



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 211 OF 1996

NATIONAL BANK OF KENYA LIMITED.....APPELLANT

AND

NDUNGU NJAU.....RESPONDENT

(An appeal from the orders of the High Court of Kenya at Nairobi (Mr. Justice Githinji) dated 2nd August, 1995

in H.C.C.C. NO. 1399 OF 1995)

JUDGMENT OF THE COURT

This is an appeal from the order of the High Court (Githinji J.) dated 2nd August, 1995 (the order) in Civil Case No. 1399 of 1995. By the order, the learned trial Judge declined to review his earlier order in the said suit made on 3rd July, 1995 and dismissed the appellant's notice of motion dated 12th July, 1995 with costs.

On 5th May 1995 Ndung'u Njau t/a Radius Construction Company (the respondent) sued National Bank of Kenya Ltd. (the Bank) in the aforesaid suit alleging by his plaint that the Bank lent and advanced to the respondent a sum of Shs.109,360.50 and promised to make further advances, the total sum not exceeding Shs.300,000/=. In consideration thereof the respondent charges his land in favour of the Bank. The land in question had not been described in the body of the plaint. But from the relief claimed it appears that it is Githunguri/Githunguri/1073. The respondent has alleged that the Bank failed to make any further advances to him and that whatever amount had been lent to him, he had fully repaid it with interest. However, he has complained that the Bank has unlawfully debited into his account a sum of Shs.232,425/20 allegedly paid by it to its lawyers namely Kangethe & Co. Advocates of Nairobi and certain auctioneers. The respondent has further alleged that the Bank had debited to the respondent's account unconscionable and unjustifiable costs and expenses which amount to a clog on the respondent's right to redeem his land. Finally it is alleged by the respondent that the Bank insists on selling the respondent's property in order to recover the said unjustifiable costs. The respondent therefore sought an injunction restraining the Bank from selling alienating transferring advertising for sale or otherwise dealing or interfering with the suit property. Along with that the respondent sought inter alia a declaration that the respondent was not obliged to pay to the Bank the sums allegedly paid by the Bank to its advocates.

The plaintiff was followed by a chamber summons filed on the said 5th May, 1995 whereby the respondent sought the following substantive orders against the Bank:-

(a) That the Bank its servants and agents be restrained

By a temporary injunction from selling the suit property until the hearing and determination of the suit.

(b) That the Bank do tax the costs that it has expended

On the respondent's account in enforcing the charge.

The contents of the plaintiff are verified by the supporting affidavit of the respondent filed on the said 5th May, 1995. The respondent has also stated by that affidavit that the Bank had made unreasonable and unconscionable payment of Shs.195,770.90 to its advocates and debited the same to the respondent's account. He has further stated that he believed that the Bank's branch manager was working in cahoots with its advocates and obtaining kickbacks from them.

On 17th May 1995, the Bank filed its grounds of opposition to the respondent's said application alleging (inter alia) that the respondent's application was misconceived and the prayers sought by it were incapable of being granted and that the entire application was frivolous, vexatious and improperly before the court.

By his replying affidavit filed on 17th May 1995, Charles Makori Rigoro, the branch manager of the Bank stated inter alia that the payments made to the Bank's lawyers were made in accordance with the charge instrument and were in respect of recovery charges and other work by the said lawyers who were entitled to the same in accordance with the Advocates Remuneration Order. He went on to say that the said that the said payments were not unjustified or unconscionable and that the respondent having received the statements in time was within his right to object and ask for taxation but instead he admitted the debt all along and was therefore estopped from complaining about the said debits. It was further said by him that he had been advised by the Bank's advocates which advice he verily believed to be true that the issue of taxation of the Bank's lawyers bill could not be raised in the said proceedings as the said lawyers were not a party to the suit.

Quite obviously the major bone of contention between the parties as the learned trial judge has also said in his ruling which incidentally is undated but which we understand was delivered on 3rd July, 1995, was whether the Bank was justified in debiting a sum of Shs.266,582.70 to the respondent's account as their advocate's fee and the other charges incurred in releasing the security and whether the respondent could in the circumstances of the suit compel the Bank to tax costs and expenses lawfully incurred by it in enforcing its security. In the judgment of the learned Judge the Bank had not disputed that the said sum had been in fact debited to the respondent's account. In the course of his submission in the superior court in support of the respondent's application Mr. Kangaroo argued that the Bank was under a duty to act fairly and the costs payable to the Bank's advocate had to be properly incurred.

Mr. Njuguna for the Bank had submitted in the superior court that as there was no prayer in the plaintiff requiring the Bank's advocates to tax their bill and as the said advocates were not a party to the suit, the court could not grant the respondent's prayer that the said advocates should tax their costs. It was further submitted by him that the respondent could, if he so wished, separately apply under S.50 of the Advocates Act (Cap.16) for taxation of the bill provided he was not caught by the limitation period prescribed under s.50(1) (ii) of the said Act. In reply Mr. Kingara argued in the superior court that a prerequisite of ss.50(1) and 50(1) (ii) was that a bill must be rendered to the party concerned before he can proceed to have it taxed. In the absence of that bill which had never been rendered, the respondent could not have applied for taxation. In the circumstances argued Mr. Kingara, the limitation under s.50(1) (ii) was not applicable.

Here, the learned trial Judge was faced with this contentious issue whether he should order taxation

of the Bank's advocates costs taking into account all the circumstances surrounding this case. The learned trial Judge upheld that he could not in these proceedings grant the respondent's prayer in his application that the Bank do tax all costs alleged to have been incurred by it. But he went on to say that by virtue of s.50(1) of the Advocates Act the respondent did have a right to separately apply to the court for an order for taxation of the bill of costs and that under s.47(1) of the said Act he had power to make orders for the delivery by an advocate of a bill of costs. However, no order for taxation could be made in the proceedings before him, as the learned Judge said, an application for taxation under s.50(1) had to be by an originating summons as provided for by Order 52 r 5(1) of the Civil Procedure Rules. He also found on prima facie evidence that the amount which had been paid to the Bank's advocates was over Shs.266,000/= and that it was prima facie excessive in relation to the amount which was payable by the respondent to the Bank under the charge.

The Bank aggrieved by the said order, by a notice of motion dated 12th July 1995 moved under s.80 of the Civil Procedure Act and Order XLIV r 1 of the Civil Procedure Rules for review of the said order of the superior court made on 3rd July, 1995. The notice of motion was based on the grounds as disclosed in the two lengthy affidavits of the said Charles Makori Rigoro sworn on 17th May, 1995 and 5th June, 1995 respectively, the affidavit of Njuguna Paul Chuchu sworn on 12th July 1995 and the aforesaid grounds of opposition dated 16th May, 1995 which had been filed in opposition of the respondent's aforesaid chamber summons dated 5 May, 1995. We are of the view that the appellant's notice of motion did not comply with the mandatory requirements of Order L r 3 of the Civil Procedure Rules according to which every notice of motion must state in general terms the grounds of the application. It is not enough to say that the notice is grounded on the grounds or evidence contained in the aforesaid affidavits. It is also not enough to say that the notice of motion is grounded on the grounds of opposition which had been filed in opposition of the said earlier application of the respondent.

On an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought.

Although this in our view was a fatal omission, yet in the broad interest of justice we asked Mr. Njuguna to say on which ground under Order XLIV he had argued the said notice of motion in the superior court and he replied that he had sought the review on the ground that there was a mistake or error apparent on the face of the record of the superior court.

The learned Judge of the superior court summed up the grounds for review as gleaned by him from the aforesaid affidavits as follows:-

- (a) That the injunction given for 3 months had no legal foundation.
- (b) That the said order was made without jurisdiction and is null and void.
- (c) and that the order was not supported by any evidence or law and it was per incuriam.

He dismissed the notice of motion because he said the grant of an injunction was a discretionary remedy and wrong exercise of his discretion could not be a good ground for review. He also held that even if he was wrong in his appreciation of the law that could not be a ground for review. He went on to say that the Bank wanted him to reconsider the law and the evidence before him and come to a different decision which he could not do as it would be tantamount to sitting in appeal on his own judgment.

By its memorandum of appeal the Bank has appealed on the grounds that the learned Judge granted orders which were not sought in the pleadings and which he had no jurisdiction to grant and made orders against a third party who was not party to the suit before him and that the learned Judge reached wrong conclusions of law invoking his inherent powers in the face of a clear statutory provision for the taxation of costs. All these grounds had been urged by Mr. Njuguna in the superior court while opposing the respondent's application for temporary injunction. They had been considered and rejected by the learned Judge who exercised his discretion in favour of the respondent. Once again these very grounds were

urged before the learned Judge on the notice of motion and were rejected.

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.

For these reasons we do not find any merit in this appeal and hereby dismiss it with costs.

Dated and delivered at Nairobi this 27th day of May, 1997.

R. O. KWACH

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR