



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 501 OF 2008

METRA INVESTMENTS LTD.....PLAINTIFF

VERSUS

EQUITY BANK LTD. 1ST DEFENDANT

PETER KAMURU KIBERA 2ND DEFENDANT

JOHN MUTHEE NDEGWA 3RD DEFENDANT

STEPHEN NYAMU MBIJIWE T/A LIFELINE TRADERS4TH DEFENDANT

RULING

1. The 3rd Defendant's application dated 21 June 2012 is for review of the orders of Khaminwa, J made on 16th February, 2011. The application is brought under the ambit of **Order 45 Rules 1 & 2** of the *Civil Procedure Rules* and **Sections 1A, 1B, 3A and 80** of the *Civil Procedure Act*. The application is premised on the grounds that there is an error apparent on the face of the record and that the applicant is and continues to be greatly prejudiced by the said error. The application is supported by the Affidavit of Esther Muigai, the advocate of the 3rd Defendant. It is contended that the Order issued on 7th June, 2012 had an error on the face of the record in that it refers to the Plaintiff as the Applicant, while in actuality the Applicant was the 3rd Defendant. As a result, the Order as drawn, is not enforceable and the 3rd Defendant has suffered great prejudice and stands to suffer irreparable loss should the Order not be reviewed.

2. In its submissions dated 25th July, 2012, the 3rd Defendant submitted that the errors apparent on the face of the record were:

- (1) with reference to the names in which the joint interest earning account was to operate and
- (2) the dates from which the deposits or amount collected should be made.

It was also submitted that the Order refers to the suit property as No. 209/12918/2 (there are two properties erected on the same) whilst the suit property/subject matter is actually **Maisonette A on L.R No. 209/12918/2**. The 3rd Defendant, as the registered owner of the said maisonette, made an application

dated 18th May, 2009 for rents to be deposited in a joint interest earning account from 1st May, 2008 pending the determination of this suit. In that application, the 3rd Defendant relied on the case of **Njeri Onyango v Patrick Musimba (2005) eKLR** in which the Court of Appeal held that an error must be self evident and should not require elaborate argument to be established and **Kaihuria Properties Ltd v National Bank of Kenya & Another (2006) eKLR** in which the court declined to strike out an affidavit due to procedural irregularities which did not affect the jurisdiction of the court and which did not occasion prejudice to the other side.

3. In opposing the application, the Plaintiff filed a Replying Affidavit sworn by **Mrs. Rehab Karei Mukiama**, the Director of the Plaintiff, dated 4th July, 2012. It was contended that the Affidavit should be struck off as it was sworn by the Advocate of the 3rd Defendant. The Plaintiff enjoys an injunction dated 24th September, 2009 as against the Defendants but the error or mistake apparent on the face of the record covers both the Plaintiff and 3rd Defendant and is said to have restraining and mandatory injunctions respectively over the same subject matter. The Plaintiff submitted that it was against public policy to have two contradictory findings in the same case.

4. Further, in its submissions dated 2nd October, 2012, the Plaintiff submitted that none of the Defendants filed an appeal against the decision of Khaminwa, J delivered on 24th September, 2010. It claimed that the application by the 3rd Defendant was a mechanism designed to defeat the Lady Justice's Order by taking away the rights of the Plaintiff to enjoy the rent by having it in a joint account. It was further submitted that if there was any review then it should be by way of striking out the 3rd Defendant's application for being *res judicata* as the issue as to collection of rent had already been determined in the previous application.

5. An application for review of the Order 45 rule 1 is entirely in the discretion of the court. The applicant aggrieved by a decree or order from which an appeal is allowed must show *inter alia* that (1) that there is discovery of new and important matter or evidence which, after due diligence, could not be produced at the time the order was made or (2) on account of some mistake or error apparent on the face of the record, or (3) for any other sufficient reason, he desires to obtain a review of the order made. Under the third ground as above, it is any reason which in the circumstances of the case, the court will consider to be sufficient enough to revisit and review its order. In the present case, the 3rd Defendant has relied on the second ground as above, that there is an error apparent on the face of the record. The 3rd Defendant has contended the order issued was unenforceable and as such a review of the same has to be made to enable it to be enforced. The review is to be in terms of the names of the operators of the joint account, being those of the Advocates of the Plaintiff and 3rd Defendant. The Order issued on 7th June, 2012 reads:

“THAT the money paid by way of rent for the premises L.R No. 209/12918/2 be paid in an interest earning account in the names of the Plaintiff Advocates the Plaintiff of the Applicant pending the hearing and determination of the suit.”

To my mind this is quite obviously an error apparent on the face of the record. The orders should have been made for the rent collected from the tenants occupying Maisonette A on L. R. No. 209/12918/2 Kileleshwa since 1 June 2008 to be paid to the joint interest earning account in the name of the Plaintiff's advocates and the 3rd Defendant's Advocates, and not the '**...the Plaintiff of the Applicant...**' as erroneously stated in the order and which words don't make sense anyway.

6. The 3rd Defendant has further contended that the money be paid into the joint interest earning account was to be from 1st May, 2008. The orders by Khaminwa, J on 16th February, 2011 do not specify the dates from which the rent was to be deposited in the account. However, in the first paragraph of her Ruling, the learned Lady Justice did detail that the third Defendant was seeking a mandatory injunction to be issued against the Plaintiff compelling it to deposit all the rent collected from the tenants occupying maisonette A on L. R. No. 29/12918/2 Kileleshwa since first June 2008 to date. Certainly that was the date detailed in prayer number 3 in the third Defendant's Application by way of Chamber Summons dated 18 May 2009. Unfortunately for the third Defendant, the 4th prayer in the said Application referred

to the depositing of:

“subsequent monthly rents collected in respect to Maisonette A..... in the said Advocates’ joint interest earning account pending the hearing and determination of this suit.”

There was no mention of a date in that prayer. Thus, for this court to make a determination that the rent to be deposited was to be from 1st June, 2008 would be rendering a decision that it considers would have been anticipated by the learned judge. In my opinion, I cannot make a decision on the issue of the date as no error in that regard has been shown to be on the record. For the court to make such a decision would be tantamount to my sitting on appeal in relation to the Lady Justice’s said Ruling. It seems to me, therefore, that the third Defendant is going to have to be satisfied that the order with regard to the deposit of the rents collected must necessarily commence from the date of the Judge’s Ruling being 16 February 2011.

8. The Plaintiff has contended that the third Defendant’s application is *res judicata* in that it was determined previously. The issue of *res judicata* is one of law and the recourse available to the Plaintiff would lie in appeal. The Plaintiff has not filed an appeal challenging the said Ruling of Khaminwa, J dated 16th February, 2011. In this regard, my learned brother Mabeya J., in rendering a decision in which the applicant sought to review the decision on a taxation issue in **H.C.C.C (Milimani) No. 531 of 2006 Murican Transport Ltd v Hunkar Trading Co. Ltd** made reference to the ruling in **National Bank of Kenya Ltd v Ndungu Njau** (supra) wherein the court stated:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require any elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.” (Emphasis added)

The Plaintiff has not made any application for review. In its submissions, it submitted at paragraph 3 that:

“...One of the glaring errors on the face of the record is that the court entertained the 3rd Defendant’s application over rent despite having previously ruled that the same should be collected by the Plaintiff as aforesaid and if any review is to be done, it should have the effect of striking out the 3rd Defendant’s application dated 20th May, 2009 as being *res judicata*...”

The basis for the review, according to the Plaintiff’s submissions, would be on the point of law, in that the matter had been previously determined. From the foregoing, it is clear that no review can be made on the grounds of an error or misconstruction of the law. The only review that can be made will therefore, be in relation to the error apparent on the face of the record. That error lies in the advocates’ names in the joint interest earning account i.e. the Plaintiff’s and 3rd Defendant’s Advocates. On the issue as regards the date from which the rent was to be deposited into the account, it will be determined by the court, in exercise of its inherent jurisdiction to be determined from the date in which the order was issued, that date being 7th June, 2012.

9. The conclusion to all the above is that I grant prayer No. 1 of the third Defendant’s Notice of Motion dated 21 June 2012. As that Application prayed for the costs of the same to be in the cause, it is so ordered.

DATED and delivered at Nairobi this 12th day of February 2013.

J. B.HAVELOCK

JUDGE