**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 86 OF 2012**

**ROY MCKENZIE ……..………………….....………...…………… PLAINTIFF**

**V E R S U S**

**CARTRACK KENYA LIMITED ………………………………. 1ST DEFENDANT**

**911 SECURITY LIMITED**

**{T/A CARTRACK GROUP} ……………………........……..... 2ND DEFENDANT**

**RULING**

1. This Court on 20th September 2012 delivered judgment for Plaintiff in the following terms-

   a. **General damages for pain, suffering and loss of amenities at Kshs. 700,000/- with interest thereon at court rates from the date hereof until payment in full, and**

   b. **Future surgery and rehabilitation costs Kshs. 550,000/-.**

   c. **Special damages awarded to the Plaintiff by way of interlocutory judgment are payable in the amount of Kshs. 3,263,311.00 with interest thereon at a court rates from the date of filing suit until payment in full.**

Paragraph (c) above comes from the background that the Plaintiff obtained interlocutory judgment on 7th June 2012 in default of Defendant's appearance in this suit.

2. Since the entry of that judgment on 20th September 2012 after formal proof there have been numerous applications by Defendant. The latter one is Notice of Motion dated 12th September 2014 for review of the judgment of 20th September 2012. The application is based on the following grounds-

   a. **That the Honourable Court made a mistake or error apparent on the face of the record when it delivered a Judgment awarding the Plaintiff imposed Special Damages to the tune of Kshs. 3,263,311.00;**

   b. **That as a result of the Judgment and decree arising therefrom, the Plaintiff has begun the process of execution;**

c. **That the Plaintiff has already seized and sold one motor vehicle and if not restrained by the Court, he will continue to seize and sell more assets exposing the Defendants to loss and prejudice;**

d. **The erroneous judgment gives the Plaintiff an opportunity for unjust enrichment;**

e. **The erroneous judgment should be reviewed or varied ex debito justiciae.**

The basis of the Defendant to say that the judgment of 20th September 2012 contained errors is because of the award in that judgment of Kshs. 3,263,311.00 being special damages. Defendants argue that the error occurred because the Plaintiff did not specifically prove those special damages. I have perused Plaintiff's Plaint and noted that the Plaintiff prayed for Kshs. 3,263,311.00 under the title of Special Damages. Defendant relied on the case **WILSON WAITHAKA GITAU –Vs- PHILIP KURIA WAINAINA (2006)eKLR** where the case **SANDE –Vs- KENYA CO-OPERATIVE CREAMERIES LTD CIVIL APPEAL NO. 154 OF 1992** was cited as follows-

**"We now turn to the Appellant's main ground regarding the alleged loss of profits and other expenses amounting in all Kshs. 14,151,650.10. As we pointed out at the beginning of this judgment Mr. Lakha readily agreed that these sums constituting the total amounts were in the nature of special damages. These were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved. We do not think we need to cite any authority for this simple and hackneyed proposition of law."**

3. The Plaintiff filed Preliminary Objection to the Notice of Motion dated 12th September 2014. The following are those grounds of objection-

- **This Honourable Court has no jurisdiction to sit on appeal against its own judgments or decisions.**

- **Further and/or alternatively, and without prejudice to the foregoing, this Honourable Court is functus officio.**

- **The application is therefore unmeritorious, an afterthought, an affront to the principle of finality of proceedings and is an abuse of the Court process and the same ought to be dismissed with costs.**

4. Plaintiff relied on the case **ALFRED MAKANGO & 2 OTHERS –Vs- ZABLON NTHAMBURI & ANOTHER [2012]eKLR**. The Court in that case held thus-

**"The Applicant's main reason is that the order is an abuse of the Court's process, and was obtained irregularly as there was a non-existent suit. I note that the orders obtained on 25/8/2011 were obtained after this same court dismissed the Plaintiff's suit and discharged the orders of 18/7/2005 and the Court became functus officio. In my view, if I delve into the issues raised by the Applicant, I will be sitting on appeal of orders granted by a court of concurrent jurisdiction. The Plaintiffs relief lies elsewhere and not before this Court. I therefore decline to grant any of the orders sought by the Plaintiff and having done so, I find that I need not belabor myself with the objections raised in the Preliminary Objection as the Court is functus officio."**

5. Plaintiff also relied on the case **DICKSON MURICHO MURIUKI –Vs- TIMOTHY KAGONDU MURIUKI & 6 OTHERS [2013]eKLR**. The Court of Appeal in that states thus-

**"In the absence of statutory authority, the principle of functus officio prevents this Court from re-opening a case where a final decision and judgment has been made …. We remind ourselves that the principle of functus officio is grounded on public policy which favours finality of proceedings. If a Court is permitted to continually revisit or reconsider final orders simply because a party intends to appeal to the Supreme Court or the Court may change its mind or wishes to continue**

**exercising jurisdiction over a matter, there would never be finality to a proceeding …. Upon delivery of judgment, the rights of the parties have been determined and it is a legal requirement that the decree emanating from the judgment should be executed …. If there are new points of law or circumstances that arise after judgment, this Court is functus officio and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court to the Supreme Court."**

6. The Defendant by Notice of Motion of 12th September 2014 seeks that I would find that Justice Mwongo by his judgment of 20th September 2012 erred by awarding special damages which the Plaintiff did not prove. There are two issues that I would have to consider if I was to sit to review the Judges judgment. Firstly would be; did the entry of interlocutory judgment do away with the need to specifically prove the claim for Kshs. 3,263,311.00; secondly was the Judge's entry of judgment for Kshs. 3,263,311.00 in error of the law. In my humble view the two issues do not show error that is self evident and more importantly in reviewing that judgment I would be applying my own interpretation of the law which cannot be permitted by a Court of concurrent jurisdiction. I cannot arrogate myself the right to sit, essentially, as an appellant court against the decision of Mwongo, J. I get support of that statement from the case **NATIONAL BANK OF KENYA LIMITED –Vs- NDUNGU NJAU [1997]eKLR** where the justices of Court of Appeal stated-

**"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 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 a ground for review. In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it could 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."**

7. Further it is also stated in similar sentiments in the case **KIZINGO DISTRIBUTORS (1984)LTD –Vs- TIBBETTE & KENYA (2013)eKLR** where the Court stated-

"**"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 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 a ground for review."**

8. If any party needs any further convincing I will refer to the case **NEWTON WANJOHI MWAI –Vs- EPHANTUS NGARI NJIRAINI (2011)eKLR** as follows-

"**"It is obvious from what I have enumerated hereinabove that there is no error apparent on record. The issue was raised, argued and determined. Such an issue cannot be re-argued via an application for review. If the Applicants are not happy with the decision of Lady Justice Kasango, they had the option to appeal against it. The Applicant seems to argue that the court arrived at an erroneous finding of the evidence and law. The Court of Appeal expressed itself in NYAMOGO & NYAMOGO ADVOCATES –Vs- KOGO E.A. [2001]173 at page 174-5 in part as follows:**

**"Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error of wrong view is certainly no ground for a review although it may be for an appeal.**

**As was said in the A.I.R. Commentaries on the code of Civil Procedure by Chitaley and Rao (4th**

**ed.) Vol. 3 at 3227. "A point which may be good ground of appeal may not be a ground for an application for review. Thus an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal."**

9. The Plaintiff's Preliminary Objection does succeed on the objection in paragraph (1) of its Preliminary Objection.

10. In conclusion the Notice of Motion dated 12th September 2014 is hereby dismissed with costs to the Plaintiff.

**DATED and DELIVERED at MOMBASA this 6TH day of NOVEMBER, 2014.**

**MARY KASANGO**

**JUDGE**