REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 51 OF 2014

SHAFFIQUE ALIBHAI.....PLAINTIFF/RESPONDENT

VERSUS

WILLIAM ONCHANDA ONGURU t/a

OCHANDA ONGURU AND CO. ADVOCATES..1ST DEFENDANT/APPLICANT

JOHNSON KIPLIMO ARAP CHEMOS.....2ND DEFENDANT

RULING

1. This Court is asked to review and set aside its Judgment of 18th May 2017 and that the Applicant be granted leave to recall the Plaintiff for cross-examination on his exparte evidence. The Applicant also seeks to amend his Defence.

2. These multiple requests are found in a Notice of Motion dated 5th July 2017 and filed on even date. The application is said to be brought under the provisions of Order 22 Rule 22, Order 8 Rule 3, Order 45 Rule 1 & 2 of the Civil Procedure Rules 2010 and Section 3, 3A and 63(e) and 80 of the Civil Procedure Act.

3. The Applicant asserts that, there is discovery of new and important matters or evidence which were not within his knowledge and could have been produced by him at the time of hearing. These new matters are that there was no contract between the Plaintiff and the 2nd Defendant which could satisfy the provisions of Section 3(3) of the Law of Contract Act and secondly, the 2nd Defendant had no valid legal title to property L.R. No. 209/11151.

4. In support of that contention, is a supporting affidavit of the 1st Defendant sworn on 5th July 2017. He deposes that, on 12th June 2017, a date after the Judgment, the 2nd Defendant filed an application seeking setting aside the Judgment. That it is in the affidavit in support of that application that the new matters have been brought to light. The Applicant says that it has come to his attention that the 2nd Defendant did not have a valid title to the sold property whose proceeds were shared with the Plaintiff. That an email dated 9th November 2012 annexed to the 2nd Defendant's application shows that the Plaintiff, the 2nd Defendant and Mr. Musa were fully conscious of this illegality.

5. The Applicant further avers that, it is clear from the affidavit of the 2nd Defendant that there were two distinct sale agreements, one for Kshs. 60 million and another for Kshs. 160 million. He then avers that the 2nd Defendant had clearly stated that he did not append his signature on the agreement of Kshs. 160 million which he alleges exists. That it is clear from the Court case that the other agreement of Kshs. 160 million which the 2nd Defendant states he did not sign was apparently between him and Daralle Limited, and that as a result of the said agreement of Kshs. 160 million, the 2nd Defendant was sued by Daralle Limited in ELC No. 567 of 2008.

6. The response by the Plaintiff is that the issues said to be new were within the knowledge of the Applicant. It is pointed out that in the Applicant's defence dated 20th March 2010, it is pleaded that the 2nd Defendant was not the owner of the suit property. That the Applicant being aware of the provisions of Section 3(3) of the Law of Contract Act, should have raised it. That in an event nothing turns on it in respect to the issues between the Plaintiff and the Applicant.

7. In respect to the 2 land cases, the Plaintiff avers that, it is not a party thereto and that the issues in the two cases have no bearing to the claim herein.

8. Lastly, that the Applicant has already preferred an appeal against the decision now sought to be reviewed and the remedy for review is not available in the circumstances.

9. This Court has read the submissions of Counsels which were highlighted orally.

10. The provisions for Review are found in Order 45 of the Civil Procedure Rules. Rule 1 thereof reads:

> **"(1) Any person considering himself aggrieved—**
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> **(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".**

11. It is the case for the Applicant three new issues which are critical to this matter have come to his knowledge. The first is the existence of two agreements. The second is that the payment of Kshs. 60 million out of which Kshs. 15 million was paid to the Plaintiff was done against a Court order. Lastly that, there was no contract between the Plaintiff and the 2nd Defendant.

12. In the first instance, the onus is on the Applicant to demonstrate that these three matters are not only new matters but were also, after exercise of due diligence, not within his knowledge or could not be produced by him at the time when the decree was made. Only then can the application be said to be properly within the ambit of the order 45.

13. However, the pleadings and proceedings herein betray that all the issues now raised were either known or within the knowledge of the Applicant. To start with, in paragraph 10 of the Plaint, the Plaintiff makes reference to the evidence of the two land suits. Then the email of 9th November 2012 which the Applicant alleges recent discovery is infact part of the Plaintiff's bundle of documents filed on 12th February 2014 alongside the Plaint (see page 26). The email makes reference to the Court order allegedly breached. Had the Applicant been diligent, then he would have sought to know the issues raised in the two land cases so as to decide whether he needed to rely on them in his defence.

14. Also revealed in the email is the supposed confession by the 2nd Defendant that the land sold was not his. This was clearly brought to the attention of the Applicant when the Plaintiff filed his bundle.

15. In respect to the existence of two parallel agreements, this Court is not certain how that helps in the defence of the Applicant. While it may be available as a defence to the 2nd Defendant, the case of the Plaintiff against the Applicant is that the Applicant released Kshs.10 million to the 2nd Defendant without his consent and authority. The existence of a second agreement may not change this fact.

16. The argument by the Applicant that the claim by the Plaintiff is not maintainable against the Applicant because of lack of a written contract between the Plaintiff and the 2nd Defendant is not any better. Once the Plaintiff filed his documents, then it would be apparent that the agreement alluded to by the Applicant did not exist. The Applicant chose not to press the issue at hearing. He should not be allowed to reopen a matter on the basis of a legal argument that was always available to him.

17. This Court does not see merit in the motion of 5th July 2017.

18. The application runs into another difficulty. Section 80 of the Civil Procedure Act provides:-

> **"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".**

It is common ground that on 23rd May 2017, the Applicant filed a Notice of Appeal against the judgment of 23rd May 2017. That Notice of Appeal is yet to be withdrawn. A party is barred from seeking Review of a Decision against which it has preferred an Appeal. That may not be controversial but the parties are unable to agree on when it can be deemed that an Appeal has been preferred. Does it mean the filing of the Notice of Appeal as argued by the Respondent or the filing of a Memorandum of Appeal as under Rule 87 of the Court of Appeal Rules as asserted by the Applicant?

19. Rule 75 of the Court of Appeal Rules is on a Notice of Appeal and provides:-

> **"(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.**

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.

(4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.

(5) where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging notice of appeal.

(6) A notice of appeal shall be substantially in the Form D in the First Schedule and shall be signed by or on behalf of the appellant".

20. While institution of Appeals is provided for under Rule 87 of the same Rules and reads:-

" (1) For the purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents—

(a) an index of all the documents in the record with the numbers of the pages at which they appear;

(b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and as regards any respondent who has not furnished an address or service as required by rule 79, his last known address and proof of service on him of the notice of appeal;

(c) the pleadings;

(d) the trial judge's notes of the hearing;

(e) the transcript of any shorthand notes taken at the trial;

(f) the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, certified translations thereof;

(g) the judgment or order;

(h) the certified decree or order;

(i) the order, if any, giving leave to appeal;

(j) the notice of appeal; and

(k) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant:

Provided that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal.

(2) For the purpose of an appeal from a superior court in it's appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as may be to those set out in sub-rule (1) and shall contain also the following documents relating to the appeal to the first appellate court—

(i) the order, if any, giving leave to appeal;

(ii) the memorandum of appeal;

(iii) the record of proceedings; and

(iv) the certified decree or order.

(3) A judge or registrar of the superior court may, on the application of any party, direct which documents or parts of documents should be excluded from the record and an application for such direction may be made informally.

(4) The documents mentioned in sub-rule (1) shall be bound in the order in which they are set out to that sub-rule and documents produced in evidence shall be put in order of the dates they bear or, where they are undated, the dates when they are believed to have been made, without regard to the order in which they were produced in evidence:

Provided that an affidavit filed in support of a chamber summons or notice of motion shall be bound immediately following the summons or notice, as the case may be.

(5) Each copy of the record of appeal shall be certified to be correct by the appellant or by any person entitled under rule 22 to appear on his behalf".

21. I would think that there is a difference between preferring an Appeal and institution of an Appeal. An Appeal is preferred once a notice of Appeal is duly lodged under the provisions of Rule 75 of the Court of Appeal Rules. An institution of an Appeal is a step taken after the Appeal has been lodged. Taking cue from Order 42 Rule 6 of The Civil Procedure Rules, an Appeal for purposes of Section 80 and Order 45 on Review is deemed as duly filed when a Notice of Appeal has been given. This Court identifies with the position of Azangalala J. (as he then was) in **Protein And Fruit Processors Ltd vs Credit Bank Limited & 2 Others** [2007] eKLR where he held;-

"The Defendant/Applicant opted to pursue the Appeal when they lodged their notice of Appeal on 10th October 2003. The filing of this notice unless withdrawn excludes the procedure under Section 80 and order XLVI of the Civil Procedure Act and Rules".

22. The application of 5th July 2017 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 21st day of February, 2019.

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F. TUIYOTT

JUDGE

Present -

Mapesa h/b for Ms. Kilonzo for Respondent

N/a for Applicant

Nixon – Court Assistant