REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 1361 OF 2000

VULCAN LIMITED …… PLAINTIFF

VERSUS

ATTORNEY GENERAL ……..……. DEFENDANT

R U L I N G

1. The matter before this Court is the Plaintiff's Notice of Motion dated 4 March 2008 seeking to set-aside the Ruling and Order made by **Justice Waweru** on 1 December 2006. The Application further seeks that the Plaintiff be allowed to amend its Plaint and, in turn, that the Defendant be allowed to amend its Defence as necessary. The said Notice of Motion is brought under the provisions of the old **Order XLIV Rules 1 and 2** as well as **sections 80, 100 and 3A** of the *Civil Procedure Act*. The Grounds in support of the Application maintained that there is sufficient reason to warrant a review and an amendment to the Plaint will assist the Court to determine the real issues as between the parties. The amendment sought does not substitute or change the subject matter of the suit and will not cause injustice to the Defendant.
2. The Application is supported by the Affidavit of **Nicholas Sebastian Ogutu** sworn on the 4 March 2008. The deponent recorded that the Plaintiff Company had changed advocates and upon such change a Chamber Summons had been filed in this Court dated 3 May 2004 which sought orders that the Plaintiff be allowed to amend its Plaint. The said Application introduced a claim for compensatory damages for wrongful elimination of the Plaintiff's bid in relation to a tender for the Ministry of Health No. HQ/POP/III/IV/93-94. The amendment to the Plaint that was sought detailed a pleading of misrepresentation and fraud in respect of the said Tender but did not, in itself, (according to the advocates for the Plaintiff on record), substitute or change the subject matter of the suit. The deponent noted that the Application was heard and a ruling made on 1 December 2006 by **Justice Waweru** dismissing the said Application. Mr. Ogutu went on to say that he had been advised by the Plaintiff's advocates on record that there was sufficient reason to warrant a review because the Court had misdirected itself on material grounds.
3. The Application was unopposed but this Court was hesitant to deliver its Ruling straightaway as regards the said Notice of Motion dated 4 March 2008. For a start, it has taken over four years for the Application to come before this court without any sort of explanation of why the delay. Miss Ng'ang'a for the Plaintiff in her submissions before Court noted that the previous application to amend the Plaint was dismissed due to the fact that it introduced a new cause of action. Counsel believed that the Ruling was in error and that there was no new cause of action. The Plaintiff had sued for breach of contract and non-payment for goods supplied as regards a Tender availed to the Plaintiff as above. The Defendant had disqualified the Plaintiff from bidding for various items under the tender on allegations of poor performance. This representation caused the Plaintiff not to be considered for the Tender for items Nos. 24, 52, 53, 991 and 994 thereof. Counsel for the

Plaintiff referred this Court to the case of **Mbugua v Muchugi & Anor (2004) eKLR** in support of its Application.

4. The old **Order XLIV** is now embodied in the new **Order 45** for Review, *Civil Procedure Rules 2010*. **Order 45 Rule 1** reads as follows:

> **"1. (1) Any person considering himself aggrieved –**
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> 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.**
>
> **(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant. Or when, being respondent, he can present to the appellate court the case on which he applies for the review".**

As I understood counsel for the Plaintiff, she believed that the Ruling delivered by my learned brother **Waweru J.** on 1 December 2006 was in error. However, is that a reason for review? As above, the Applicant who seeks for an Order or Decree to be reviewed has to establish firstly, that there was discovery of new and important matter not before Court at the time its Ruling under review was delivered. Secondly, that there was some mistake or error apparent on the face of the record and thirdly, for any other sufficient reason. From what Plaintiff's counsel has told this Court, the Plaintiff is maintaining that **Waweru J's** said Ruling contained an error apparent on the face the record. To back up her submission, counsel for the Plaintiff produced before Court the **Mbugua** case as above. **Mutungi J.** quoted therein from the landmark case of **Central Bank of Kenya Ltd v Trust Bank Ltd & Ors Civil Appeal No. 202 of 1998** as follows:

> **"The guiding principle in applications for leave to amend is that all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party…."**

5. In the Supporting affidavit, Mr. Ogutu maintains that **Waweru J.** misdirected himself on what was before him. In my view, this does not create a basis from which an application for review may emanate. It sets grounds for appeal, as the issue raised in the Supporting Affidavit cannot be determined by review and set aside. In the case of **Francis Origo & Another v Jacob Kumali Munagala [2005] eKLR**, the Court of Appeal held;

> **"From the foregoing, it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason…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."**

First, I should note that the Application before this Court goes no further than to repeat the

application to amend the Plaint which was before the Court by way of Chamber Summons dated 3 May 2004. There is no fresh draft amended Plaint for this Court to consider now and consequently what was before the Court in 2004 still remains before this Court in 2013. I have perused the Ruling of my learned brother **Waweru J.** dated 1 December 2006 which resulted in the Order of the same date, which the Plaintiff would have this Court review. The Judge clearly found that the intended amendment by the Plaintiff sought to introduce a new cause of action which was time barred under the Public Authorities Limitation Act. This Court cannot sit on appeal of its own Ruling. The application, as put by the Plaintiff seeks for this Court to sit on appeal, a mandate that it clearly has no jurisdiction so to do. In my view, the Plaintiff has failed to establish any of the three heads under which an application for review is predicated. No evidence has been produced or shown before Court that there are any other **"sufficient reasons"** from which the Orders may be reviewed. In my view, even if the Application was merited, such would cause severe prejudice to the Defendant herein.

6. As a result, the Plaintiff's application dated 4 March 2008 is therefore dismissed with costs as it does not fall within the purview of **Order 45 Rule 1 (1) (b)** of the *Civil Procedure Act*. As the Defendant has not appeared to respond to the said Application, there will be no order as to costs.

DATED and delivered at Nairobi this 13th day of June, 2013.

J. B. HAVELOCK

JUDGE