REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 512 OF 2010

ERERI COMPANY LIMITED ……..…….. PLAINTIFF

VERSUS

SIMON KAMAU GITAU …….....1ST DEFENDANT

FRANCIS KARIUKI MARANGA ……..…….2ND DEFENDANT

STEPHEN KAMAU KUNGU …….....3RD DEFENDANT

NEPHAT GICHUHI KINYANJUI ……..……...4TH DEFENDANT

STEPHEN NDUNGU NJENGA …….…….5TH DEFENDANT

GEOFFREY MUIRURI MUCHAI …….…....6TH DEFENDANT

GIKONYO NDIRANGU ……..… 7TH DEFENDANT

KAMAU MURIGU ……..…..8TH DEFENDANT

RULING

1. This is the defendants' notice of motion dated 9th February 2012. The defendants pray that the order of court of 4th November 2011 be reviewed and set aside. There is annexed an affidavit sworn by Francis Kariuki Muranga on even date together with annextures. There is also another affidavit of the same date sworn by Kamau Murigu.

2. The principal ground for review is that the order of 4th November 2011 requires the defendants to produce and return to the plaintiff several items including the original title to LR No 8622 Longonot farm. As the defendants are not in possession of those items, the order of court is incapable of enforcement and exposes the defendants to contempt of court.

3. The defendants state that they have discovered new and important evidence to ground an application for review. The newly discovered matters are stated to be as follows:

(i) The subdivision plan for the land formerly L.R No.8622 Longonot Farm, showing title to L.R No.8622 Longonot Farm was obliterated and land divided;

(ii) The location where the plaintiff's offices used to be situated on the undivided Longonot farm, has since the subdivision become a new title known as LR No. Longonot/Kijabe Block 12 registered in the name of Mary Wairimu Karoba;

(iii) The record books for Nanyuki Ereri farm assets, record books for Longonot farm assets, livestock records for both Nanyuki and Longonot farms, accounts books and members' register were collected by officers of CID Nakuru sometime on or about 1987.

(iv) Some of the plaintiff company's books accounts were sometime in July 1993 picked from the CID in Nakuru and deposited with the Plaintiff's then board of directors.

(v) There has never been any or proper handover of the plaintiff company's books of accounts from successive boards of directors.

Those matters are buttressed further by paragraphs 6 to 39 of the affidavit of Kamau Murigu. The plaintiff contests the motion. The plaintiff contends that the matters raised are *res judicata* and not new. The plaintiff says the application is incompetent and an afterthought and should be dismissed. The plaintiff has filed a replying affidavit sworn by Njuguna Kungu in support its case.

4. I have heard the rival arguments. I have compared the evidence that the defendants say is new with the evidence before the honourable Justice Koome and in her considered ruling of 12th February 2010. I have also compared it with this court's ruling of 4th November 2011. The evidence that the defendants say is new was before Lady Justice Koome and informed partly, the ruling of 12th February 2010. It was also before me when I delivered the impugned ruling of 4th November 2011. I have thus formed the view that the defendants are regurgitating or seeking to litigate afresh over the same matters that were considered by the court.

5. Secondly, the defendants are simply saying that this court reached an erroneous decision in ordering the defendants to surrender materials that are not in their possession. That was the defendants position and answer to the plaintiffs initial notice of motion dated 27th July 2010. At paragraphs 3 and 4 of the ruling of court of 4th November 2011, the court dealt with the defendants' claims that they were not in possession of those materials or title. For considered reasons, the court was of the view that the defendants were in possession. The court thus made an order for mandatory injunction to return the assets to the plaintiff company. If this court made a wrong decision, then the remedy for the defendants does not lie in an action for review. I would venture to think that the remedy should be an appeal. The applicants cannot have a second bite at the cherry in this court.

6. Section 80 of the Civil Procedure Act reads as follows;

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.

Order 45 rule 1(1) is *pari materia* with section 80 and provides;

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 mater 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.

From a plain and natural meaning of the words of the law, an application for review is open to a person aggrieved by a decree of this court and who is entitled to an appeal to the Court of Appeal but has not preferred such appeal or who holds a decree or order from which no appeal is allowed by the Act. It is thus a unique and special power of this court. For an application for review to succeed, it must be brought without delay, it must be on the basis of either new and important evidence not available at the time of trial, or on account of mistake or error on the face of the record, or for other sufficient cause. Those are the parameters set by the authorities. And the authorities abound including *Origo & another Vs Mungala* [2005] 2 KLR 307, *Kisya Investments Ltd Vs Attorney General and another* Civil Appeal No 31 of 1995 (unreported), *Refrigeration Contractors Ltd Vs Lieta* [2005] KLR 506, *Kuria Vs Shah* [1990] KLR 316 and *M'Anthaka M'Mwoga Vs M'Boore* [2006] eKLR.

7. The application for review was only presented to court on 9th February 2012. The impugned ruling was delivered three months earlier on 4th November 2011. I find that dilatory in the circumstances. An application for review must be made with expedition. The applicants do not state clearly the time when they discovered the new evidence that they could not have discovered with due diligence at the hearing. They simply state that they found it after the hearing. The delay in bringing the application for review is thus not properly explained.

8. In *Panistar Company Limited Vs Catherine Wanjiku Mwangi & others*

HCCC No 1154 of 1999 [2002] e KLR the court stated;

"Order 44 rule 1 [the predecessor to order 45] makes it clear that the application for review should be made without unreasonable delay. This is reflected in a recent amendment to the order. That amendment would not have been made without a reason"

9. I am also guided by the decision in *National Bank of Kenya Ltd Vs Njau* [1995 – 1998] 2 E A 249 at 253.

"*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 an 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 of review that the court proceeded on an incorrect proposition of the law. Misconstruing a statute or another provision of law cannot be a ground for review".*

10. In *James Kingaru & others Vs J.M. Kangari and others* it was stated of sub rule 2 of order 44 [the predecessor to the present order 45].

"It *appears that the applicants, having lost their case, wanted a second bite of the cherry …… applications on this ground must be treated with great caution. Review cannot be sought to supplement the evidence or to introduce new evidence. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of the trial".*

See also *Business Partners International Kenya SME Fund L.P Vs Zingo Investments Limited and another* HCCC 797 OF 2009 (Nairobi, High Court, unreported).

11. Granted all of those circumstances and the law, I am not persuaded that this is a proper case for

review. The order that then commends itself to me to grant is that the defendants' notice of motion dated 9th February 2012 be and is hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 20th day of April 2012

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

Mr. K uyo for the Defendants.