



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 570 OF 2014

PADDY MICRO INVESTMENT LTD.....APPELLANT

- V E R S U S -

PATRICK KARIUKI MUTONYI.....RESPONDENT

RULING

1. The applicant filed a motion dated 19th January 2015 where it sought orders to wit:

1. THAT the orders of review made on the 9th July 2014 setting aside earlier orders of dismissal of the respondents earlier application for injunction be stayed pending the hearing and determination of the appeal lodged herein.

2. THAT the costs of this application be costs in the cause.

2. The parties have filed their respective written submissions which I have considered. I have also considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the application. The applicant avers that the respondent filed an application in the trial court seeking injunction orders against the appellant from any dealings on the subject motor vehicle KAM O12C Suzuki Escudo and an order for unconditional release of the suit motor vehicle to the respondent. He stated that the Hon. Magistrate heard the application and dismissed it on merit. However, the respondent unsatisfied with the decision of the court sought to review the said orders vide an application dated 7th August 2014. He asserted that the court heard the review application and reviewed its orders. It is the applicants contention that the court erred in reviewing its orders since the respondents application fell short of the requirements for a review of a decision as set out under Order 45 Rule 1 and 2 of the Civil Procedure Rules. In particular, he complained that the application for review did not allege that there was an error apparent on the court neither did it demonstrate that there was new evidence that was not within his knowledge as at the time he firstly approached the court. He argued that the new evidence that the respondent relied on was an OB extract which had not been taken to the court initially yet he had reported the matter to the police prior to instituting the suit and said so in his pleadings. It is the applicant's contention that in these circumstances, the respondents did not show any new material that he could not have obtained if he had acted with due diligence as required under the law. He referred to the **Court of Appeal case in Civil Appeal no. 107 of 1995, Jackson Gatere vs Mount Kenya Bottlers Limited** where the court stated *inter alia*"

a) "If it is not shown that the new material could not have been obtained if the applicant had acted with due diligence an application for review would not be granted.

b) The appellate court will not interfere with the exercise of discretion unless the exercise was

wrong in principle or the judge acted perversely on the facts”.

He prayed that his application be allowed.

3. The respondent on the other hand submitted that he filed a suit at the chief magistrates court Civil Cause no. 717 of 2013 under a certificate of urgency and a notice of motion dated 13th November 2013. He argued that the application was dismissed on the ground that he had not made a report at the parklands police Station as a result of which he filed another application for review dated 4th August 2014 and the same was allowed. He accused the applicant of failing to comply with the orders of the court issued on 15th December 2014. He prayed that the applicant’s application be dismissed.

4. In a nutshell, the applicant is praying that the review order of the trial court issued on 15th December 2014 be set aside. Its main contention is that those ought not to have been issued because there was no new evidence discovered by the respondent that was not within his knowledge as required under Order 45 Rule and 1 of the Civil Procedure Rules. According to it, the OB abstract was well within the respondent’s knowledge. On his part the respondent argues that he only filed the review application after the previous injunction application was dismissed following his failure to report the possession of the subject motor vehicle at the Parklands Police Station.

5. I have perused the material before me. It is clear that the orders of the court have not been annexed to the application. However, the parties concur that the trial court issued review orders in favour pursuant to the motion application filed by the respondent. The application dated 6th August 2014 which elicited the response as laid out in the replying affidavit dated 26th August 2014 have been annexed. According to the application before the trial court the respondent intimated that he made a report of the detained motor vehicle at the parklands Police Station on 12th November 2013 and was given OB No. 25/12/11/13. He proceeded to produce the abstract of the OB and averred that had the trial court seen the abstract, then it would have come to a different conclusion. The court agreed with him and reviewed its orders.

6. The question arising here therefore is whether the OB abstract produced can be termed as new evidence that would cause issuance of review orders. Order 45 Rule 1 is clear that any person aggrieved by a decree or order can have the same reviewed upon discovery of new and important matter or evidence which after 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 record or for any sufficient reason.

7. I have re-examined the decision of the trial court dated 9th July 2014 and that dated 15th December 2014 that has elicited this appeal. In the former decision, the court dismissed the injunction application for various reasons including the fact that the respondent had not attached a police report showing that the vehicle was illegally taken away from him. It is in light of this decision that the respondent had not attached a police station and obtained an O.B which he produced in court as new evidence that he had discovered which could not have been obtained at the time which evidence gave rise to the later decision. The question arising therefore is whether this O.B abstract can be termed as new matter or evidence which after exercise of due diligence, was not within his knowledge or one that could not be produced by him at the time when the decision was made.

8. I have analysed the OB abstract, dated 12th November 2013. The same is deemed to have been reported and recorded at the Parklands Police Station. I have also looked at the two applications filed by the respondent in the trial court. In the first application dated 16th December 2013, the respondent prayed for injunction orders. In that application the respondent does not mention that he reported the alleged confiscation of his motor vehicle to the police neither does he mention the OB abstract. However in the 2nd application for review dated 6th August 2014, he produced the OB abstract which as I stated is dated 12th November 2013. It is apparent that the respondent had reported the confiscation of his motor vehicle to the police and the report was entered in the OB prior to filing of the 1st application. Therefore, the OB abstract was evidence that was well within his knowledge and it cannot be termed as new evidence.

However, Order 45 Rule 1 is very clear that a party shall seek review of a decree or order for various reasons including, upon discovery of new and important matter or evidence which after 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 on account of some mistake or error apparent on the face of record or for any other sufficient reason.

9. According to the lower court record, it is evident that the respondent upon filing the application dated 15th November 2013 where he sought injunction orders, the applicant responded vide a replying affidavit dated 15th March 2014 and the respondent in response erroneously filed a ‘supporting’ affidavit dated 21st March 2014 instead of a supplementary affidavit. In that ‘supporting’ affidavit he attached the OB abstract. The court’s ruling then followed on 9th July 2014. It is therefore apparent that the OB abstract was in the court record as at the time of the delivery of the ruling. There was an oversight on the part of the Hon. Magistrate, in failing to consider that the OB abstract had been annexed to the affidavit, on the basis of its absence, she proceeded to dismiss the injunction application. She thereafter reviewed her ruling and allowed the application rightly so.

10. The applicant in this case has built his arguments on discovering of new evidence that was not within the respondents knowledge but I find that the review was properly done but solely on the principle that some mistake or error apparent on the face of record was committed by the court. I therefore find that the trial court and rightly so, was justified in reviewing its orders.

11. In the end, I hereby dismiss the application. The respondents to have the costs of the application.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent