REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CIVIL APPEAL NO. 88 OF 1993

LEONARD KIMEU MWANTHI.....APPELLANT

VERSUS

FRANCIS NUNGURI IMANENE.....1ST RESPONDENT

STANLEY KIBIIRA MWITHIMBU.....2ND RESPONDENT

RULING

INTRODUCTION

By a Notice of Motion dated 16th March, 2018 brought under Order 45, Order 51 Rule 1 CPR and Section 80(b), &((c) 1A, 1B, 3 and 3A CPA, the applicant/appellant sought the following orders:

1. **Spent.**

2. **THAT this Honourable court be pleased to stay the execution of the judgment decree and all consequential orders of this court dated 16th February, 2018 pending the interparties hearing and determination of this application.**

3. **THAT this Honourable court be pleased to review and set aside the orders and decree or the judgment herein and grant the applicant hearing on grounds set out herein.**

4. **THAT prayer 3 of this application be heard by two judge bench.**

5. **THAT costs of this application be provided for on cause.**

That application is premised on grounds shown on the face of the said application and the supporting affidavit of the appellant/applicant sworn the same date.

The application is opposed with a Notice of Preliminary Objection and a replying affidavit sworn by Stanley Kibiira Mwithimbe and Francis Nunguri Imanene sworn on 12th April, 2018.

When the application came up for interparties hearing on 11/6/2018, Mr. Thangicia instructed by the firm of Thangicia M. David & Co. Advocates canvassed the application at length which was opposed by Mr. Maitai Rimita & Co. Advocates in equal measure. In his arguments, Mr. Thangicia argued that there is an error on the face of record in which this Honourable court relied on the wrong Memorandum of Appeal dated 2/11/93 instead of the amended Memorandum of Appeal dated 11/11/2015. The Learned Counsel further submitted that due to that error apparent on the face of record, the court may have arrived at a wrong decision after relying on a non-existent pleading.

Mr. Thangicia therefore urged that by considering a non-existent pleading this Honourable Court did not hear this appeal and that it would only be fair and just that the judgment of this court delivered on 16/2/2018 be reviewed and/or set aside. Mr. Ngangicia further argued that the Amended Memorandum of Appeal raises new weighty issues which were not considered in the judgment of the court. The Learned Counsel submitted that if the new evidence adduced in the supplementary record of Appeal was considered, the court would have arrived at a different decision.

The Learned Counsel also argued that the additional evidence contained in the supplementary record of Appeal indicates that the appellant

was not the legal tenant occupying the respondent's premises but a company that is capable of suing and being sued in its name. In conclusion, Mr. Thangicia submitted that there was a substantial mistake when the court relied in the contents of a non-existent Memorandum of Appeal. The Learned Counsel also sought to have this Application for Review referred to the Hon. Chief Justice to constitute a bench of two judges to hear and determine the same. As regards the Preliminary Objection filed by the Respondent, Mr. Thangicia argued that though a decree has not been extracted and attached to the application, the mistake is a procedural issue which cannot stand on the way of substantive justice as the Respondent will not suffer any irreparable loss if the application is allowed. Mr. Thangicia cited Sections 1A, 1B, 3, 3A CPA and Article 159 of the Constitution of Kenya 2010 in support of this application. He also referred to case of **Abdullahi Mohamed –vs- Mohammud Kahiye [2015[eKLR.**

The Respondent through Maitai Rimita opposed the application arguing that since the Appeal was dismissed, there is nothing to be stayed. The Learned Counsel also submitted that the costs awarded to the Respondent has not been applied for taxation and the application for stay is therefore premature. Mr. Maitai further submitted that a party who seeks the review of judgment must attach a copy of the judgment or decree. The Learned Counsel also argued that an order for review is restricted to an error apparent on the face of record. He stated that the issues being canvassed by the appellant was dealt with at the appellate stage and that there is no error that require to be reviewed by this court.

I have anxiously and carefully considered the application by the Appellant and the Notice of Preliminary Objection and Replying Affidavit by the Respondent. I have also considered the submissions by their counsels and the applicable law as well as the authorities relied by both sides.

First the notice of Preliminary Objection filed by the Respondent is premised on the ground that the decree sought to be reviewed is not annexed to the supporting affidavit and therefore the application is incompetent and fatally defective. That issue of whether an application as presented without an extract order of decree is fatally defective was pronounced in the case of **Stephen Boro Gitiha –vs- Family Finance Building Society & 3 Others Civil Appeal No. 263/2009 (Nairobi)** where the court held as follows:

> ***"The overriding objective overshadows all technicalities precedents, rules and actions which are in consent with and whatever is consent with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the court are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all cobwebs hitherto experimented in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just fair and expeditious manner…."***

Again in **Abdullahi Mohamed –vs- Mohammud Kahiye [20150 eKLR** the court was faced with a similar objection and held as follows:

> ***"…….this court as an agency of the legal process of justice is called upon and appreciates all the relevant circumstances and the requirements of a particular case, and to conscientiously determine the best case cause. I am convinced that this is one of the cases where a court can disregard procedural technicalities in favour of substantive justice, having regard to all relevant circumstances obtaining in this case. I dismiss the defendant's objection that failure to annex copy of decree sought to be reviewed renders this application fatally defective….."***

I totally associate myself with the reasoning of my colleagues and find no merit in the Notice of Preliminary Objection dated 10th April, 2018, which I hereby dismiss with no order as to costs. As regards to application dated 16th March, 2018, the appellant's/applicant's main ground for review is that there is a glaring mistake and/or error apparent on the judgment that the court relied on a non-existing Memorandum of Appeal to arrive at its determination. He annexed a copy of the said Amended Memorandum of Appeal marked LKM 1. Looking at the judgment of this court giving rise to the application for review issued on 16th February, 2018, it is clear that the court declined to consider the Amended Memorandum of Appeal and the supplementary record of Appeal dated 29/10/2015 and 17th May, 2017 for obvious reasons apparent on the face of record. On page 18 paragraph 2 thereof the judgment reads as follows:

> **"As regards the Amended Memorandum of Appeal pursuant to the leave of this court granted on 29/10/2015, I wish to state that the grounds being raised therein are new issues which were not raised and canvassed by the parties during the hearing before the Learned Chairman of the Business Premises Tribunal. The same apply to the record of Appeal dated 17th May, 2017. That record of Appeal contained documents and new evidence which were not raised during the hearing and subjected to cross examination by counsel for the opposite side. This court is an appellate court and cannot sit as a trial court. I can only analyze and re - evaluate the evidence which were dealt with by the trial court….."**

This court in its judgment delivered on the said 16th February, 2018 gave reasons why it considered the grounds contained in the original Memorandum of Appeal and record of Appeal instead of the Amended Memorandum of Appeal and supplementary record of Appeal which the appellant was attempting to introduce new evidence at the appellate stage when the issues were not canvassed and tested by cross examination before the trial court. The court addressed itself extensively why the two items could not be taken into consideration and the same cannot be reintroduced again by way of review. I hasten to say that the issues which the applicant is seeking to be reviewed are issues that were dealt with in the judgment of the court and are therefore not new matters. The purported amended appeal and supplementary record of appeal introduced new evidence which in my view amounted to a new cause of action. **In Simani Vs Magotswe (1989) KLR at page 620, the court held as follows:**

> ***"…….the evidence sought to be introduced was that of two persons who had dealt with the boundary dispute well before the respondent instituted proceedings therefore the court did not see how the evidence could be said not to have been within the knowledge of the appellant……..***
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> ***Under order XIII rule 3 (2) of the civil procedure rules documents not admitted in evidence do not form part of the record of the***

suit. The agreement in question was never tendered in evidence and so did not form part of the record in the proceedings".

The evidence which the applicant had sought to introduce in the amended memorandum of appeal and the supplementary record of appeal is an attempt to introduce new evidence which were not canvassed before the trial court. It is my view that the leave granted to the applicant to amend the memorandum of appeal and the supplementary record of appeal was only remitted to matters that dealt with before the trial court and did not extent to the introduction of new matters that were not canvassed before the trial court. Under order 45 civil procedure rules, the law provides as follows;

> 45 (1)
>
> 1. 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 form 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 on account of some mistake or error apparent on the face of the record or for any other sufficient reason deserves to obtain a review of the decree or orders, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay ……."

In the case of **Musiara Ltd vs Ntimama (2004) 2 KLR 172 the court of appeal dealt extensively on review and held as follows:-**

> ***"……The court of appeal has always refused invitation to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this rule would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of this court on the basis of arguments thought of long after the judgment or decision was delivered or made. The only exception of course is where the applicant has been wrongly deprived of the opportunity of presenting his argument on any particular point, which might lead to the proceedings being held to be null and void. This had not been demonstrated on this case. Rule 35 (1) of the rules was of no assistance to the applicant because there was no clerical or arithmetical mistake in the decision or any error arising therein from an accidental slip or omission to justify a correction of the ruling.***
>
> ***Though it is the duty of the court to see that no injustice is occasioned to a litigant, a court has no power after the judgment, or the ruling is signed to alter or add to it, as to do so would be in direct contravention of order 2 rule 3 of the civil procedure rules ……."***
>
> ***Where an issue has been determined by a decision of the court that decision should definitely determine the issue as between the parties. The reason for this general approach is that public policy demands that the outcome of litigation should be final and that litigation should not unnecessarily be prolonged……."***

I associate fully with the reasoning of the judges of appeal in that decision.

In conclusion therefore, I find and hold that the application dated 16th March 2018 has not raised any new matters which were not within the applicant's knowledge during the hearing of the appeal.

As regarding the prayer to remit this matter to the Hon. Chief Justice of the Republic of Kenya to constitute a two judge bench, I find the request coming too late in the day. An application of that nature is usually made before the appeal is heard. This appeal arises from the decision of the chairman of the Business premises Rent Tribunal which provides that that it shall be heard by a single Judge. The application by the applicant to refer the matter to the chief Justice to constitute a two Judge Bench is therefore without basis and lack merit.

The entirety of this appeal is that the same has no merit and the same is hereby dismissed with costs to the respondent. It is so ordered.

READ, DELIVERED AND SIGNED BY E. C. CHERONO, ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT MERU THIS 14TH DAY OF NOVEMBER, 2018.

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In the presence of:

C/A: Janet

Mr. Munene holding brief for Thangicia for appellant