



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 543 OF 2015

**LANDBANK REAL ESTATE INVESTMENT
TRUST LIMITEDPLAINTIFF/RESPONDENT**

VERSUS

**STANDARD CHARTERED
BANK KENYADEFENDANT/APPLICANT**

RULING

1. This Ruling relates to a Notice of Motion Application dated 12th June, 2017, brought under the provisions of; Order 21 Rule 8 of the Civil Procedure Rules, 2010 and the inherent power of the Court.
2. The Applicant is seeking for orders that, the order issued by the Court on 14th December, 2016, be recalled and expunged and the costs of this Application be paid by the Plaintiff /Respondent.
3. The Application is premised on the grounds on the face of it and the Supporting Affidavit dated 12th June 2017, sworn by Wanjiru Mutero, a student in the firm of; Hamilton Harrison & Mathews Advocates, who have the conduct of this matter on behalf of the Defendant.
4. The Applicant avers that the Plaintiff/Respondent has filed an Appeal in the Court of Appeal, against “the Ruling/decision” of Hon. Justice Ogola dated 16th May, 2016. That upon perusal of the record of Appeal served on the law firm, Hamilton Harrison & Mathews Advocates, on 17th June 2016, there was no copy of the order of the High Court in respect of the said Ruling.
5. On 6th July 2016, the firm of Hamilton Harrison & Mathews Advocates wrote to the law firm of; Miyare & Company, Advocates who are appearing for the Appellant, pointing out the omission of the certified copy the order of 16th May, 2016, as required by Rule 87(1) (h) of the Court of Appeal Rules, 2010 and requested the said Law firm to take action to rectify the omission.
6. However, no response to that letter was received. The firm of Hamilton Harrison & Mathews applied then to the Court of Appeal on 15th July 2016, for the Appeal to be struck out on the grounds that the Record of Appeal did not contain a copy of the said order contrary to the cited Rule 87(1) (h) of the Court

of Appeal Rules and that, an Appeal under “section 75 of the Civil Procedure Rules”. (I am not sure of what the deponent meant by section 75 being a provision under the Rules, but I believe it is the Civil Procedure Act), only lie against an Order, and the Court of Appeal does not have jurisdiction to hear the Appeal.

7. However subsequently, on 1st March, 2017, the firm of Hamilton Harrison & Mathews Advocates received a letter dated; 27th February 2017, from the firm of Miyare & Company Advocates, together with a Supplementary Record of Appeal, filed on 20th January 2017. The firm of Hamilton Harrison & Mathews Advocates replied to that letter on 10th March 2017, setting out the various concerns about the Order included in the Supplementary Record of Appeal.

8. The Defendant's Application to strike out the Appeal came on for hearing in the Court of Appeal on 20th March, 2017 and adjourned to enable the Plaintiff seek leave to file a Supplementary Record of Appeal. On 27th March 2017, Hamilton Harrison & Mathews wrote to the Deputy Registrar, Commercial & Tax Division of the High Court in Nairobi, seeking clarification regarding the Order included in the Supplementary Record of Appeal. The Deputy Registrar of the Commercial & Tax Division replied to the letter on 5th May 2017, confirming that there were errors in the Order and advising the parties to move the Court accordingly.

9. Even then the Plaintiff/Appellant has not taken any action to rectify the Order hence this Application to have the Order recalled and expunged because of the irregular manner in which it was drawn and obtained.

10. However, the Respondent opposed the Application vide a Replying Affidavit dated 18th August, 2017, sworn by Mr. George Miyare, an Advocate of the High Court of Kenya, having the conduct of the matter on behalf of the Plaintiff/Respondent. He averred that on 16th May, 2016, Hon Justice E.K.O. Ogola, delivered a Ruling on the Plaintiff's Notice of Motion dated 20th November 2015, and the Defendant's Notice of Motion dated 6th January, 2016. By the virtue of that decision, this suit was stayed pending hearing and determination; **Nairobi HCCC No. 381 of 2015. Sichuan Huashi Enterprises Corporation East Africa Limited Vs Landbank Real Estate Investment Trust Limited.**

11. Being aggrieved by the decision, the Plaintiff/Respondent sought and obtained leave of the Honourable Court to appeal against it and consequently applied for and obtained typed and certified Ruling together with the Court proceedings, which were received on 25th May, 2016.

12. On 16th June, 2016, the Plaintiff/Respondent lodged its Record of Appeal at the Court of Appeal and promptly served the Defendant/Applicant on 17th June, 2016. On 11th July 2016, the firm of; Miyare & Company Advocates received a letter from the Defendant/Applicant's Advocates, notifying them that a certified copy of the Order of the High Court given on 16th May, 2016 had been omitted from their Record of Appeal. The Defendant's Advocates further advised and requested that the omission be corrected. That on 14th December, 2016, the Honourable Court issued the firm of; Miyare & Company with a copy of the Orders given on 16th May 2016, the Deputy registrar having been satisfied with the Order as prepared before approving it by signing and sealing.

13. However, innocently/inadvertently, the firm of; Miyare & Company failed to notice the errors in the said Court Order, as did Deputy Registrar of the Honourable Court. However, the firm of; Miyare & Company has sought to rectify the Court Order, through their letter dated 16th June 2017, addressed to the firm of; Hamilton Harrison & Mathews Advocates enclosing a draft Order for their approval. Subsequently, a reply was received from the Defendant/Applicant's Advocates, with suggestions of amendments to the Order which were incorporated in their draft and forwarded to the Deputy Registrar for signing and sealing.

14. The Plaintiff/Respondent argues that they took all lawful steps and have made efforts to have a proper

Order prepared, including making the requisite payments to Court. That the clerical mistakes in the Honourable Court's orders, or errors arising from any accidental slip or omission may at any time be corrected by the Court, either of its own motion or on the Application of any of the parties pursuant to Section 99 of the Civil Procedure Act. The mistake herein is therefore not fatal and the said Orders should be amended and not expunged from the record with costs as sought.

15. That the application is thus malicious, misconceived and improper as the mistakes in the Court order herein are not the making of the Plaintiff/Respondent and he should thus be excused from any penalties. Similarly the Defendant/Applicant has failed to demonstrate any prejudice it has suffered or is likely to suffer as a result of the said innocent mistake; whereas the Plaintiff/Respondent is at the risk of being saddled with unnecessary/unjust costs should the Application herein be allowed. That in any event, the Defendant/Applicant has a fair opportunity of filing the correct Court Order through a Supplementary Record of Appeal in; **Nairobi Appeal No.132 of 2016sichuan Huashi Enterprises Corporation East Africa Limited Vs Landbank Real Estate Investment Trust Limited**, in accordance with Rule 92 of the Court of Appeal Rules.

16. The Respondent submitted that the instant Application is inimical to the overriding objectives of the Civil Procedure Rules, since it is solely intended to obfuscate the real issues in the matter, delay and frustrate the Plaintiff/Respondents aforesaid Appeal and unjustly escalate costs of litigation hereof; it is scandalous, frivolous, vexatious and a gross abuse of Court and Court process, hence it should be dismissed with costs.

17. I have considered the Application, the Affidavits in support and the Affidavit in reply thereto alongside the skeleton submissions filed by the Defendant/Applicant. I have perused the Court record and note that the subject Order was extracted by the Court on 14th December 2016 and signed for by the Hon. Deputy Registrar. On 27th March 2017, the errors in the said Order were brought to the knowledge of the Court by the Law firm representing the Defendant/Applicant. On 5th May 2017, the Hon. Deputy Registrar replied to the Law firm's letter acknowledging that the Order extracted had errors and indicating the errors therein. She advised the parties to move the Court accordingly. This is what was expected to be done.

18. However, the Plaintiff/Respondent did not move the Court but filed a supplementary Record of Appeal with the same Order, whereupon the Defendant/Applicant protested through their letter dated 10th March 2017. Subsequently, the Plaintiff's/Respondent's lawyers wrote to the Defendant/Applicant lawyers on 16th May 2017, enclosing an draft Court Order for approval but the same was rejected vide a letter dated 21st June 2017, which included a draft order was enclosed.

19. On 12th July 2017, the Hon. Deputy Registrar wrote to the Defendants lawyers and copied in the Plaintiff's lawyer, suspending any action on the Order following the filing of the Notice of Motion dated 12th June 2016. It is therefore clear that the Hon. Deputy Registrar would have dealt with the issue had this Application not been filed. In my considered opinion, the Court having conceded to the mistake, it is only fair and just that it does correct the mistake. It is unfortunate that the issue has taken the direction it has, necessitating the filing of this Application.

20. In the letter of the Deputy Registrar, dated 5th May 2017, she clearly advised the parties to move the Court accordingly as aforesaid, had this been done this Application would have arisen. It is the Plaintiff/Respondent who required the Order for purposes of; inter alia the filing of the Appeal. It was therefore their responsibility to act in accordance with the directions given by the Court on 5th May 2017.

21. Be that as it may in the interest of justice, I shall not order that the said Order issued on 14th December 2016, be recalled and/or expunged but I hereby direct that the Hon. Deputy Registrar do correct the errors in the Orders and issue the amended Court Order forthwith. In view of the fact that the Defendant/Applicant has moved this Court to necessitate this Order, I will grant them the costs of this Application.

22. These, then, are the orders of the Court.

Dated, delivered and signed this 14th day of December, 2017.

G.L. NZIOKA

JUDGE

In the presence of:-

Mr Odhiambo for Mr Miyare.....for the Plaintiff/Respondent

Ms Ndirangu for Mr Fraser.....for the Defendant/Applicant

TeresiaCourt Assistant