REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 1388 OF 1997

ZULFIKAR ALI HASSANALLY AND

RUSTAM HIRA (suing as the legal representatives

of the late ABDUL KARIM HASSANALLY)

NYOTA SERVICE STATION LIMITED............PLAINTIFFS

VERSUS

1. WESTCO KENYA LIMITED

2. MWAI KIBAKI

3. KIBAKI MURIITHI

4. DR. JOHN KABIRU.................................DEFENDANTS

RULING

By a considered ruling dated and delivered on 9th March 2016, I allowed with costs the 2nd Defendant's application by Notice of Motion dated 7th September 2015 for striking out of the suit as against him by the Plaintiff with costs brought under Order 2, rule 15(1) of the Civil Procedure Rules (the Rules).

The Plaintiff has now filed an application by Notice of Motion dated 6th April 2016 seeking the main order for review and setting aside of the ruling of 9th March 2016, and for the Notice of Motion dated 7th September 2015 to be wholly dismissed. The application is stated to be brought under Sections 80, 1A and 1B of the Civil Procedure Act, Cap 21 (the Act) and under Order 45, rule 1 of the Rules.

The grounds for the application stated on the face thereof are -

i. That there is an error and mistake on the face of the record.

ii. That there is sufficient reason or cause for the review of the aforesaid orders.

iii. That the court made an apparent error when it held that the Plaintiffs had failed to file a

Replying Affidavit to controvert the 2nd Defendant's allegation that there was no valid guarantee when in fact Order 2 Rule 15(2) of the Civil Procedure Rules forbids the Plaintiffs from filing any such Affidavit in an application brought under that order.

iv. That the court erred when it held that the Plaintiff ought to have filed a replying affidavit in reply to the 2nd Defendant's allegations of fact when, in fact, the 2nd Defendant had not filed any affidavit in support of his allegations of fact to warrant a similar reply.

v. That the decision made is not in furtherance of the overriding objective of the Act and Rules.

vi. That the Court shifted the burden of proof from the Applicant to the Respondent by asking him to disprove facts which had not been proved by affidavit.

vii. That the court determined the Application on a ground raised *suo motu* which had not been raised by either party.

There is a supporting affidavit sworn by the applicant which in effect recites the grounds for the application.

The 2nd Defendant has opposed the application by grounds of opposition dated 5th May 2016. They include –

i. That the application is misconceived as it is grounded on an alleged error on the face of the record which is non-existent.

ii. That Order 2 Rule 15(2) makes reference to an application made by an applicant and does not bar a Respondent from filing Replying Affidavit in response to or in opposing the application.

iii. That the court did not err in holding that the Plaintiffs ought to have controverted the allegation by the 2nd Defendant that there was no valid guarantee.

iv. That Order 51 rule 14(1) allows for a Respondent wishing to oppose an application to do so under any of the options provided for.

v. That the overriding objective applies in favour of removing the 2nd Defendant from the suit as he would be forced to defend a suit in which no reasonable cause of action has been demonstrated against him.

vi. That the 2nd Defendant had clearly demonstrated that the pleadings on record did not disclose any reasonable cause of action against him and therefore the burden of proof did not shift as alleged.

vii. That the application does not satisfy the legal requirements for an order for review.

The application was heard by way of written submissions. Submissions filed by the parties have been duly considered by the Court.

Errors of law and fact are not mistakes or error apparent on the face of the record amenable to correction by review under Order 45 of the Rules. They can be corrected only on appeal. This court cannot correct its own erroneous findings (if any) of law and fact. It cannot sit on appeal over its own decisions.

This Court in its ruling noted -

"The Plaintiff's plead breach of contract as against the 2nd Defendant who guaranteed to pay the Plaintiff's loan advanced in case the 1st Defendant failed to pay. The Plaintiffs have failed

> **to provide facts and or evidence that support their cause of action against the 2nd Defendant. For example the issue raised by the 2nd Defendant to the effect that there was no valid guarantee signed by him as in any case it has not even been exhibited in the Plaintiffs' documents."**

This Court still stands by its pronouncement.

As espoused in **Eastern and Southern African Development Bank vs African Green Fields Ltd & Others 2002 EA page 377** –

> **"The proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose"**

In view of the foregoing, the Notice of Motion dated 6th April 2016 is hereby dismissed with costs as it is clearly misconceived and lacks merit. It is so ordered.

Dated, signed and delivered at Nairobi this 26th day of September 2016.

A. MBOGHOLI MSAGHA

JUDGE