



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 91 OF 2011

KAKAMEGA PAPER CONVERTORS LIMITED PLAINTIFF

VERSUS

MOHANLAL ARORA 1ST DEFENDANT

SUSHILA MOHANLAL ARORA 2ND DEFENDANT

PASPULATI JAYASURYA SUNIL RAJ 3RD DEFENDANT

EAST AFRICA PAPER CONVERTORS LTD. 4TH DEFENDANT

BANK OF BARODA 5TH DEFENDANT

R U L I N G

1. For the determination of the Court is the Amended Notice of Motion filed by the 1st and 2nd Defendants. The application, filed on 28th October, 2013, is brought pursuant to the provisions of **Sections 3A, 63(e) and 80** of the *Civil Procedure Act*, as well as **Order 45 Rule 1(1), Order 8 and Order 51 Rule 1** of the *Civil Procedure Rules, 2010*. The applicants seek the following prayers *inter alia*:

“1. THAT the Court be pleased to certify this application as urgent and to grant the earliest available hearing date for the application;

2. THAT this Honourable Court be pleased to review its order made on 16th February, 2012 on grounds of error apparent on the face of the record and for sufficient reason;

3. THAT the Court be pleased to vary and/or set aside its order Number 1 of its ruling dated 16th February, 2012;

4. THAT in the result the 1st and 2nd Defendants’ passports be released to the said Defendants *ex debito justitiae*;

5. THAT the costs of this application be in the cause”.

2. The application is predicated upon the grounds set out which essentially are that there was no application for the passports to be deposited as security, that the grounds upon which the Orders issued by Mutava, J have since fundamentally changed and/or lapsed and that it would only be just and fair that the Applicant's passports be released in the circumstances.
3. The application is further supported by the Affidavits of **Mohanlal Arora** and **Sushila Mohanlal Arora** both sworn on 25th October, 2013, and both alluding to similar facts. It is deponed to therein that the withholding of the passports was agreed to by consent and was pending the hearing and determination of the **Criminal Case No. 431 of 2011**, in which judgment was delivered by Chemitei, J on 31st October, 2012. It is averred that there is prejudice and inconvenience that has been occasioned against them, given that their passports continue being held in the Court's custody. It would only be fair and just if the same were released to enable the free movement of the Applicants. It is further adduced that the apprehension by the Plaintiff that the 1st and 2nd Defendants may abscond the jurisdiction of the Court is unfounded and absurd and in any event, the suit premises is well within the control of the Plaintiff.
4. The application is opposed. In the Grounds of Opposition dated 2nd December, 2013 the Respondent contends that the application is frivolous, vexatious, unmeritorious and an abuse of the process of the Court. Further, it is contended that there has been an inordinate and unexplained delay in the making of the instant application, with some of the issues raised being *res judicata*. In the Replying Affidavit of **Mitesh Fulchand Shah** sworn on 6th December, 2013, he deponed to the fact that the delay in setting down the suit for hearing is predicated and actuated by the Defendants who have failed to expedite the suit and the deponent reiterated several incidents to that effect, including the applications filed and withdrawn by the Applicants, being the intended Notice of Appeal dated 9th October, 2012 and the Applications for Recusals dated 19th October, 2011 (Apondi, J) and 28th March, 2012 (Mutava, J). Further, the Respondent contends that there is no nexus between the determination of the criminal case and the order for the deposit of the passports.
5. **Section 80** of the *Civil Procedure Act* as read with **Order 45 Rule 1** of the *Civil Procedure Rules* provides both the substantive and procedural law in an application for review. Under **Section 80**, it is provided that:

“Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Pursuant to **Order 45 Rule 1**, it is provided that:

“(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”.

(Underlining mine).

The application is predicated upon the grounds that there was an error apparent on the face of the record and for sufficient reason. The error apparent contended by the Applicants, upon a careful perusal of the application and the affidavits on record, is that there was no application for the depositing of the Applicants' passports as security and that, upon the hearing of the application dated 8th April, 2011, the application dated 15th November, 2011 was spent. The Applicants further went on to submit that the Court did not have jurisdiction to grant relief on matters which have not been specifically pleaded. This is with regards to the issue of the continued deposit of passports as ordered by Mutava, J in his decision given on 16th February, 2012. In that regard, the Applicants relied on the cases of **Charles C. Sande v Kenya Co-operative Creameries Civil Appeal No. 154 of 1992** and **Richard Satia & Partner v Samson Sichangi [1997] eKLR**. They submitted that there was an error apparent by the Court in issuing Orders for the continued deposit of the Applicants' passports where there was no application before Court for the same. For this contention, they relied on **Nairobi City Council v Thabiti Finance Ltd Civil Appeal No. 264 of 1996**. The allegation by the Applicants was that the Orders issued by Mutava, J. extending the orders issued by Apondi, J., were to subsist only pending the hearing and determination of the application dated 8th April, 2011.

6. The hearing of the application dated 8th April, 2011 did not come before Court (Mutava J.) – until 16th February, 2012. Before the hearing and determination thereof, Apondi, J. made interlocutory orders on 12th April, 2011 which issued in part;

“2. That the 1st and 2nd Respondents be and are hereby ordered to deposit their passports in Court by 14th April, 2011 pending the hearing and determination of the application dated 8th April, 2011.”

The Orders were issued based on the consent Orders entered into by the parties. Pending the hearing and determination of the said application dated 8th April, 2011, the Applicants filed another application on 15th November, 2011 seeking the release of their passports, which application was heard and determined by Mutava, J by his Ruling of 16th February, 2012. The subsequent dismissal of that application and the extension of the Orders issued by consent of the parties plus the interlocutory Ruling of Apondi, J. on 12th April, 2011 are all the subject of this application for review.

7. In the determination of Mutava, J as regards the issue of depositing of the Applicants' passports in the custody of the Court, the learned judge determined *inter alia*:

“This case therefore is replete with grounds meriting the apprehension that the Plaintiff has that the 1st and 2nd Defendants may abscond unless they furnish security to the Court for their appearance during the proceedings filed against them by the Defendant. Such apprehensions are well grounded as above and are not mere apprehensions.”

In arriving at his determination, the learned Judge highlighted five (5) issues, which included that the 3rd Defendant had already absconded from the jurisdiction of the Court and that the claim against the Defendants was colossal in itself an impetus for the 1st and 2nd Defendants to abscond from the jurisdiction of the Court. The Judge further reiterated that the freedom of movement was limited by law, and only in exceptional, reasonable and justifiable circumstances. He then went ahead to determine in the purview of *Articles 24(1) and 25 of the Constitution*. To this Court, such were the cogent reasons that the Judge adopted in his Ruling. In my view, no error on the face of the record can be deduced from the Ruling to warrant a review of the same. As detailed in the case of **Francis Origo & Another v Jacob Kumali Munagala [2005] eKLR**, the Court of Appeal held *inter alia*:

“...Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. (emphasis added). Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction.”

8. As a result, the contentions by the Applicants are in this, unfounded and unjustifiable. The freedom of movement, as enunciated in the determination of Mutava, J, is a right that may be limited in certain circumstances which he found to be just and fair in the averting of perpetration of the law. In the Supreme Court of India case of **P. N. Eswara Iyer v The Registrar 1980 AIR 808; 1980 SCR (2) 889**, with regard to an application for review, the Court held that:

“A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and over-ruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use. We regret to say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as a passport. Nothing which we did not hear then has been heard now except a couple of rulings on points earlier put forward. Maybe, as counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality.”

9. In this Court's opinion, the Applicants have not raised any sufficient reasons as regards to the fact that there was an apparent error on the face of the record to warrant the Court to order the relief sought. The Court adopts upon **Order 39 Rules 1 and 2(1)** of the *Civil Procedure Rules*. At Rule 2(1), wherein it is provided:

“Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1”.

10. As regards the ambit of “sufficient reason”, the Court finds that the Applicants have not met the threshold provided under **Order 45 Rule 1** of the *Civil Procedure Rules*. Mutava, J. determined that there was a real danger that the Applicants would abscond the jurisdiction of the Court, and thus ordered them to continue furnishing security in the form of the deposit of their passports that were already in the custody of the Court. On the basis of “sufficient reasons”, the Applicants appeal to the inherent jurisdiction of the Court, denoted under the provisions of **Section 3A** of the *Civil Procedure Act*. However, *Articles 24(1), 25, 39, 40 and 48* of the Constitution, the supreme law having already been canvassed in the determination of Mutava, J., this Court finds no justification in enunciating the same. As to whether the attachment of the Order or Decree suffices, it is appropriate at this juncture to refer to the case of **Jan Bonde Nielsen v Herman Philipus Steyn & Others Civil Case No. 332 of 2010; (2014) eKLR** in which my learned brother Mabeya, J determined *inter alia*:

“In my view the operative words in those provisions are may apply for a review of judgment to the court which passed the decree or made the order. What is to be reviewed is not the decree or order but the judgment. In this regard, judgment will extend to include a ruling. I say so because, whilst Section 2 of the Civil Procedure Act has defined both the terms “decree” and “judgment”, it has not done so for the terms “order” and “ruling”. I have also looked at the provisions of Order 21 of the Civil Procedure Rules, the same also provides for “Judgment” and “decree” but has not done so for the terms “ruling” or “order”. The

conclusion I come to is that in using the term Judgment in Section 80 and Order 45 of the Rules, the same was meant to connote both a decision that finally determines the rights of the parties in a given proceeding.”

11. The upshot and conclusion, is that this Court finds that the amended application by the Applicants filed on 28th October 2013 is without merit and is hereby dismissed with costs to the Respondent.

DATED and delivered at Nairobi this 26th day of June, 2014.

J. B. HAVELOCK

JUDGE