IN THE COURT OF APPEAL

AT NAIROBI

CORAM: TUNOI, O'KUBASU, JJ.A. & ONYANGO OTIENO, AG.J.A.

CIVIL APPEAL NO. 249 OF 2001

BETWEEN

TANJAL INVESTMENTS LIMITED ………...………………………. APPELLANT

AND

EL NASR EXPORT & IMPORT COMPANY …………………… RESPONDENT

JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court (Mitey J) delivered on 17th July 2001 in which the appellant's application dated 13th February 2001 was dismissed. In that application the appellant (*the defendant in the superior court*) sought orders of stay of execution, review and or setting aside of an earlier ruling in which judgment was entered in favour of the respondent *(the plaintiff in the superior court).* That application of 13th February 2001 was brought on the following grounds:-

"1. There is an error apparent on the face of the record in that the prayer for general damages was still unresolved and the same is not liquidated.

2. The plaintiff company has wound up its operations in Egypt and is no longer in existence.

3. The decree was extracted contrary to the provisions of the Civil Procedure Rul es.

4. The plaintiff will not suffer any prejudice as the decretal sum is placed in an interest earning fixed deposit account.

5. The plaint, Defence and Reply to defence disclose various triable issues which ought to go for full trial.

6. The court rel ied on defective affidavits to grant summary judgment.

7. Summary Judgment procedure was not available to the Plaintiff after the Defence and Reply to Defence had been filed.

8. The Appeal process has flopped before lodging the record of Appeal.

9. The court did not determine the rate of interest.

10. Special damages must be proved."

The respondent herein filed a Notice of Preliminary objection based on the following grounds:-

> *"1. The defendant's application is for the review and setting aside the ru ling of the Honourable Mr. Justice J. K. Mitey delivered in this suit on 3 rd March 1999 in the High Court of Kenya;*
>
> *2. The defendant has previously preferred an Appeal to the Court of Appeal of Kenya against the whole Ruling of Honourable Mr. Justice J. K . Mitey having filed it's Notice of Appeal on 8 th March 1999.*
>
> *3. Consequently the Defendant is barred from bringing this application under Order XL1V Rule 1 of the Civil Procedure Rules:*
>
> *4. The Defendant's application is therefore misconceived, incompete nt and bad in law and ought to be dismissed with costs."*

The preliminary objection was argued before Mitey J. who upheld it and proceeded to dismiss the appellant's application for review. In upholding the preliminary objection the learned Judge stated:-

> ***"The application for review is being made by the respondent only a few days after its bid in the Court of Appeal failed. That is slightly over two years after the ruling of this Court. Is it then that it dawned on the defendant that the grounds it shou ld have relied on in its intended appeal qualified as grounds for a review? The grounds set out in the defendant's application dated 13 th February 2001 don't qualify for review. They challenge the ruling of this Court. I cannot sit on appeal from my own ruling."***

From the above ruling the appellant now comes to this Court setting out the following grounds of appeal:-

> ***"1. The Learned judge erred in law in considering the possible merits of the application dated 13 th February 2001 and dismissing the same w ithout hearing it.***
>
> ***2. The Learned judge erred in law in holding that the remedy of review was not available to the Appellant and in upholding the Preliminary Objection.***
>
> ***3. The Learned judge erred in law and in fact in failing to appreciate the gist of th e preliminary objection before him and instead dealing with the merits of the application dated 13th February 2001 .***
>
> ***4. The Learned judge erred in law failing to appreciate that the application dated 13 th February 2001 had other prayers apart from the pray er for review.***
>
> ***5. The Learned judge made his decision pre maturely and acted on wrong principles of law and fact."***

Mr. Weda for the appellant submitted that what was before the superior court was a preliminary objection and that the learned judge was in error when he dealt with the merits of the entire application. Mr. Weda was of the view that the superior court ought to have allowed the application for review as the preliminary objection lacked merits. Mr. Weda relied on various authorities e.g. ***Motel Schweitzer v. Thomas Edward Cunningham and Marius Leon Estienne (1955) EACA 252 and Yani Haryanto v. B.O. & F. Man. (Sugar) Ltd.*** – Civil Appeal No. 122 of 1992 (*unreported*)

In his answer to Mr. Weda's submission Mr. Amin, counsel for the respondent, chose to rely on Civil Procedure Rules and especially Order XL1V rule 1 which provides:-

"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 p assed 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 decr ee or made the order without unreasonable delay."

Mr. Amin brought to our attention this Court's decision in ***Kisya Investments Limited v. The Attorney -General & R. L. Odupoy*** – Civil Appeal No. 31 of 1995 (*unreported*).

This appeal has a long and rather interesting background. The appellant herein was the defendant in the superior court. An application for judgment was made and the respondent came out victorious. The appellant being dissatisfied with that judgment it did not move with speed like other litigants but took time to consider the next step. When the idea of appeal crystallized the appellant discovered that it was out of time.

An application for extension of time in which to file appeal out of time was made under rule 4 of this Court's Rules. That application was placed before a single judge of this Court, but the same was dismissed. The appellant preferred a reference before a full bench of the Court but the reference was dismissed. It was after the dismissal of the reference that the appellant settled for an application for a review under Order XL1V of the Civil Procedure Rules. Clearly, a party seeking review must do so without unreasonable delay. Hence, on the issue of the time taken to file application for delay the appellant would not have succeeded. Its application for review was brought after a very long and unexplained delay. But even more important is the fact that the appellant applied for a review after its efforts for lodging an appeal had come to nought. Indeed in Kisya case (supra) this Court stated:-

"The principal and the only ground of appeal urged before us was that the first defendant having filed a notice of appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of review. W e accept this is a sound proposition of law."

In view of the foregoing, we are satisfied that the learned judge was entitled to dismiss the appellant's application for review. Consequently, this appeal must fail and we order that it be dismissed with costs to the respondent.

Dated and delivered at Nairobi this 21 st day of May, 2004.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

………………………………..

AG. JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR