IN THE COURT OF APPEAL

AT NYERI

SITTING IN NAKURU

(CORAM: G.B.M. KARIUKI, F. SICHALE, & S. KANTAI JJA)

CIVIL APPEAL NO. 331 OF 2014

BETWEEN

NAKURU INDUSTRIES LIMITED.....APPELLANT

AND

SIRBROOK (K) LIMITED.....RESPONDENT

(An Appeal from part only of the 1. Judgment /Decree and some of the orders made by Emukule J. delivered in HCCC No. 277/2009 and 2. part of subsequent ensuing Ruling delivered on 17.12.2013 and some of the orders made pursuant thereto, and 3. the whole Ruling and all ensuing Orders made and delivered on 28th March, 2014 by the High Court of Kenya at Nakuru (Emukule, J.)

in

H.C.C.C NO. 277 of 2009)

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JUDGMENT OF THE COURT

1. The appellant, **Nakuru Industries Limited,** has appealed against the decision of the High Court at Nakuru **(Anyara Emukule, J.)** made in the ruling delivered on 28th March 2014 in NKU HCCC No. 277 of 2009 (Sirbrook (K) Limited versus Nakuru Industries Limited and Direct O. Services) dismissing with costs the appellant's Chamber Summons application seeking, *inter alia*, to review the ruling and orders of that Court (Anyara Emukule, J.) of 17th December 2013. In that ruling, the court had before it an application dated 3rd May 2013 seeking stay of execution pending the hearing of an intended appeal. The court in exercise of its discretion under Order 42 Rule 6(2)(b) of the Civil Procedure Rules ordered stay for a period of 30 days on condition that the appellant would deposit the sum of Kshs 4,152,000/= into court within 30 days. For the avoidance of doubt, the court emphasized that there would be stay of execution pending appeal after the said sum of Kshs 4,152,000/= was paid into court within the said period.

2. It is this order that the appellant in its application dated 2nd January 2014 sought to have reviewed. The learned Judge after hearing the parties and after considering the application (for review) found that the parameters set out under Order XLIV rule 1(1) of the Civil Procedure Rules (now **Order 45** rule 1 (1) of the **Civil Procedure Rules 2010**) were not met. The court found that the appellant did not allege discovery of any new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the appellant at the time when the decree was passed. The appellant contended that there were errors apparent on the face of the record which it sought to be reversed and replaced with “appropriate orders”. The court found that the application was a criticism of the court ruling and declined to grant the orders. It also found that the application for review was incompetent as it was by Chamber Summons instead of Notice of Motion as provided by Order 45. However, the application was dismissed for want of merit and not due to procedural technicalities. The court also observed that it could not correct the errors alleged in the said application as it could not sit on appeal on its own orders to correct its own alleged mistakes.

3. Aggrieved by that decision, the appellant gave a notice of appeal on 2nd April 2014 pursuant to Rule 75 of the Rules of this Court manifesting its intention to challenge the whole of the ruling (dated 28th March 2014). On 21st November 2014, the appellant lodged the record of appeal.

4. In the Memorandum of Appeal dated 21st April 2014, the appellant set out 13 grounds of appeal but when the appeal came up for hearing

on 1st November 2017, **Mr. Odhiambo M. T. Adala,** learned counsel for the appellant withdrew grounds 3, 4, 5, 7, 8, 9 and 10 and made submissions on grounds 1, 2, 6, 11, 12 & 13. If we understood Mr. Adala correctly, the matters set out in grounds (K) to (O) in the Chamber Summons application dated 2nd January 2014 before the High Court seeking review constituted his arguments before us that the learned Judge erred in not granting orders for review. Those grounds contained what the appellant contended were mistakes and contradictions on the part of the learned Judge. The appellant through his counsel criticized the learned Judge "for recognizing, promoting or espousing amity between the parties"; for erroneously exercising its discretion under Order 42 rule 6 (2) of the Civil Procedure Rules "firstly by not distinguishing or appreciating that the appeal before it was not from a court subordinate to it; and by not following the provisions of Order 42 rule 6(2) requiring the court to be satisfied that substantial loss might occur if an order of stay is not made; and thirdly in not making a finding that substantial loss might occur. In ground (N) and (O) relied on by counsel for the appellant, the latter contended that the finding by the learned Judge in the application of 2nd January 2014 that the respondent was entitled to stay could not sit side by side with the finding that the application was made in bad faith for the purpose of frustrating the court orders.

5. It was Mr. Adala's submission that the trial court should have had regard to Article 159 of the Constitution and looked at the justice of the case between the parties as this was the overriding factor in the case. It was Mr. Adala's submission that the misdirections and errors by the trial court led to miscarriage of justice. He urged that the appeal be allowed with costs.

6. The appeal was opposed by **Mr. Gor,** learned counsel for the respondent. It was his submission that the application (dated 2nd January 2014) was dismissed on merit although it was irregular in that it did not comply with the Civil Procedure Rules as it was by Chamber Summons instead of Notice of Motion. Mr. Gor's submitted that the application was devoid of any merit in as much as it did not contain any material that could justify a review. Counsel contended that the alleged errors on which the review was sought were not self-evident. On the contrary, contended counsel, they constituted criticisms of the Judge's findings and decision and at best formed a basis for appeal which the appellant did not pursue. Mr. Gor's urged us to dismiss the appeal as devoid of merit and award the respondent costs.

7. We have perused the record of appeal and duly considered the rival submissions made by the parties. The appeal is not complicated. It is from a decision of the High Court dismissing a Chamber Summons application seeking an order for review of orders dated 17th December 2013.

8. In the High Court, review is governed by **Section 80** of the **Civil Procedure Act, Cap 21** and **Order 45 rule 1(1)** of the **Civil Procedure Rules 2010.** Section 80 (supra) states

> ***"80. Any person who considers himself aggrieved—***
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> ***(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."***

9. Rule 1(1) of Order 45 states

> ***"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 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.***
>
> ***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."***

10. Under rule 3(1) & (2) of Order 45, the court has discretion to dismiss an application for review if there is no sufficient ground for review and to grant review if it is of the opinion that it should be granted. The rule stipulates:

> ***"3. (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.***
>
> ***(i) Where the court is of opinion that the application for review should be granted, it shall grant the same:***
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> ***Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation."***

11. The grounds for review of an order or decree from which an appeal is allowed but from which no appeal has been preferred or from a decree or order from which no appeal is allowed are stated to be:-

".....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."

12. The appellant did not bring itself within the parameters set out in Order 45 Rule 1(1) in as much as it did not allege discovery of new and important matter or evidence or mistake or error apparent on the face of the record, or any other sufficient reason. What the appellant put forward as the basis for the review was scathing criticism of the learned Judge's ruling. Such criticism is not provided for in the rules for review. A litigant who is aggrieved by a decision of the court where appeal is allowed can and is entitled to challenge the decision on appeal in the next higher court. A litigant who has a right of appeal but has not appealed or who has no right of appeal but who desires to seek review of the order or decree with which he is aggrieved must bring himself within the parameters of rule 1(1) of Order 45. In the instant case, the matters stated by the appellant as the basis of the review sought before the learned Judge fell outside the ambit of rule 1(1) (supra). They also could not constitute *"any other sufficient reason"* as they were clearly grievances appertaining to alleged errors by the learned Judge in his decision. That is the stuff expected in an appeal and not in a review. It would be awkward for a judicial officer to be required to sit and listen to submissions and arguments as to why his decision is wrong or erroneous. That would be tantamount to asking the court to sit on appeal on its own decision. That is precisely what the appellant did in this case. He unleashed a criticism of the court orders. In **National Bank of Kenya Ltd vs. Ndungu Njau [Civil Appeal No. 211 of 1996]** (unreported) cited by Mr. Gor, learned counsel for the respondent, this Court held that:-

"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. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More 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 ground for review."

13. Chittaley & Rao on the **Code of Civil Procedure (4th Edn), Vol. 3, Pg 3227** also cited by the respondent's counsel state that:-

"A point which may be a good ground of appeal may not be a good ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal."

14. The decision sought to be reviewed was dated 17th December 2013 and was made in an application by Nakuru Industries Limited (the appellant) in which the latter sought stay of execution of decree/judgment issued in NKU HCCC No. 277 of 2009 which the appellant averred involved payment of substantial but indeterminate sums of money relating to rent arrears. The learned Judge ordered stay for 30 days upon the condition that the appellant would deposit Kshs 4,152,000/= into court within 30 days and for avoidance of doubt the court ordered that stay pending appeal would be in place after the said sum was paid into court within the said period.

15. In the application dated 2nd January 2014 whose ruling gave rise to this appeal, two of the germane prayers seeking an order for review stated:

"3. That several specific parts of the ruling made herein by the Hon. Mr. Justice Emukule on the 17th December 2013 be reviewed, reversed and/or replaced with other appropriate orders on correction of the said mistakes and/or errors apparent on the face of the record, as identified in grounds appended hereto and also in the annexed affidavit in support of this application."

7. That this Honourable court be further pleased to consider and make findings and rulings on the issue of jurisdiction as raised in the 1st defendant's grounds of opposition but not specifically considered by the court in the ruling delivered on 17th December 2013."

16. It is plain to see that the appellant was aggrieved by the dismissal of its application dated 2nd January 2014 seeking to review the orders made on 17th December 2013 but its remedy ostensibly was in an appeal which it did not pursue. The review application was ill-fated for want of merit. In **Francis Origo & Another vs. Jacob Kumali Mungala [C. A. Civil Appeal No. 149 of 2001]** cited by Mr. Gor, learned counsel for the respondent, this Court held:

".....an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellant 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 therefore have no option but to dismiss this appeal with costs to the respondent."

17. The sentiments expressed in Francis Origo's case apply here. We find no merit in the appeal and we accordingly dismiss it with costs to the respondent.

Dated and delivered at Nakuru this 22nd day of November, 2017

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR