



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & ASIKE-MAKHANDIA, J.J.A)

CIVIL APPEAL NO. 397 OF 2018

BETWEEN

NATHAN CHESANG MOSON.....APPELLANT

AND

GRAND CREEK LLC.....1ST RESPONDENT

JOHN KRISTLER COORS.....2ND RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nairobi (C. Kariuki, J.) dated 23rd March, 2016 in HCCC No. 214 of 2011)

JUDGMENT OF THE COURT

By an application dated 25th February, 2013 the appellant moved the High Court of Kenya at Nairobi seeking an order staying execution of the judgment of Musinga, J. delivered on 25th January, 2013. He also sought to have the said judgment reviewed and set aside. The application was premised on the grounds that though the appellant had filed and served his written submissions, the learned Judge in his judgment had not considered those submissions and had he done so, he would have arrived at a different conclusion. That the decree resulting from the judgment was on the verge of being executed which act would cause irreparable harm to him.

That he had a strong case and that the mistakes of the court registry were excusable and should not be visited on him.

Opposing the application, the respondents filed a replying affidavit in which they deposed that the appellant was indolent having filed the application as a last effort to deny the respondents from enjoying the fruits of their judgment. That in any event the application had been brought under the wrong provisions of the law and the allegations that the learned Judge did not factor in his submissions in the judgment were unfounded and uninformed.

The learned Judge in rendering his verdict observed that the appellant primarily relied on the ground that the Judge in his decision failed to consider his submissions but did not state whether there was an error apparent on the face of the record, a mistake or error that the court had made in rendering its decision or whether the claim that the Judge did not consider his submissions was sufficient ground for the court to consider in setting aside or varying the said judgment. The learned Judge concluded that no cogent reason had been adduced by the appellant to support the claim that the court did not consider his submissions. That it was an attempt by the appellant to subvert the course of justice by filing a frivolous, vexatious and spurious application that would not only be an abuse of the process of the court but also deny the respondents from enjoying the fruits of their judgment. In the result, the appellant's application was dismissed with costs to the respondents.

Aggrieved, the appellant lodged the present appeal in which he raised nine (9) grounds to wit; that the learned Judge erred in law and in fact in: stating that the application was not brought under the proper provisions of the law; failing to appreciate that the appellant's right to fair hearing under Articles 25 and 50 of the Constitution were violated by not allowing him to defend himself in the suit; failing to appreciate that the failure by the appellant's advocate to lead witnesses despite the existence of witness statements and cross-examine the appellant was a material error; failing to consider that the appellant's failure to receive adequate assistance from counsel should not be held against him; finding that the judgment of the court had been arrived at after taking consideration of the submissions that had been filed despite the fact that no single reference was made to the said submissions; failing to consider that the failure of the appellant to present evidence on oath despite his intention and readiness to do so resulted in grave miscarriage of justice; ruling that the application was unmeritorious but failed to consider that the appellant was not given a chance to defend himself; failing to appreciate that the appellant had new counsel on record who had requested for the re-opening of the case which request was declined; and finding that the appellant had not proved to court that his right to be heard had been infringed upon.

At the plenary hearing of the appeal, **Mr. Kanjama**, and **Mr. Wairegi**, learned counsel appeared for the appellant and respondents respectively. Counsel relied on their written submissions which they briefly highlighted.

Mr. Kanjama submitted that mistakes of counsel should not be visited upon the appellant as he was denied a chance to be heard for that reason. He reiterated that the appellant's submissions were never considered. That the appellant was not given adequate legal counsel by his previous advocates hence he did not have his day in court leading to a failure of justice. He maintained that an appeal was not an alternative, in view of the fact that the appellant's submissions were not considered in the first place. Counsel further stated that Article 159(2) (d) of the Constitution captures the principle of overriding objective where technicalities are not supposed to be impediments to the administration of justice hence even though the application was erroneously brought under Order 10 Rule 11 instead of Order 45 of the Civil Procedure Rules, the court should have still invoked its inherent jurisdiction pursuant to Section 3A of the Civil Procedure Act and grant the orders sought. He relied on the following cases **Hunker Trading Company Ltd v Elf Oil Kenya Ltd [2010] eKLR**; **Thomas Ratemo Ongeri & 2 Others v Zacharia Isaboke Nyaata & Ano. [2014] eKLR** and **Nancy Nyamira & Ano. v Archer Dramond Morgan Ltd [2012] eKLR** for the proposition.

As to whether the appellant's submissions were considered by the court, counsel submitted that although the said submissions were filed on 4th December, 2012 they were not placed in the court file due to the mistake of the court clerk hence the court at the time of delivery of judgment did not have the opportunity to look at them. He faulted the Judge for not referring to the appellant's submissions in his judgment and for basing the judgment entirely on the pleadings and evidence of the respondents. That the rules of natural justice dictate that a party should not be condemned unheard and the apparent failure by the Judge to consider the appellant's submissions clearly violated his right to fair trial. In support of this proposition counsel relied on the case of **Richard Ncharpi Leiyagu v IEBC & 2 Others [2013] eKLR**. On whether the appellant had provided sufficient grounds for setting aside the judgment, counsel faulted the learned Judge for holding that the trial court had considered the appellant's submissions when the said judgment did not refer at all to the submissions hence the decision to dismiss the application was based on the erroneous stand point of the court.

In opposing the appeal, Mr. Wairegi submitted that the appellant was attempting to prosecute the present appeal against the decision by Musinga, J. (as he then was) and not the impugned ruling by Kariuki, J. Counsel submitted that the learned Judge had properly considered the application and arrived at a proper decision and what is before this Court ought to be limited to the decision by Kariuki, J. Counsel contended that though the application did not fall within the provisions of Order 10 Rule 11, the learned Judge proceeded to determine the application as though it was properly brought under Order 45, hence the appellant's allegation that the application was dismissed because it was brought under the wrong provisions of the law was misguided. Counsel further submitted that the appellant's right to a fair hearing was not infringed. That the appellant failed to attend court when required and cannot now be heard to say or complain that he was not given an opportunity to defend himself.

This being a first appeal, the duty of this Court was re- stated in the case of **Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where it was held in part that:

“This being a first appeal, we are reminded of our primary role as

a first appellate court namely, to re-evaluate, re-assess and reanalyze 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.”

We have carefully perused the record, rival submissions by counsel and the law. The issue for determination is whether the judgment dated 25th January, 2013 should have been reviewed and set aside as prayed for in the application dated 25th February 2013.

The High court in declining the application was exercising judicial discretion. The circumstances in which this Court can interfere with such exercise of discretion are circumscribed. This Court may only interfere with the exercise of such discretion when, in the words of the predecessor of this Court in **Mbogo and Another v Shah [1968] EA 93**, it is satisfied that the decision of the lower court is clearly wrong:

“...because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

It is trite law that where a party is aggrieved by the judgment, or ruling of the court, such a party can either appeal, apply for review or have the same set aside. In this case the appellant opted for a review and setting aside of the Judgment. Although the appellant cited the wrong provisions of the law in his application, it is clear to us that the court applied oxygen principles and determined the application on its merit. The court proceeded as though the application was brought under the proper provisions of the law, that is, Order 45 of the Civil Procedure Rules. The complaint therefore that the High court dismissed the application on account of wrong provisions of the law being cited has no basis at all. We are satisfied that the court properly exercised its discretion in this regard.

The grant of an order for review is pegged on certain grounds. These grounds are; discovery of new and important matter of evidence; mistake or error apparent on the face of the record; and any other sufficient reason and most importantly, the application has to be made without unreasonable delay.

Section 80 of the Civil Procedure Act states that:

“Any person who considers himself aggrieved—

a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is allowed by this Act may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

While Order 45 Rule 1 of the Civil Procedure Rules states that:

“(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 from 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, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.” (Emphasis ours.)

The appellant’s application for review was hinged on the last limb of “*any other sufficient reason*”. He alleged that the Judge failed to consider his written submissions while crafting his judgment. While addressing the issue of sufficient reason in the case of The Official Receiver and Liquidator v Freight Forwarders Kenya Limited [2000] eKLR the court stated that:

“these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice ‘be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record.’”

Similarly, in Tokesi Mambili & Others v Simion Litsanga Sabwa, Civil Appeal 90 of 2001 the court held thus:

“i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.” Emphasis ours.

Finally, in the case of Pancras T. Swai v Kenya Breweries Limited [2014] eKLR this Court quoted with approval the case of Wangechi Kimata & Another v Charan Singh, C.A. No. 80 of 1985, (unreported) wherein this Court held that:

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

In the instant appeal, it is evident from the record that upon entering appearance and filing his defence, the appellant did not attend court on several occasions to defend the suit. Eventually, the suit was heard in his absence. Be that as it may, before delivery of judgment the appellant was given 10 days within which to file his written submissions. He claims that he filed his written submissions on 4th December, 2012 but the court clerk did not place them in the court file. The appellant contends that since the Judge did not specifically refer to his submissions in the judgment, he did not therefore consider them. However, a careful reading of the judgment shows that the Judge went to great lengths to analyze the evidence and pleadings by both the appellant and the respondents and actually relied on them in his determination. The Judge chose not to specifically refer to submissions by either of the parties to the suit. However, this does not mean that he did not consider them.

We agree with the learned Judge that there was no evidence to show that the submissions were not in the court file when Musinga, J was crafting the judgment, neither does the learned Judge in his judgment indicate that they were not on record. It is also important to note that the respondents filed a rejoinder to the appellant’s submissions, and as a consequence, the likelihood that the learned Judge would have considered the respondents’ rejoinder without noting that the appellant’s submissions were not on record is impossible. In the case of Evan Bwire v Andrew Nginda (2000) LLR 8340, this Court stated:

“An application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.”

There is no doubt at all that, the application for review in the High Court was pegged on quick sand and suppositions. It was bound to fail. We are satisfied that the Judge properly exercised his discretion in declining to allow the application as no sufficient reason was advanced in support thereof.

In the result this appeal lacks merit and is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 6th day of November, 2020.

R. N. NAMBUYE

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

ASIKE- MAKHANDIA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR