



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 31 OF 1995

KISYA INVESTMENTS LTD.....APPELLANT

AND

ATTORNEY GENERAL

R. L. ODUPOY.....RESPONDENTS

(Appeal from the Ruling of the High Court of Kenya at Nairobi (Hon. Justice Shah)

dated 15th December, 1994

in

H.C.C.C. NO. 2832 OF 1990)

JUDGMENT OF THE COURT

This is a appeal by the plaintiff from an order of the superior court (Shah, J.) delivered on December 15, 1994 granting the first defendant's application for review of judgment of late Tank, J.

The appellant sued the defendants for general and special damages for breach of contract. The first defendant, the Attorney-General, having been duly served with summons to enter appearance and having entered appearance failed to file defence within the prescribed period; so, leave was granted to the plaintiff to apply for judgment in default of defence. Consequently, an interlocutory judgment was, on the application by the plaintiff, entered against the said first on February 27, 1991 for special damages and the suit was ordered to be set down for assessment of general damages. A defence was filed on the following day which on November 8, 1991 Walekwa, J. struck out. No application was made to set aside the said order nor was any appeal preferred against it. After formal proof on May 12, 1992, late Tank, J. on September 10, 1992 delivered judgment in favour of the plaintiff. On July 8, 1993 the first defendant filed a Notice of Appeal out of time under an order of this Court. The first defendant obtained an extension of time to file the record of appeal but failed to comply with the said order. The first defendant not resisting, on an application made by the plaintiff, this court, on October 18, 1994 struck out the Notice of Appeal.

Soon thereafter on October 26, 1994 the first defendant filed an application for review of the judgment of late Tank, J. under Order 44 Rule (1) of the Civil Procedure Rules. We may say here and now that the matters stated in the affidavit in support of the said application did not, in law, warrant the grant of an application for review. No case such as that which can sustain an application for review was

made out. The learned judge in a considered ruling granted the application for review, purported to set aside the judgment and decree of Tank, J. and ordered that the case be re-heard. Against that decision the plaintiff has now appealed to this Court.

The principal and the only ground of appeal urged before us was that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review. We accept this is a sound proposition of law. The correct position appears to us to be as set out by Sarkar on the Law of Civil Procedure, 8th Edition, where at page 1592 it is stated as follows:

“The crucial date for determining whether or not the term of 0.47 r. 1 are satisfied is the date when the application for review is filed. If on that date no appeal has been filed, it is competent for the Court to dispose of the application for review on the merits notwithstanding of the pendency of the appeal subject only to this that if before the application for review is finally decided, the appeal itself has been disposed of, the jurisdiction of the court hearing the review would come to an end.....Review application should be filed before the appeal is lodged. It if is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with.....A review application is incompetent after appeal is preferred.”

This point was taken before the learned Judge. It does not appear to have been dealt with by him in his considered ruling. In granting the order for review the learned judge, with respect, fell into an error.

There is another matter we must mention before we part with this appeal. Upon a careful reading of the decision of the learned judge, we are left with a distinct impression that he dealt with the application for review as if he was sitting on an appeal. Indeed, the extract of the order confirms it fully when it seeks to set aside the decision of Tank, J. We need hardly re-state that a review is not an appeal and the ground upon which an application for review can be allowed are specified in the provisions of Order 44 Rule(1) of the Civil Procedure Rules. It is unfortunate that the application for review was allowed when it was clearly incompetent and, in any event, in the absence of any basis for the same. The learned judge, with respect, clearly did trip and fall.

Accordingly and, for the reasons above stated, the appeal is allowed and the order of the superior court granting the application for review and dated December 15, 1994 is set aside. We order that the application for review made to the superior court and dated October 26, 1994 stands dismissed. We hereby restore the judgment and decree of the late Tank, J. The first defendant shall pay to the appellant its costs her and below.

Dated and delivered at Nairobi this 8th day of November, 1996

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. A. LAKHA

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JUDGE OF APPEAL

I certify that this is a
true copy of the Original.

DEPUTY REGISTRAR