IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, SICHALE & J. MOHAMMED, JJ. A)

CIVIL APPEAL NO. 171 OF 2015

BETWEEN

VIOLET MERAB SONGA

EUGENE HARRY SONGA

EUNICE JEANETTE SONGA (Suing in their capacity as administrators of the Estate of

DAVID OYALLO SONGA (Deceased))..... APPELLANTS

AND

STANLEY MUGACHA T/A GALAXY AUCTIONEERS..... 1ST RESPONDENT

JAMES MUGA OGODA

EMMANUEL OCHOLA ODHIAMBO

CELESTINE LESWETI

WOSE T/A SONGA OGODA & ASSOCIATES..... 2ND RESPONDENT

(Being an Appeal against the decision of the High Court of Kenya at Nairobi (H.P.G. Waweru, J.)

dated 30th *June 2014 and delivered on* 9th July 2014 *in* ***H.C. Misc. Application No. 227 of 2010)***

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JUDGMENT OF THE COURT

1. A brief background of this case is that the deceased **(David Oyallo Songa),** was the senior and founding partner of Songa Ogoda & Associates, a quantity surveyors' firm established under a partnership Deed. Following his demise, the appellants, under the belief that the respondents had continued benefiting from the partnership's asset and/or proceeds to their exclusion, instituted their claim through arbitration proceedings. Ultimately, an arbitral award was granted in their favour.

2. Dissatisfied, the respondents vide **High Court Misc. Civil Application No. 195 of 2010** challenged the arbitral award, efforts which proved futile. The appellants were therefore granted orders to have the arbitral award adopted as a judgment and decree of the Court to pave way for execution. They then proceeded to enforce the arbitral Award vide **High Court Misc. Application No. 227 of 2010**. Subsequently, the appellants acquired warrants of attachment and sale of the respondents' movable property hence instructing Auctioneer, S.T Mugacha t/a Galaxy Auctioneers to proclaim the respondents' property. However, the respondents obtained an order for stay of execution bringing the proclamation to a halt.

3. Consequentially, a dispute arose as to who between the appellants and the respondents was to settle the auctioneer's fees. This culminated in Galaxy Auctioneers filing an application vide a motion on notice dated 29th March, 2012 and filed on 5th April, 2012, seeking a determination of the same. Upon hearing the application, the learned Judge, Waweru J., on 19th July, 2013 delivered a ruling dated 17th July,

2013 granting orders to the effect that the auctioneers' costs be paid by the appellants.

4. Aggrieved, the appellants approached the High Court seeking to review and/or setting aside the aforementioned ruling under Order 45, rules 1 and 2 of the Civil Procedure Rules vide a motion on notice dated 19th September, 2013 and filed on 25th September, 2013.

5. The motion was premised on grounds, *inter alia,* that when the auctioneer's application dated 29th March, 2012 came up for hearing,

> "material facts and information pertinent to the case was withheld from the Court by the applicant and respondents."

6. The application was supported by an affidavit sworn by the appellants' counsel, Wilfred Mutubwa, the pertinent paragraphs being as follows:-

> **"9. THAT information and material facts not disclosed to the Court include:**
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> **a. …**
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> **b. Unknown to the Applicant, the Respondents had *filed Misc. Appl. No. 195 of 2010 challenging the arbitral award.***
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> **c. The Applicants only became aware of Misc. Appl. No. 195 of 2010 after execution in Misc. Appl. No. 227 of 2010 had been commenced.**
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> **d. The original applicants were only thereafter served with the Application (Misc. Appl. No. 195 of 2010) after they had applied for execution and Auctioneers, Galaxy Auctioneers, had been lawfully appointed by the Court, warrants issued and proclamation commenced. The original respondent only woke up from slumber upon execution.**
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> **e. …**
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> **f. The Honourable Court ruled in favour of the Applicants herein in Misc. Appl. No. 195 of 2010 and condemned the Respondents to pay costs and which the respondents have paid including the Auctioneers Costs incurred in Misc. 227 of 2010 to the tune of Kshs. 300,000.00 a fact not disclosed by the Original Respondents and the Auctioneer."**

7. Upon consideration of the application before him, evidence in support and rival submissions, the learned Judge held as follows:-

> ***"4. … Finally, I have read the ruling of the court dated 17th and delivered on 19th* July 2013. It was noted in that ruling that the Decree-Holders never filed any replying affidavit to the application dealt with in that ruling. They filed only grounds of opposition.**
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> **5. I have considered the submissions of the learned counsels appearing. I find no new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the Decree-Holders, or which they could not produce at the hearing of the application. Nor do I find any mistake or error apparent on the ace of the record, or any other sufficient reason to interfere with the order sought to be set aside.**
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> **6. The Decree-Holders are merely trying to have another go at the application, a second bite at the cherry as it were. They cannot be permitted to do so. Contrary to their assertion, the other proceedings (Misc. Application No. 195 of 2010) and how they related with the present proceedings, were brought to the attention of the court by the Judgment-Debtors, and the court fully appreciated their import.**
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> **7. I find no merit in the notice of motion dated 19th September 2013. It is hereby dismissed with costs to the Judgment-Debtors and the Auctioneer. It is so ordered."**

8. It is the above findings and determination of the Court that are impugned in the instant appeal.

9. The appellant predicated this appeal on grounds *inter alia* that the learned Judge erred by: failing to consider that the respondents had been condemned to pay costs pertaining to the arbitration proceedings and enforcement of the arbitral award proceedings hence condemning the appellants to pay the auctioneers' costs was a determination on costs that had already been determined with finality and without any appeal or review thereto; ruling in violation of **Rule 7** of the Auctioneers Rules under the Auctioneers Act; failing to consider that an order for stay of execution

was in place as at the time the appellants instructed the auctioneers; failing to consider that the respondents only served the appellants with the order of stay after the appellants had already instructed the auctioneers and after proclamation and; by failing to appreciate that an application to set aside and arbitral award does not and cannot operate as an automatic stay of execution of a court decree derived therefrom.

10. Urging the court to allow the appeal, learned Counsel, Mr. Lubullelah, citing among others the case of **Nyamogo & Nyamogo v. Kogo (2001) EA 170,** submitted that the learned Judge made an error apparent on the face of the record before him by misapprehending the facts, hence reaching an erroneous conclusion. He contended that the learned Judge failed to appreciate that the decision of 19th July, 2013 was in violation of **Rule 7** of the Auctioneers Rules, 1997 under the Auctioneers Act. Further, that in equal regard, the auctioneers' application was incompetent as it did not meet the required threshold under the law.

11. He maintained that the appellants, during hearing of the application before the High Court, demonstrated sufficient reasons warranting a review and/or setting aside of the ruling delivered on 19th July, 2013. In conclusion, he urged the Court to allow the appeal.

12. Opposing the appeal, Mr. Makumi learned counsel for the 1st respondent (Auctioneers) submitted that the appeal before the Court is an appeal against the High Court's decision declining to review and/or setting aside of the ruling delivered on 19th July, 2013 and not an appeal on the ruling delivered on 19th July 2013 *per se*.

13. On the issue of the violation of Rule 7 of the Auctioneers Rules, 1997 under the Auctioneers Act, he maintained that this was a matter which the appellants ought to have pursued through an appeal and not a review. In a nutshell, Mr. Makumi submitted that the learned Judge had properly exercised his discretion in dismissing the application for review. He therefore urged the Court to dismiss the appeal.

14. Also opposing the appeal, learned counsel, Mr. Ochieng, appearing for the 2nd respondents (Judgment-Debtors) echoed Mr. Makumi's submissions urging the Court to dismiss the appeal on grounds that it was not within the ambit of the guiding principles as laid out in the well celebrated case of **Mbogo v. Shah (1968) EA 93.**

15. This being a first appeal, this Court is guided by the principles in **Abok James Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR** where this Court stated as follows: -

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kustron (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-**
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> **"On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."**

16. With the above parameters in mind, having gone through the entire record, we identify the sole issue falling for determination in this appeal to be whether the learned Judge properly exercised his discretion in declining to grant orders of review as sought by the appellants.

17. This Court is being called upon to interfere with the discretionary powers of the learned Judge. That being the case, we are minded to seek guidance from the *locus classicus* case of **Mbogo & Another v Shah** (supra) where the predecessor of this Court pronounced itself as follows:-

> **Sir Charles Newbold, P, put it thus:**
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> **"... a Court of Appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been *clearly wrong in the exercise of his discretion and that as a result there has been misjustice ....*"**

18. The learned Judge in determining whether or not to allow the application for review ought to have been guided by the provisions of **Order 45** of the Civil Procedure Rules which is very explicit that a court can only review its orders if there is discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made, if there is a mistake or error apparent on the face of the record, or based on any other sufficient reasons. Further, the application must have been made without undue delay.

19. From the appellants' submissions before this Court, it is apparent that the main argument is that the learned Judge failed to appreciate that there was discovery of new and important evidence which after the exercise of due diligence, was not within their knowledge at the time the order was made.

20. It is evident from the appellants' oral and written submissions before this Court that the appellant has extensively pointed out issues of fact which this Court cannot delve into and the same would only be properly determined on by a Court hearing the matter on merit.

21. This Court in **Pancras T. Swai v. Kenya Breweries Limited [2014] eKLR** held that:

> **"In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated: -**
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> **"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent." We think Bennett J was correct in Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557 when he held that:**
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> **"A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal."**
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> (Emphasis added)

22. In view of the above we are persuaded that the learned Judge did not err in his findings that:-

> **"6. The Decree-Holders are merely trying to have another go at the application, a second bite at the cherry as it were. They cannot be permitted to do so. Contrary to their assertion, the other proceedings (Misc. Application No. 195 of 2010) and how they related with the present proceedings, were brought to the attention *of the court by the Judgment-Debtors, and the court fully appreciated their import."***

23. From the foregoing, it is evident that the issues raised by the appellants in the application for review had already been canvassed before the learned Judge and dismissed. There was therefore no error apparent on the face of the record, nor was there discovery of any new and important material which could not have been discovered with due diligence as at the time the appellant's application was heard by the learned Judge. The application for review fell way below the threshold set in the **Mbogo vs Shah** case *(supra)* and was, in our view, properly dismissed. This appeal is devoid of merit and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 19th day of June, 2020.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true *copy of the original.*

Signed

DEPUTY REGISTRAR