



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL APPEAL NO.E 469 OF 2019

DARI LIMITED.....1ST PLAINTIFF/APPLICANT

RAPHAEL TUJU.....2ND PLAINTIFF/APPLICANT

MANO TUJU.....3RD PLAINTIFF/APPLICANT

ALMA TUJU.....4TH PLAINTIFF/APPLICANT

YMA TUJU.....5TH PLAINTIFF/APPLICANT

S.A.M. COMPANY LIMITED.....6TH PLAINTIFF/APPLICANT

- VERSUS -

EAST AFRICAN DEVELOPMENT BANK.....1ST DEFENDANT

MUNIU THOITHI.....2ND DEFENDANT

GEORGE WERU.....3RD DEFENDANT

RULING

1. The Notice of Motion dated 19th May 2020 is brought by the plaintiffs. The prayer which is subsisting in that application, for consideration in this Ruling, is for this court to review and set aside the interim orders made on 23rd March 2020.

2. This matter is under the docket of **Justice G. Nzioka**. It is before me for consideration of that application of 19th May 2020 because the order sought to be reviewed by that application was made by me on 23rd March 2020.

3. Since 16th March 2020, the courts downscaled their operations because of the threat of the COVID -19 pandemic. The application dated 19th March 2020 was filed by the defendants under certificate of urgency. The application was placed before me, the then duty judge, on 23rd March 2020. After considering that application, I granted the following prayers ex parte (hereinafter impugned orders):

i. An order is issued that the 2nd to the 5th plaintiffs do immediately grant the Receivers full, complete and effective access to the 1st plaintiff's premises in accordance with the Notice of appointment and Receivers' letter to the directors of 23rd December 2019 and in accordance with the court order of 2nd March 2020.

ii. The 2nd to the 5th plaintiffs shall provide the Receivers with the 1st plaintiff's statement of affairs, financial returns and company records, cash book as from 23rd December 2019 to date, the management accounts, the debtors and creditors listing as at 4th February 2020 and the 1st plaintiff's staff payroll for the last three months.

iii. A Notice to Show Cause to issue for RAPHAEL TUJU, YMATUJU, ALMA TUJU and MANO TUJU to show cause why they should not be committed to civil jail for disobedience of this court order to allow the Receivers to resume their duties at the 1st

plaintiff's premises. The hearing of the said Notice to Show Cause shall be before Justice Nzioka on 20th May 2020.

iv. The Notice of Motion dated 19th March 2020 to be served on the plaintiff to be heard inter-partes on 20th May 2020.

4. The prayers in the plaintiff's application dated 19th May 2020 are premised on the grounds that the impugned orders issued ex parte finally determined the defendant's application; the plaintiffs were not accorded opportunity to be heard, contrary to dictates of the constitution of right to fair hearing; the plaintiffs have a complete defence in law and ought to be heard in response to the application and; that there is sufficient grounds to have the impugned orders reviewed and set aside.

5. The defendant opposed the plaintiff's application by arguing that to the contrary the impugned orders were not final and the court provided an opportunity to the plaintiffs to be heard inter-partes on the application on 20th May 2020. In defendants' view the impugned orders were largely reiterating previous orders of the court which granted the defendants access into the 1st plaintiff's premises. That the court in issuing the impugned orders was not making new orders because Justice Nzioka, on 4th and 19th February and 2nd March 2020 made orders which were reiterated by the impugned order. Defence further submitted that the principle of right to be heard can only be raised when a party is completely shut out which is not the case with the plaintiffs. That the impugned order did not make a finding that the plaintiffs were in contempt of a court order but rather that the plaintiffs were given an opportunity to show cause on 20th May 2020.

ANALYSIS

6. The plaintiffs seek review of the impugned order. The court's power to review is found under Order 45(1) of the Civil Procedure Rules, which provides:

“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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

7. The plaintiffs have moved their application on the basis that the review should be permitted under “any other sufficient reason” stated in the above Order 45 (1). **Justice John M. Mativo** in the case **Nabiswa Wakenya Moses v University of Nairobi & another (2019) eKLR** discussed “any sufficient reason” in Order 45 (1) and had this to say:

*“28. An application for review may be allowed on any other “sufficient reason.” The phrase ‘sufficient reason’ within the meaning of the above rule means analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in **Sadar Mohamed vs Charan Singh and Another**[13] where the court held that:-*

“Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).”

29. Mulla in the Code of Civil Procedure[14] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression ‘any other sufficient reason’...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the rules, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.”

8. I am persuaded by that point of view, that there is a kindred relationship between the “mistake or error apparent on the face of the record” with “any other sufficient reason,” in Order 45(1). I also concur with **Justice Mativo's** citation as follows:

*“Perhaps it is worth citing **Evan Bwire v Andrew Nginda** [Civil Appeal No. 103 of 2000, Kisumu (2000) LLR8340] where the court held that ‘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 afresh.’”*

9. I began by stating that this file came before me during a period when the courts had scaled down operations because of the COVID-19 pandemic. The defendant's application, which resulted in the impugned order, was placed before me on 23rd March 2020 because I was then the duty judge. This matter had been, until that date, under the docket of **Justice Nzioka**. It is that learned judge who made the previous orders which the defence argue were reiterated by the impugned orders. When the matter was placed before me on 23rd March 2020 and because the Judiciary Staff who would have availed the court file of this matter were not on duty, due to the pandemic, I was constrained to rely on the application as it appeared and to also rely on the depositions supporting the application to make the impugned orders.

10. The plaintiffs have argued that the impugned orders denied them an opportunity to be heard. The right to be heard *audi alteram partem* is the twin pillars of natural justice. It recognises that no person should be judged without a fair hearing, that is each party should be given an opportunity to respond to evidence brought against them. This indeed was reiterated by the Judges of the court of appeal in the case **Kial Mbaki & 2 Others v Gichuhi Macharia (2005) eKLR** thus:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard. This Court has indeed reiterated that principle on many occasions and we need only cite one for emphasis: - Matiba vs. Attorney General [1995 – 1998] 1 EA 192 where in an application for leave to seek an order of certiorari, the superior court refused to grant the prayer for stay without hearing counsel for the applicant who was present in court.”

11. My consideration of the sacrosanct right each one has, to be heard before being judged and bearing in mind the impugned orders issued on 23rd March 2020, I come to the inescapable conclusion that the plaintiffs were denied a right to be heard on whether they should present to the Receiver full access to the 1st plaintiff's premises, whether they would present the Receiver with the full statement of affairs of the 1st plaintiff and, whether a notice to show cause should be issued against the 2nd to the 5th plaintiff. I have taken note of the defendants' argument that the impugned orders simply reiterated the orders made by **Justice Nzioka** but then I find myself asking this question: why would court orders need to be reiterated. If they are clear orders they simply need execution. If they are not clear the opposite party must be given an opportunity to be heard before they are clarified.

12. The plaintiffs have in my view shown that there is sufficient reason for the impugned orders to be reviewed. There is an error on or mistake in granting the impugned orders without affording the plaintiffs the right to be heard. It is because of my above finding that the impugned orders will be vacated/set aside to enable the plaintiff to be heard on the same. This matter will be placed before the learned Judge handling this matter for further directions to be given.

CONCLUSION

13. The orders of the court are:

a. The orders issued on 23rd March 2020 are hereby set aside and vacated.

b. The matter will be placed before Justice Nzioka on 15th June 2020 for the learned Judge to give directions on this matter.

c. The costs of the Notice of Motion dated 19th May 2020 will abide with the outcome of the Notice of Motion dated 19th March 2020.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JUNE 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **11th** day of **June, 2020**.

MARY KASANGO

JUDGE