REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

HIGH COURT CIVIL CASE NO. 7 OF 2020

CHINO GENERAL MERCHANTS

XTREEM LTD..PLAINTIFF/APPLICANT

-AND-

CHEN ZHEBIT ALIAS JACK..........1ST DEFENDANT/RESPONDENT

AVIC INTL BEIJING

(E.A) CO. LTD.................................2ND DEFENDANT/RESPONDENT

RULING

1. On 7th July, 2020, this Court expressed itself as hereunder while grating the application for injunction.

(a) Subject to compliance with (b) below pending the hearing and determination of this suit or further orders:

(i) An injunction will issue restraining the Defendants from communicating with the Plaintiff's clients, repossessing machinery/merchandise sold to them by the Plaintiff, harassing, threatening, intimidating, directly selling to them machinery/merchandise or dealing with the Plaintiff/Applicant's clients in any way whatsoever.

(ii) A mandatory injunction will issue compelling the 2nd Defendant to release logbooks and registration plates for trucks and 3 machines in respect of Aceel Ltd, Abu Ubadya High School, Sharusi Ltd and Skyline Construction Limited.

(iii) An injunction will issue restraining the Defendants from increasing the dealership fees other than as per the Supplies and Dealership Contract Price List dated 1st October, 2018.

(iv) An injunction will issue restraining the Defendants from interfering with the Plaintiff's dealing and/or transacting with Shandong Shantui Construction Machinery Company Limited in any manner whatsoever.

(b) An order compelling the Plaintiff to pay to the 2nd Defendant a sum of Kshs 9,081,085.00 being the difference between the sum indicated in the termination agreement as owed to the 2nd Defendant by the Plaintiff and the sum indicated in the reconciliation statement as being owed to the Plaintiff by the 2nd Defendant. The said sum is to be paid within 30 days from the date of this ruling.

(c) The Plaintiff shall, within 14 days file a suitable undertaking as to damages in the event that the suit against the Defendants does not succeed.

(d) The Costs will be in the cause..

2. The Plaintiff has moved this court vide an application dated 17th August, 2020 seeking the following orders:

1. Spent.

2. That pending the hearing and determination of this application, the honourable court be and is hereby pleased to grant an order to review and/or set aside paragraph 74(b) of its ruling dated 7th July, 2020.

3. That upon determination of this suit, the main suit e set down for full hearing.

4. That pending the hearing and determination of this application and the main suit, a mandatory order be issued compelling the Defendant/Respondents to pay the Plaintiff/Applicant his dealership fees of Kshs 22,069,665/-

5. That the costs of this application be provided for.

3. The said application was based on the fact that the applicant stands to suffer immense loss amounting to Kshs 22,069,665/- duly owed to it by the Respondent as its dealership fees yet the Defendants are in breach of the contract.

4. The Applicant stated that it was aggrieved by order (b) above. According to it there was an error or mistake apparent on the face of the record as the court failed to take into account fresh evidence from discovery of important evidence after exercise of due diligence being the non-payment of the Applicant's dealership fees in arriving at the amount of Kshs 9,081,085/-. According to the Applicant, the said decision is extremely prejudicial to it as it stands to suffer undue loss. It was therefore sought that the said decision be set aside and/or reviewed.

5. In response to the application it was averred on behalf of the Defendants that the Plaintiff is not at any risk of losing the alleged amount and that it was the 2nd Defendant who risked losing Kshs 9,081,085.00 which remains unsettled despite being a conditional requirement before the Plaintiff proceeds.

6. It was averred that the nature of the orders sought herein cannot be granted in an application for review since they amount to challenging the court's decision which can only be done on an appeal.

Determination

7. I have considered the application, the affidavits in support of and in opposition to the application as well as the submissions filed.

8. As can be seen from the prayers set out at the beginning of this ruling, prayer 2 seeks orders that pending the hearing and determination of this application, the honourable court be and is hereby pleased to grant an order to review and/or set aside paragraph 74(b) of its ruling dated 7th July, 2020. That prayer is clearly not a substantive prayer and cannot be granted in this ruling since after the delivery of this ruling that prayer ceases to have any relevance.

9. Nevertheless assuming that the said prayer was for a substantive relief for review, in order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1 of the ***Civil Procedure Rules***, certain requirements must be met. The said provision states as follows:

"(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. ***The Code of Civil Procedure,*** Volume III Pages 3652-3653 by **Sir Dinshaw Fardunji Mulla** states:

"The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure…The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

11. In **Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited Nairobi (Milimani) HCCC No. 532 of 2004, Okwengu, J** (as she then was) expressed herself as hereunder:

"In this case the court is being invited to review the order on the grounds that there is an error apparent on the face of the record or other sufficient reason the pleadings, in particular, the plaintiff's reply to the amended defence in which the plaintiff is alleged to have conceded that the defendant's fee policy was illegal and *contra statute* which was the basis of the Defendant's application for striking out the plaint. It is the defendant's contention that the plaintiff is bound by his pleadings and could not therefore depart from the same…It is my considered opinion that the pleadings went beyond the reply to the amended defence and to understand the matters which were in issue one has to look at the plaint *vis-à-vis* the amended defence and the reply to the amended defence. A careful reading of the ruling however, makes it clear that the court had the pleadings in mind and moreover, there is no basis for the conclusion that the court would have arrived at any different decision. The court was simply interpreting the provisions of Section 36 and 45of the Advocates Act as read with the Advocates Remuneration Order and it was not bound by any position taken by the parties. It may well be that the court was wrong in its interpretation or in the approach it took. However, that is not a matter that can be taken up on review as it is not an error apparent on the face of the record but ought to be subject of an appeal. Moreover to invite the court to set aside the order of dismissal and substitute it with an order striking out the plaint and dismissing the plaintiff's suit in effect is to invite the court to sit on appeal on its own ruling and make a complete turnaround which is not within the purview of Order 44 of the Civil Procedure Rules.

12. That was the Court of Appeal's decision in Court of Appeal case of **Anthony Gachara Ayub vs. Francis Mahinda Thinwa [2014] eKLR** which quoted with approval the judgment of the High Court in **Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation**, by stating:

"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible."

13. With respect to the other issues raised, the Court of Appeal in **Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418** expressed itself as follows:

"The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

14. The decision whether or not to review a court's decision was well captured by the Court of Appeal in **Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002,** where it was 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 however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

15. I have considered the grounds upon which this application is based and it is clear that the Plaintiff contends that this court the Court proceeded on an incorrect exposition of the law and facts and reached an erroneous conclusion. Misconstruing a statute or misapprehension of facts, in my view cannot be a ground for review.

16. The Plaintiff seems to be of the view that this court has already made a determination as to the amount owed to the Defendants by the Plaintiff. This Court in granting the injunction was clearly alive to the fact in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law based on contradictory affidavit evidence or disputed propositions of law. However, the Court is not excluded from expressing a *prima facie* view of the matter. In other words a prima facie view formed by the court during an interlocutory application is not final but is subject to the hearing of the suit.

17. Where the court grants an injunction subject to conditions, it does not mean that the said conditions amount to a relief in the main suit. It simply means that unless the said conditions are fulfilled, the injunction will not issue. It does not follow that an order made in interlocutory application for injunction, unless it is a mandatory injunction, can be executed in the event that the applicant does not comply therewith.

18. The Plaintiff's apprehension, if I understand it correctly, is that it stands to be prejudiced in its suit in light of the conditions imposed for the grant of the injunction. With due respect, that is not the position. The suit is yet to be heard and if at the hearing the court finds in favour of the Plaintiff, the conditional orders granted at the time of the application for injunction will lapse and if he had deposited or paid a sum of money it will be entitled to the refund of the same. In other words the court's finding in an interlocutory application are based on prima facie findings and do not necessarily bind the court in arriving at its determination after hearing the main suit.

19. However, if the Plaintiff is aggrieved by the conditions imposed, then the only option available to the Applicant is to appeal.

20. As regards the third prayer seeking a mandatory order be issued compelling the Defendant/Respondents to pay the Plaintiff/Applicant his dealership fees of Kshs 22,069,665/-, I agree with **Warsame, J** (as he then was) in **Sara Lee Household & Body Care (K) Ltd vs. Damji Pramji Mandavia Kisumu HCCC No. 114 of 2004** that the essence of a review must ordinarily be to deal with straight forward issues

which would not fundamentally and radically change the judgement intended to be reviewed, otherwise parties would lose direction as to the finality of a decision made by a particular court as on occasions a review may necessarily entail arriving at a decision different from the one originally arrived at. This was the position in **Atilio vs. Mbowe (1969) THCD** where it was held that an application for review should not be granted if it will result into the orders, which were not contemplated.

21. To grant the order sought would amount to this court in effect sitting on appeal on its earlier ruling.

22. In the premises the Motion dated 17th August, 2020 fails and is dismissed with costs

23. It is so ordered.

Read, signed and delivered in open Court at Machakos this 25th day of February, 2021.

G V ODUNGA

JUDGE

Delivered in the absence of:

Mr Langalanga for Mr Kitindio Musembi for the Defendants

CA Geoffrey