



No. 301/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC APPLICATION NO. 30 OF 2011

DICKSON M. TUMBO.....APPLICANT/OBJECTOR

VERSUS

TRANSFLEET (EPZ) LTDLANDLORD/RESPONDENT

AND

ROLEX GRAMENT (EPZ) LTD.....TENANT

RULING

1. By an application dated 2nd May, 2013, the applicant seeks review of the ruling by **Dulu, J** dated 25th March, 2013 to ammend the award of **Kshs. 1,000,000/= (One Million)** payable to the applicant to make it **Kshs. 1,400,000/=(One Million Four Hundred Thousand only)**.
2. The application is based on grounds that; the ruling was erroneous and not based on the **Auctioneers Act**; the Court found that the Auctioneer, had sold goods worth **Kshs. 20,000,000/= (twenty million)**. Consequently the fee should have been 7% of the sale which is **Ksh, 1,400,000/=**.
3. The application is supported by an affidavit deponed by **Dickson Mbulu Tumbo**, the appellant, who states that having been dissatisfied by the taxed fees in his favour as the Auctioneer in the Lower Court he appealed. **Dulu, J** on hearing the appeal awarded him **Kshs, 1,000,000/= (one million)** for work executed. The value of the sale he conducted was **Kshs. the 20,000,000/=**. According to the **Auctioneers Act, 2009**, the Judge should have applied the provided for percentage. Therefore there was an error on the face of the record that called for review.
4. In a reply thereto, **Gladys Gichuki**, counsel in conduct of the matter stated that the ruling was straightforward, accurate and there was no error exhibited as alleged. Further, she stated that if the applicant is dissatisfied by the ruling of the court he should prefer an appeal.
5. I have considered rival submissions filed by both parties. The application has been brought pursuant to the provisions of **Order 45** of the **Civil Procedure Rules** which provides thus:-

“Any person considering himself aggrieved-

- 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 an 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.

2. (1) an application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

3(1) Where it appears to the court that there is no sufficient ground for a review, it shall dismiss the application”.

6. It is not in dispute that the application was filed without any delay. This application is basically based on account of an error being purportedly apparent on the face of the record. The reason given is that the bill should have been taxed at **One Million Four Thousand Shillings (1,400,000/=)** instead of **One Million (1,000,000/=)**. The fees for sale should have been at 7% of the sale.
7. In the case of *Pancras T. Swai versus Kenya Breweries Limited [2014]eKLR* the Court of Appeal defined what constitutes a matter of mistake or error apparent on the face of the record. They stated thus:-

“The discovery of new and important matter or evidence or mistake or error apparent on the face of the record... in rule 1 of Order 44 (now Order 45 in 2010 CPRS) relates to issue of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to”.

8. In the case of *National Bank of Kenya Limited versus Ndungu Njau (Civil Appeal No. 211 of 1996* (unreported) the Court of appeal held that :-

“A review may be granted wherever the court considers that it is necessary to correct an apparent 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 the law. Misconstruing a statute or other provision of the law cannot be a ground for review.”

9. The applicant seeks review of the ruling because the learned Judge reached a wrong conclusion. The subject of review being fees awarded pursuant to the **Auctioneers Act**. This was because the Judge misconstrued the provisions of statute. It is a matter emanating from existing law as opposed to facts. Consequently it cannot be a subject of review. Venturing into such an area would be tantamount to sitting as an appellate court on a judgment of court of the same jurisdiction, which cannot be permitted in law. In the premises the only remedy available for the applicant is to appeal as provided by the law.
10. From the foregoing, it is apparent that the application has no merit. Accordingly, it is dismissed.

DATED, SIGNED and DELIVERED at MACHAKOS this 9TH day of JUNE, 2014.

L.N. MUTENDE

JUDGE