



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 455 OF 2010

CANUK HOLDINGS LTD.....PLAINTIFF

V E R S U S

PRAMOD PATERL

(t/a PRAMOD PATEL ADVOCATES).....DEFENDANT

R U L I N G

1. By a **considered ruling dated 16th and delivered on 17th October 2012** I dismissed with costs the Defendant's application by notice of motion dated 7th February 2011 for dismissal of the Plaintiff's suit with costs brought under Order 2, rule 15(1) of the **Civil Procedure Rules** (the **Rules**).

2. The Defendant has now filed a second application by **notice of motion dated 12th November 2012** seeking the main order for review and setting aside of my ruling of 17th October 2012, and for the notice of motion dated 7th February 2011 to be heard *de novo*. 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.

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

(i) That I failed to consider any of the legal authorities cited by the Defendant and thus "caused an error apparent on the face of the record".

(ii) That I "failed to consider at all the fact that the Plaintiff paid a sum of KShs 35,646,000/00 in addition to the agreed price of KShs 27, 764,000/00, thus avoiding stamp duty, which is an offence under the Stamp Duty Act, which is sufficient to nullify and make void the transaction because of the illegality. This is an error apparent on the face of the record".

(iii) That I "failed to see the machinations of the Plaintiff in paying the said sum of KShs 35,646,000/00 direct to Lutta & Company, Advocates...", another error apparent on the face of the record.

(iv) That I "did not consider (what was obvious and clear on the record) the illegalities perpetuated by the Plaintiff and hence allowed the said illegalities to inure to the benefit of the Plaintiff".

(v) That I failed to consider that the Plaintiff has sued other persons in Nairobi HCCC No. 822 of 2010 “for the same amount as claimed in this suit”.

(vi) That I “failed to take into consideration the undisputed fact that the Plaintiff had insisted on completing the transaction despite the company file (of Brentwood Traders Limited) not being available at the Companies Registry, a fact which the Plaintiff was fully aware of”.

(vii) That I delayed writing and delivery of the ruling, and further, that I had many undelivered decisions to write and deliver on account of appearing for vetting before the Judges and Magistrates Vetting Board, and that therefore I did not have sufficient time to fully consider the arguments made on the application.

(viii) That “there (are) too many lacunae in the ruling thus causing a miscarriage of justice *ex facie* the record”.

(ix) That by the said ruling I have “given license to the Plaintiff to pursue a clearly illegal and unlawful claim”.

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

5. The Plaintiff has opposed the application by **replying affidavit filed on 18th February 2013**. It is sworn by one ZOHER PIRBHAI, a director of the Plaintiff. Grounds of opposition emerging therefrom include –

(i) That in the impugned ruling I duly exercised my judicial discretion in refusing the Defendant’s application upon its merits or lack thereof.

(ii) That the ruling “is in fact comprehensive and exhaustively addresses the issues raised and takes into account arguments from both parties...”.

(iii) That at paragraph 17 of the ruling I gave the reason for the delay in preparation and delivery of the ruling.

(iv) That the Defendant in his present application has not met the legal requirements for an order for review.

(v) That the application is a gross abuse of the process of the court.

6. The application was canvassed by way of written submissions. Those of the Defendant were filed on 21st January 2014. The Plaintiff’s submissions were filed on 12th February 2014. The Defendant then filed a response to the Plaintiff’s submissions on 27th February 2014.

7. I have considered those submissions, including the cases cited. What the Defendant is saying in the present application, in plain English, is that for the reason he has speculated upon (vetting), I did a very bad job of the application for striking out, and that I should now sit down calmly and seriously, to re-consider the application and write a good and proper ruling deserving of the “weighty” submissions made by the Defendants’ learned counsel!

8. The Defendant has further argued in this application that I not only failed to consider the many authorities cited, but I failed also to appreciate various issues of fact that were allegedly not in contention or that were duly established by the pleadings and the affidavits before the court.

9. Failure to consider or appreciate the effect of legal authorities is not an error apparent on the face of the record. It is an error of law. Failure to appreciate or hold as proved certain issues of fact is not an error apparent on the face of the record. It is an error of law.

10. The tone and purport of the present application is preposterous. No judge has jurisdiction to embark upon a reconsideration of a matter he has already dealt with in a considered ruling upon the ground, allegedly, that he did not do a good job of it the first time round! It is the function of the *Court of Appeal* in a proper appeal before it, to look at the ruling in issue here, and if satisfied that I indeed did a bad job of the application before me in fact and law, it would remit the application back to the *High Court* for re-hearing by a **different** judge. I cannot sit in appeal over my own decisions!

11. The Defendant has not come anywhere near establishing any of the grounds under Order 45, rule 1 of the Rules upon which I can lawfully exercise my power of review over my ruling of 17th October 2012. The application is not only misconceived, but also brought in bad faith with the intention to embarrass the court. I will neither sit on appeal over my own decision nor embark upon a justification of my ruling aforesaid.

12. The notice of motion dated 12th November 2012 is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF APRIL 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 4TH DAY OF APRIL 2014