service of this Application be dispensed with at the first instance and the matter be certified as urgent and be fixed for hearing on a priority basis.
2. THAT the ruling delivered by Honourable J. M. Mutava on 17th April 2013 be reviewed on account of some mistake or error apparent on the face of the record or for any other sufficient reason.
3. THAT upon review this honourable be pleased to order that the costs awarded to the Respondent in the lower court and the auctioneers costs in the sum of Ksh.318,431/= together with the accrued interest be released to the Respondents advocates from the sum of Ksh.350,000/= deposited in court as security.
4. THAT costs be provided for.

The Appellant herein filed grounds of opposition to resist the Motion.

I have considered the grounds stated on the face of the Motion and the facts deponed in the affidavit filed in support of the Motion plus the grounds of opposition. I have further considered the oral submissions of learned counsels. It is the submission of Mr. Konosi, learned advocate for the Respondents that on appeal, the judgment gave the Appellant half the costs. This is said to be an error on the face of record hence it should be reviewed and set aside. Mr. Miruka, learned advocate for the Appellant urged this court to find that the Motion does not meet the threshold of an application for review.

The Respondents were prompted to file this Motion by the ruling given by Justice Mutava on 15th April 2013 in which the Hon. Judge expressed himself by making the following orders:

1. The taxing officer of this court do determine the costs of the appeal out of which half should be awarded to the Appellant.
2. The taxing officer of this court do re-tax legal and Auctioneers' costs awarded in the lower court to verify if the sums claimed by the Respondents are within scale.
3. The sums determined to be payable to the Appellant under (1) above be set-off from the sums determined to be payable to the Respondents under (2) above.
4. Any ensuing credit after the set-off in favour of the Respondents be paid from the sum deposited by the Appellant in court; and
5. The balance remaining after deducting any sums payable under (4) above be released to the Appellant.

I have now been asked to review the orders and set aside. With great respect, I do not think the orders are available via such an application. It is clear in my mind that the errors pointed out cannot be dealt with by an application for review. The only available avenue or redress is for the Respondent to appeal. In short the motion does have the ingredients necessary to sustain an application for review. I agree with the submissions of Mr. Miruka that the Motion is incompetent and lacks merit. The same is hereby ordered struck out and dismissed with costs to the Appellant.

Dated, signed and delivered in open court at Kericho this 16th day of May 2014

J. K. SERGON

JUDGE

In the presence of:

- N/A Konosi for Appellant
- N/A Miruka for Respondent