



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC SUIT NO. 2247 of 2007**

MOHAN GALOT .....PLAINTIFF

-VERSUS-

GANESHLAL PUSHARAM GALOT .....1<sup>ST</sup> DEFENDANT

PAVIN GALOT .....2<sup>ND</sup> DEFENDANT

RAJESH GALOT.....3<sup>RD</sup> DEFENDANT

**CONSOLIDATED WITH CIVIL SUIT NO. 49 OF 2009**

MOHAN GALOT.....PLAINTIFF

-VERSUS-

PRAVIN GALOT.....1<sup>ST</sup> DEFENDANT

RAJESH GALOT.....2<sup>ND</sup> DEFENDANT

GANESH GALOT .....3<sup>RD</sup> DEFENDANT

KEVIN GALOT.....4<sup>TH</sup> DEFENDANT

PRADEEP GALOT .....5<sup>TH</sup> DEFENDANT

NARENDRA GALOT.....6<sup>TH</sup> DEFENDANT

**RULING**

The plaintiff's Notice of Motion application dated 24<sup>th</sup> January 2014 expressed to be brought under section 1A, 1B and 80 of the Civil Procedure Act, Cap 21 of the Laws of Kenya and Order 45 Rule 1 of the Civil Procedure Rules, 2010 is the subject of this ruling. By the application the plaintiff seeks orders that item number 1 of the Order made by this court on 12<sup>th</sup> February, 2013 be reviewed and set aside. The order sought to be reviewed and set aside was in the terms **“that the hearing of the present suit be and is hereby stayed to await the decision in HCCC NO. 55 of 2012”**. The application is premised on the grounds that:-

(i) The plaintiff has discovered new and important matter or evidence which was not within his knowledge or could not be produced by him at the time when the order of 12<sup>th</sup> February 2013 was made.

(ii) The order of 12<sup>th</sup> February, 2013 was made on the mistaken and erroneous representations by the Defendants apparent on the face of the record.

(iii) There are other sufficient reasons to warrant the review and setting aside of the order of 12<sup>th</sup> February, 2013.

The application is further supported on the grounds set out in the supporting affidavit of Mohan Galot sworn on 24<sup>th</sup> January, 2014. The applicant's contention is that **HCCC NO. 55 of 2012** pursuant to the consent Order of 24<sup>th</sup> February, 2012 and further directions issued by the three Judge bench on 23<sup>rd</sup> July 2012 was to deal only with the limited issue concerning the determination of who the shareholders and directors of Machester Outfitters Limited were and was not to deal with the rest of the cases between the parties and those included in the inventory submitted by the parties. The applicant avers that the record of proceedings and/or the pleadings in **HCCC NO. 55 of 2012** were not availed to the court at the time the court made the order staying the instant suit to await the determination by the three Judge bench of **HCCC NO. 55 of 2012**. The copies of the proceedings and the pleadings have now been annexed and the applicant contends that this is new and important matter of evidence which was not within his knowledge or could not be produced by him at the time the court made the order of 12<sup>th</sup> February 2013. The plaintiff avers that the file in respect of **HCCC NO. 55 of 2012** was not availed to the court when considering the issues that led to the making of the order of 12<sup>th</sup> February 2013 and neither were the typed record of the proceedings in **HCCC NO. 55 of 2012** which took long to type and to be available.

It is the plaintiff's assertion that had the file in respect of **HCCC NO. 55 of 2012** been availed to the court or the record of proceedings therein on 23<sup>rd</sup> July, 2012 the court would have been able to note that the three Judges mandate in **HCCC NO. 55 of 2012** was limited to the determination of only the issue as to who were the directors and shareholders of Machester Outfitters Limited and did not include issues in other suits between the parties as in the present case.

The plaintiff further states that the instant application for review has been made without unreasonable delay as any delay is attributable to the time taken in obtaining the certified copy of the proceedings in **HCCC NO. 55 of 2012** by the plaintiff's present counsel who were only appointed to act for the plaintiff on 30<sup>th</sup> September 2013. Further the plaintiff argues there is sufficient cause to warrant the review and setting aside of the order of 12<sup>th</sup> February 2013 and cites the failure by the Defendants to comply with the pre-trial requirements as directed by the court vide its order of 12<sup>th</sup> February 2013.

**Mr. Pravin Galot** the 2<sup>nd</sup> Defendant filed a replying affidavit in opposition to the plaintiff's application sworn on 20<sup>th</sup> February 2014 in which he takes the position that the plaintiff's application is defective, frivolous and devoid of any merit and is made in abuse of the process of the court. The 2<sup>nd</sup> Defendant avers that the plaintiff/ Applicant has deliberately concealed and distorted facts with a view to mislead the court. The 2<sup>nd</sup> Defendant states that the consent recorded on 24<sup>th</sup> February 2012 in HCCC No.55 of 2012 in the presence of all the parties including the plaintiff was in the following terms:-

(i) That an inventory detailing all matters related to this suit be done within fourteen (14) days from date hereof.

(ii) That the issue of directorship and shareholding of Machester Outfitters Limited be heard before a three Judge bench to be appointed by the Chief Justice and the determination thereof to be applied in all the other cases.

(iii) That the matter be mentioned for compliance and giving further directions on the 23<sup>rd</sup> of March, 2012.

The 2<sup>nd</sup> Defendant states the plaintiff was represented on all occasions when either **HCCC NO. 55 of 2012** or the instant suit came for hearing, mention or directions. The 2<sup>nd</sup> Defendant avers that the plaintiff has distorted the true intent and purport of what transpired in court on 23<sup>rd</sup> July 2012 regarding **HCCC NO. 55 of 2012** in an effort to mislead the court that the 3 Judge bench was to only determine the directorship and shareholding of Machester Outfitters Limited which had nothing to do with the other issues and/or pending cases between the parties. In order to appreciate what transpired in court on 23<sup>rd</sup> July 2012 it is necessary to revert to the record of the court that day. On the date the plaintiff is shown to have been represented in court by a battery of lawyers, **Mr. Havi, Mr. Arwa, Mr. Osundwa, Mr. Kibe and MS Ngania. Mr. Kaka** Advocate represented the Defendants. After hearing the respective counsel the court recorded the following directions:-

**“We have heard preliminary arguments by various advocates as to what issues ought to be determined by this bench. Having taken into consideration all their representatives, we are of the considered view that we will deal with the issue of directorship and shareholding of Machester Outfitters only. Any other related issue will have to await our determination of the said issue. Regarding the issue of representation, we shall deal with the same in the course of the hearing because it is intertwined with the issue of shareholding and directorship”.**

The 2<sup>nd</sup> Defendant contend that the direction/order of the three Judge bench made on 23<sup>rd</sup> July 2012 cannot constitute new and important matter since the order was made in the presence of the plaintiff's advocates and was therefore all the time within the knowledge of the plaintiff.

The plaintiff filed a supplementary affidavit sworn on 11<sup>th</sup> April 2014 to which the 2<sup>nd</sup> Defendant filed a replying affidavit sworn on 9<sup>th</sup> May 2014 which largely sought to put into perspective the goings on in regard to the hearing and determination of **HCCC NO. 55 of 2012** which in my view cannot have a bearing on the determination of the application for review before me.

The parties filed written submissions to canvass the application. The plaintiffs submissions dated 15<sup>th</sup> April 2014 were filed in court on 15<sup>th</sup> April 2014 while the Defendants submissions dated 8<sup>th</sup> May 2014 were filed in court on 9<sup>th</sup> May 2014. Having perused the application and the affidavits in support and in opposition thereof and the parties submissions the issue for the court to determine is whether the applicant has satisfied the conditions under which review may be granted under Order 45 Rule 1 of the Civil Procedure Rules 2010 which provides as follows:-

**45.1(1) 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

An applicant therefore in an application for review has to establish either:-

- (a) There has been a discovery of new and important matter or evidence; or
- (b) There is an error apparent on the face of the record; or

(c) There is other sufficient reason to warrant a review; and

(d) The application has been brought without unreasonable delay.

The applicant in the present matter has submitted under all the ends but I discern his application turns on whether there was a discovery of new and important matter or evidence which was not availed and/or could not be produced at the time the order of directions were given. Secondly, whether there is sufficient reason to warrant the review of the directions.

The foundation of the plaintiff's submission that there has been a discovery of new and important matter or evidence is that the court at the time of making the order of directions did not have the benefit of the court file in HCCC NO. 55 of 2012 and specifically the order made by the three Judge bench on 23<sup>rd</sup> July 2012 and hence did not have the full appreciation of the proceedings in that matter. This court before issuing the directions that have given rise to the instant application invited the parties to file submissions in support of the directions they sought from the court as they could not mutually agree on the directions. The plaintiff filed his affidavit sworn on 30<sup>th</sup> November, 2012 wherein he sought for a priority hearing of the instant suit. The 2<sup>nd</sup> defendant, Pravin Galot filed an affidavit on behalf of himself and the other defendants sworn also on 30<sup>th</sup> November 2012 and principally he sought the stay of this suit to await the determination of HCCC NO. 55 of 2012 in line with the directions given by that court on 24<sup>th</sup> February 2012. The 2<sup>nd</sup> Defendant annexed a copy of the directions given by consent by the court and signed by all the parties on that date including the Plaintiff. The 2<sup>nd</sup> Defendant also annexed copies of the inventory of cases submitted by the parties as being related to and likely to be affected by the determination of HCCC NO. 55 of 2012.

The parties counsel made oral submissions before me on 19/12/2012 when the plaintiff was represented by Mr. Kibe Advocate and the Defendants by Mr. Sagana advocate and Mr. Kaka Advocate. I have reviewed the record of proceedings before me on 19/12/2012 and my ruling on directions and I am satisfied there is no way that HCCC NO. 55 of 2012 can be divorced from the proceedings in the instant suit. In my ruling I appreciated that the various suits are intrinsically intertwined and that the determination of HCCC No. 55 of 2012 would perhaps serve to unlock some of the issues.

In part of the ruling I observed thus:-

**“The inventories submitted to the court in HCCC 55 OF 2012 of the cases that were likely to be affected by the decision in the 3 bench matter included the instant case and it is unclear why the plaintiff would want the case fast tracked when the defendants have indicated it as one of the cases that would be affected by the decision in the 3 bench case. The plaintiff did not protest the inclusion of the instant suit in the inventory of the Defendants. The court has reviewed the affidavits sworn by Mohan Galot the plaintiff herein and by Pravin Galot the first defendant herein and has considered the submissions made by the counsels of the respective parties and agrees there are various cases that are intrinsically interwoven by reason of the parties being common and further by reason of the parties being close family relatives who have had a long history of working together in family businesses either as co-owners or employees. In the present suit the plaintiff claims he is the sole owner of the suit property whereas the defendants counter that the plaintiff holds the property on trust for himself and the defendants. As I understand it, the defendants are contending that the property was purchased using proceeds from family businesses of which the defendants had an interest. This is how Manchester Outfitters as a business and subsequently as an incorporated company gets dragged into the mix”.**

I have seen the order/direction of the three Judge bench of 23<sup>rd</sup> July 2012 and I do not think it in any material manner varied the consent order of the parties of 24<sup>th</sup> February 2012 as all it stated was that the issue of directorship and shareholding would be determined by the three Judge bench as a preliminary issue and all any other issues were to await the determination of that said issue. While I am not persuaded the court order/ direction of 23<sup>rd</sup> July 2012 would qualify as a new and important matter or

evidence under Order 45 Rule 1 of the Civil Procedure rules my position is that even if the same had been available to me at the time I made the directions, it would not have altered and/or affected the directions/orders that I issued on 12<sup>th</sup> February 2013 on the basis of the information and material that was before me.

The order/directions of 23<sup>rd</sup> July 2012 in my view could not qualify as new and important matter or evidence since the same was all the time available and within the knowledge of the plaintiff's counsel and the Defendants counsel. Indeed the plaintiff's counsel on 19<sup>th</sup> December 2012 submitted before me that the three Judge mandate was limited to determining the directorship and shareholding of Manchester Outfitters Limited and it was my view that the decision of that issue could have wide and far reaching implications which could affect the other related cases including the instant case. The impact of that decision would not be known until a decision has been rendered by the 3 Judge bench.

I have reviewed and considered the consent order on directions recorded by the parties in **HCCC NO. 55 of 2012** on 24<sup>th</sup> February 2012 and I find no apparent error on the face of the record in the manner the Defendants made representations before me. It is a fact there was a consent entered by the parties and the effect of that consent was that the issue of directorship and shareholding of Manchester Outfitters Limited was to be heard by a three Judge bench and the determination thereof to be applied in all other cases. Of necessity in my view that meant that the issue of directorship and shareholding was to be tried first and whatever decision was made was to apply to the extent applicable to the other related cases. Thus to the extent the instant case was one of the related cases as per the inventory supplied, then it followed a stay of the suit was necessary to enable the preliminary issue to be determined.

On the issue whether there is sufficient reason to warrant a review the plaintiff submits that the Defendants failed to comply with the direction requiring them to complete compliance with Order 11 of the Civil Procedure Rules. At the time the parties submitted before me on 19<sup>th</sup> December 2012 it was disclosed that the three Judge bench had scheduled the hearing of **HCCC NO. 55 of 2012** on 29<sup>th</sup>, 30<sup>th</sup> and 31<sup>st</sup> January 2013 and thus the direction relating to compliance with Order 11 Civil Procedure Rules was made in anticipation that the three Judge bench would by the time the directions were given have concluded hearing their matter and that is evident in the manner the direction was couched as follows:-

**“in the meantime however, and in order to facilitate the hearing of the suit after a decision is rendered in HCCC NO. 55 of 2012 the Defendants are hereby directed to complete their compliance with Order 11 of the Civil Procedure Rules within the next 30 days of the date hereof”.**

On the evidence of the parties it is evident that the three Judge bench is as yet to render a decision on the issue pending before them. Without a decision in **HCCC NO. 55 of 2012** the Defendants may be unable to make full compliance with Order 11 of the Civil Procedure Rules since the decision awaited may have a bearing in the present case. Thus any compliance the defendants may make can only be partial as full compliance will only be possible after a decision is rendered in **HCCC NO. 55 of 2012**. The order/direction for stay of the suit has no direct correlation with the direction for compliance with Order 11 of the Civil Procedure rules and the non compliance thereof cannot have any effect on the order for stay which was tagged to the determination of **HCCC NO. 55 of 2012** and thus cannot be sufficient reason to review, vary or set aside the order staying this suit.

Accordingly and for the reasons set out above in this ruling I find no merit in the application by the plaintiff and the same is ordered dismissed with costs to the Defendants.

Ruling dated, signed and delivered this 23<sup>RD</sup> day of JULY, 2015.

**J. M. MUTUNGI**

**JUDGE**

**In presence of:**

..... for the Plaintiff

..... For the Defendants