IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G. B. M. KARIUKI, KIAGE & J. MOHAMMED,JJ.A.)

CIVIL APPEAL NO. 275 OF 2010

BETWEEN

PANCRAS T. SWAI ..... APPELLANT

AND

KENYA BREWERIES LIMITED ..... RESPONDENT

(An appeal arising from the ruling of the High Court of Kenya at Nairobi,

(Lesiit, J.) delivered on 4th July 2008

in

H.C.C.C. NO.1190 OF 1994)

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JUDGMENT OF THE COURT

1. The background to this litigation is reflected in the record of appeal which we have perused. It shows that the appellant, Pancras T. Swai, who claimed to be "a partnership" sued the respondent, Kenya Breweries Limited, in H.C.C.C. No.1190 of 1994 claiming special and general damages for breach of contract relating to sale of beer. In his plaint in the said suit, the appellant alleged that he paid the respondent US$ 22,990 towards purchase of Tusker and Pilsner beer which he intended to export to Tanzania but the Defendant breached the contract when it failed to supply the same. He claimed a refund. He also alleged that he had deposited with the respondent a total of 10,688 empty beer crates in respect of which he claimed US $106,880 at the rate of 10 dollars each. He alleged that he suffered loss of profit and claimed US$12,871 in respect thereof. The total sum claimed was US $ 142,741.
2. The respondent denied the alleged breach of contract. It also denied that the appellant was a partnership and therefore a separate entity and averred that it dealt with the appellant as an individual although the respondent later became aware through pleadings in the said suit that Antony M. Ndunda and Norman Malili were partners in the firm of Pancras T. Swai. The respondent further denied that the appellant remitted to it 10,688 empty beer crates between December 1993 and January 1994 as alleged. The respondent contended that the said suit was a sham and did not lie in law and was an abuse of court process. In addition, the respondent counter-claimed for Shs.7.5 million, as damages occasioned by loss suffered an account of money and/or value of goods which the appellant's partner, one Norman Mulili, fraudulently obtained

from the respondent and/or caused the respondent to lose upon his uttering forged customs beer exportation documents.

3. On 10.12.2004, Njagi, J. on an application made by the respondent seeking security for costs, ordered the appellant to deposit US$40,000 in a joint interest earning account as security for costs ostensibly because it was feared that the respondent, being a Tanzanian national, might run away to avoid liability for costs in the event he was unsuccessful in the suit. The appellant failed to remit the money in compliance with the court order.
4. The respondent, by notice of motion dated 03.03.2005 premised on Order 25 rules 1, 5, 6 and 7 of the Civil Procedure Rules, sought to have the suit No.HCCC 1190 of 1994 dismissed due to the appellant's failure to provide security for costs in compliance with the court order dated 10.12.2004.
5. The appellant, by a notice of motion dated 26.10.2005, applied under Section 80 of the Civil Procedure Act, Cap 21, and Order 44, rules 1 and 2 of the Civil Procedure Rules seeking a review or setting aside of the order for security for costs made on 10.12.2004 by Njagi, J.
6. After considering the two applications Lesiit, J. observed that the appellant had not complied with the order for security for costs although he had had 3 ½ years from 10.12.2004 to July 2008 when he filed the review application. On 4.7.2010 the Judge dismissed the appellant's application and allowed the respondent's application and dismissed the suit by the appellant with costs.
7. Aggrieved by the decision, the appellant filed in this Court on 15.10.2010 the appeal herein challenging the ruling of the Lesiit, J. dated 4th July 2008 delivered in suit No.Nbi H.C.C.A. 1190 of 1994.
8. The appellant proffered the following nine (9) grounds of appeal in his memorandum of appeal.

1. *The learned Judge erred and misdirected herself by invoking the concept of ignorance of law is no defence which is a concept of criminal law with no relevance or application in civil cases whatsoever.*
2. *The learned Judge erred and misdirected herself by condemning an innocent litigant for the mistake of counsel.*
3. *The learned Judge erred and misdirected herself by following the ruling of a Judge of parallel jurisdiction, namely Osiemo J. in HCCC No. HFCK – VS- PRUDENTIAL ASSURANCE LTD [2002] KLR 162 to the effect that one cannot seek a review purely on a ground of law when there is no such restriction put on the term "or for any other sufficient reason" by 0.44 R1, Civil Procedure Rules nor indeed by the parent statute, S.80, Civil Procedure Act (Cap 21 Laws of Kenya).*
4. *The learned Judge erred and misdirected herself by finding that the failure by counsel to produce the two authorities namely, the Treaty for the East African Co-operation (EAC) and Shah & others (2003) 1 EA 294 to Njagi J indicated that the Plaintiff had not undertaken due and diligent research, when in fact the plaintiff produced a reasonably long list of authorities indicative of the level of industry and research that had gone into the matter.*
5. *The learned Judge erred and misdirected herself by restricting the exercise of her discretion to the last limb of 0.44,R1 Civil Procedure Rules namely for any other sufficient without appreciating that the discovery of the 2 authorities constituted new and important matter that warranted the grant of the order sought.*
6. *The learned Judge erred and misdirected herself by failing to follow the time honoured propositions of law that a litigant however poor should be permitted to bring proceedings without hindrance and that courts of law should aim at sustaining rather than dismissing cases.*
7. *The learned Judge erred and misdirected herself by assuming that since the plaintiff's application had failed, there was no reason why the defendant's application for dismissal of the suit should not succeed, without considering the formidable submission by the plaintiff that the poverty of a litigant should never be bar to a litigant.*
8. *The learned Judge erred and misdirected herself by failing to appreciate that the plaintiffs poverty was itself induced by the defendant's undisputed retention of his stock in trade of over 10,688 cases account by the plaintiff over 18 years ago which property should in any event constitute sufficient security for costs in any event.*
9. *The learned Judge erred and misdirected herself by failing to appreciate that by dismissing the plaintiff's suit, she had just allowed the defendant to unjustly enrich itself at the plaintiff's expense*

since the former had taken the latter's property without the due process of law.

9. The appeal came up for hearing before us on 26th September 2013. Learned counsel Mr. Kyalo Mbobu appeared for the appellant while learned counsel Mr. C. M. Njagi appeared for the respondent.
10. Mr. Mbobu abandoned grounds 5, 7, 8 and 9 of the appeal and urged the rest of the grounds. On ground No.1 he attacked the decision of the trial Judge for applying the concept of *"ignorance of the law is no defence"* which, he said, though known in Criminal Law, had no relevance in Civil Law. We observe that during the hearing of the appellant's application for security for costs, the appellant's counsel had contended in the High Court that the order for security for costs had been made in ignorance of the provisions of Article 104 (1) of the Treaty for the Establishment of the East African Community which provides:

    "Article 104 (1) the partner states agree to adopt measures to achieve the free movement of persons, labor and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community."

11. Further, Mr. Mbobu contended that if the learned Judge who made the order for security for costs had been aware of Article 104 (1) (supra), he would not have ordered the appellant to deposit any sums of money as security for costs. Counsel relied on a decision of the High Court of Uganda, to wit, **Shah & Others versus Manurama Limited & Others (2003) 1 EA 294** in which the Court stressed that *in East Africa there can no longer be an automatic and inflexible presumption for the Courts to order payment of security for costs with regard to a plaintiff who is a resident of the East African Community.* Counsel also referred to the case of **Abdalla vs Patel and another (1962) EA 447** in which the Court of Appeal for Eastern Africa, the predecessor of this Court, noted that:-

    "it is right that a litigant however poor should be permitted to bring his proceedings without hindrance and have his case decided."

12. The Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty") and the two cases alluded to above were not cited before Njagi, J. at the time when the application resulting in the order for security for costs was argued. Lesiit, J. in her impugned ruling observed that both the Treaty and the two authorities were already in existence at the time when the application that resulted in the order by Njagi, J. for security for costs was heard and in the Judge's view, counsel for the appellant seemed to have been unaware of the same. It is in that context that the trial Judge commented that *"ignorance of the law is no defence."* The trial Judge also addressed the issue as to whether the failure of the appellant's counsel to cite the said authorities during the hearing of the application seeking security for costs was due to lack of due diligence and came to the conclusion that the appellant did not prove 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 during the hearing of the application for security for costs nor that there was "any sufficient reason" why his counsel had not demonstrated diligence in his legal research. As we shall show below the latter holding and reasoning was a misdirection on the part of the Judge.
13. Mr. Mbobu contended that a mistake on the part of counsel ought not to be visited on a litigant. In support of this proposition, he referred us to the case of **Wangechi Kimita and another versus Mutahi Wakibiru (1982-88) 1 KAR 977.** In that case, an application for review was made on the ground that there was an error relating to acreage of land which had led to recording of a consent judgment but when survey was carried out and the correct acreage ascertained the Court held that the appellants who were illiterate were untitled to an order for review and that the error constituted a sufficient reason under Rule 1 of Order 44 to warrant granting such review. The Court also held that notwithstanding the contractual effect of a consent order, Section 67 (2) of the Civil Procedure act, Cap 21, was not a bar to setting aside a judgment (and decree) by consent on grounds which would justify the setting aside of a contract. What is salient in the case of **Wangechi Kimita and another v. Mutahi Wakibiru** (supra) is that the error was of fact and not

of law.

14. It was Mr. Mbobu's contention that the Court misconceived the basis of the application for review which, as per ground No.4 of the memorandum of appeal, was *"any other sufficient reason."* The criticism by counsel that the trial Judge wrongly directed her mind to *"any other sufficient cause"* instead of *"any other sufficient reason"* is not borne out by the record at page 338. The record shows that the Judge alluded to counsel's lack of due diligence that led to the latter's failure to bring to the attention of Njagi, J. **The Treaty** and the authority of **Shah & Others v. Manurama Ltd & others**. It was Mr. Mbobu's submission that the appellant was condemned on account of his poverty. Even paupers, he said, have rights and can sue but the appellant was hampered by the requirement of security for costs which he could not afford as a result of which his suit was struck out.

15. The respondent's counsel, Mr. Njagi, urged us to dismiss the appeal on the ground that no case, in his view, had been made out, to warrant interference with the trial Judge's decision. In particular, he contended that there was no basis to show that the trial Judge exercised her discretion wrongly and what was more, he said, the appellant was not being deprived of his right to property. Moreover, he said, application for variation was being treated by the appellant as an application for review and was made one year after the order to furnish security for costs was made.

16. Njagi, J. who ordered security for costs after hearing counsel for both parties recapitulated the germane facts in the litigation which were not contested by either side. He stated thus:

"By reason of the foregoing, I find that the application has not passed the test for the grant of an order for review. At the same time, I find that the applicant has established a case for enlargement of time to comply with the court order. Counsel for the respondent submitted that he had no quarrel with an extension of time, and suggested that the applicant may be granted an extension of 15 days. I do not think that two weeks is a reasonable time. If he was not able to comply within 21 days, I don't think that another 15 days will do him much good. For these reasons, I make the following orders-

1. ***The time for depositing the security for costs ordered on 10th December, 2004 is hereby extended for a period of 30 days from today.***
2. ***Pursuant to the proviso to O. XLIX rule 5 of the Civil Procedure Rules, the costs of this application shall be borne by the applicant.***

17. The application for security for costs before Njagi J, was predicated on, amongst others, rules 1, 5, 6 and 7 of Order 26 of the Civil Procedure Rules. Rules 1 and 5 stipulate:-

"rule 1: In any suit the court may order that security for the whole or part of the costs of any defendant or third or subsequent party be given by any other party."

"rule 5(1): If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit."

2. ***If a suit is dismissed under subrule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court may set aside the order dismissing the suit and extend the time for giving the required security."***

Dated and delivered at Nairobi this 1st day of August 2005

L. NJAGI

JUDGE

18. The discretion of the High Court to order security for costs is explicit. Njagi, J. correctly observed:

"wide and unfettered as this power (to order costs) may be however, it should be exercised reasonably and judiciously, having regard to all the circumstances of a particular case."

19. On the respondent's notice of motion made under Order 25 rules 1, 5, 6 and 7 of the Civil Procedure Rules to have the appellant's suit dismissed on account of the latter's failure to provide security for costs Lesiit, J. found and delivered herself thus:-

"it is now 3 ½ years since the order was made and the plaintiff (appellant) has made no effort to deposit the amount ordered by the Court."

"since the application to review the Court's order has failed, it follows that there is no reason why the defendant's application to have the suit dismissed for failure to deposit the money as ordered should not succeed."

20. In effect, Lesiit, J. found that the appellant had not proved that he had been prevented by sufficient cause from giving the security for costs as ordered.

21. We have perused the record of appeal and considered the rival submissions made by counsel on behalf of their respective clients in this appeal. The issue for determination is whether Lesiit, J. was right in dismissing the appellant's application to set aside the order for security for costs and in allowing the respondent's application for dismissal of the appellant's suit for failure to provide security. Did the appellant's application for review of the order for security for costs have merit? The order for security for costs was made on 10.12.2004 by Njagi, J. No appeal was preferred against it. However, an application for its review was made on 26.10.2005 after the respondent made on 07.03.2005 an application for dismissal of the suit on account of non-compliance with the order for security for costs. The appellant's application for review was premised mainly on the ground that the appellant was an East African and therefore not a person of a foreign country, a fact that the Court did not appreciate at the time of making the order for security for costs. Counsel for the appellant went so far as to say that the order for security for costs was made in ignorance of the law. But Mr. Mbobu who opposed the application for security for costs failed to bring to the attention of Njagi, J. the provisions of the Treaty and the authority of Shah & others versus Manurma Ltd & others (supra) which may have influenced the outcome of the application for security for costs and perhaps forestalled his criticism that the Court made the order in ignorance of these authorities which subsequently cited by counsel in the application for review. Perhaps that is why the Lesiit, J. was tempted to state:-

"... the plaintiff (appellant) and his advocate made no attempt to give any explanation why these two authorities were not cited before Njagi, J. at the time of the hearing. No cogent reason was given why the issue of the two authorities was not raised before the Judge."

"...the two authorities were in existence at the time the application was argued and had the plaintiff or his advocate exercise due diligence they should have been able to produce the two authorities to the Judge. Even if I was to consider the application on the basis of the applicant demonstrating any other sufficient reason I would still find that this requirement has not been met."

22. The trial Judge went on to find that the appellant and his counsel *"had not exercised due diligence" and had they done so, they would have produced the two authorities which were in existence then*." This reasoning on the basis of which Lesiit J, reached her decision was a misdirection. Failure by counsel to know or to cite relevant authorities that would have impacted on the Court decision had no relevance under rule 1 of Order 44. The Court was deemed to know the law and ought to have been aware of the Treaty. Its lack of awareness of the Statute or case-law, however obscure, was not a mistake or error apparent on the face of the record nor was it a new and important matter or evidence which was discovered. The three limps of rule 1 in Order 44 (now Order 45) relate to issues of fact. The issues raised by the appellant related to law. Where the Court is not well served, an error of law in a decision predicated on correct facts cannot be

blamed on a litigant or his counsel. But it can be challenged on appeal.

23. The High Court is presumed to know the law. That is why the Constitution has conferred on the High Court in Article 165(3)(a) unlimited original jurisdiction in Civil and Criminal matters and in Article 20 (3)(a) jurisdiction to develop the law and in Article 20 (3) (b) the mandate to interpret the Bill of Rights. It was expected that counsel, in getting up on the brief would come up with the law and authorities including the Treaty and the case-law. But he failed to do so. It was the duty of the Court to have before it the relevant law and to apply it correctly. Njagi, J. was not well served. He seems to have made an error of law. The appellant's right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the Court was wrong either on account of wrong application of the law or due to failure to apply the law at all.

24. In **National Bank of Kenya Limited v. Ndungu Njau** (Civil Appeal No. 211 of 1996 (unreported)) this Court, with respect, correctly held:

"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."

"... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it."

25. 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:-

"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."

26. We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.

27. We think Bennett J was correct in **Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557** when he held that:

"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"

28. On the same point, the authors, **Chittaley & Rao in the Code of Civil Procedure (4thEdn) Vol.3, pg 3227** in explaining the distinction between a review and an appeal have this to say:

"A point which may be a good ground of appeal may not be a 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."

29. It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *factus officio* and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts. Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limps therein stated or *"for any sufficient reason."* The appellant did not bring his application within any of the limps nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this Court, the words, *"for any sufficient reason"* must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. **In Sarder Mohamed v. Charan Singh Nand Sing and Another (1959) EA 793**, the High Court correctly held that Section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. **In Shanzu Investments Limited v. Commissioner for Lands (Civil Appeal No. 100 of 1993)** this Court with respect, correctly invoked and applied its earlier decision in **WANGECHI KIMATA & ANOTHER VS. 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."

30. The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to.
31. The appellant, besides the error of law pointed out on the part of the Court (Njagi, J.), did not advance any other reason. In the circumstances, it is our finding that the decision of Lesiit, J. was not wrong in dismissing the application for review. For this reason, we find no merit in the appeal. We accordingly dismiss it with costs.

Dated and delivered at Nairobi this 28th day of February 2014.

G. B. M. KARIUKI, SC

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

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