



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Suit 233 of 2004

ESTON NDUNG’U WANYOIKE.....1ST PLAINTIFF
DUNCAN THUITA MUGO.....2ND PLAINTIFF
STEPHEN NJOROGE NDUATI.....3RD PLAINTIFF

ALL T/MATURO HARDWARE, TOOLS AND PAINTS

VERSUS

BERMARD THUITA.....1ST DEFENDANT
CATHERINE MUTHONI.....2ND DEFENDANT
HELLEN WANJIRU.....3RD DEFENDANT
ROSEMARY NYAMBURA.....4TH DEFENDANT
JOYCE NJOKI.....5TH DEFENDANT
AMOS IRUMBI CHEGE.....6TH DEFENDANT

RULING

On 15th February 2012 I gave directions in this matter in I directed that since I was unable to follow the proceedings, the hearing of the suit would start *de novo*.

The 3rd plaintiff herein, is however, unhappy with the said directions and has moved the Court by way of a Motion on Notice dated 26th March 2012 expressed to be brought under the provisions of Order 45 rule 1(b) of the Civil Procedure Rules, in which he primarily seeks orders that this Court be pleased to review

and set aside its said earlier orders and that the case be transferred to the **Hon. Justice Khaminwa** for hearing and disposal. He further seeks, in the alternative, an order that the business and the subject matter of the suit be placed in the hands of independent managers for preservation and proper accounting.

The application is supported by the affidavit sworn by **Stephen Njoroge Nduati**, the 3rd plaintiff. According to him, his father, the defendants' father, together with the 1st and 2nd plaintiffs were co-owners of the businesses the subject matter of the suit. All these people have passed on and the protagonists in this arena of dispute are their offspring. Whereas the defendants' father passed on before the suit was filed, the 1st plaintiff passed on after the suit was filed but before giving evidence while the 2nd plaintiff passed on after giving evidence. The deponent, himself, has testified and was cross-examined. This matter was heard by **Hon. Justice Khaminwa**. At the time I was giving directions the learned Judge was on long leave. Having now resumed work and since the reason why the hearing *de novo* was ordered was the failure to read the Judge's proceedings, it is contended that it would be in the interest of justice that the matter be proceeded with from where it had reached. To do otherwise, it is contended would act injustice since the people who had given evidence in support of the plaintiffs' case are out of reach of this court by virtue of their having transcended to the world hereafter. It is further deposed that the applicant continues to suffer while the defendants enjoy the proceeds of the suit properties hence the need to put in place independent managers to manage the same.

The application was opposed by way of a replying affidavit sworn by **Bernard Thuita Chege**, the 1st defendant herein. According to him whereas the parties have testified the Plaintiffs have not demonstrated ownership of properties in dispute. It is further contended that the suit has not been fully heard by **Justice Khaminwa** as alleged. The deponent further does not understand why the plaintiffs insist that the matter be heard by **Hon. Justice Khaminwa** who had directed that the matter be heard at the Milimani Commercial Courts since she was proceeding on leave. It is further deposed that there is no connection between the alleged partnership and the properties listed in the plaint and no evidence has been led to that effect. According to the deponent this suit was instituted with a view to rendering the defendants destitute. Accordingly it is the defendants' position that the application does not meet the threshold in Order 45 rule 1(b) aforesaid.

The application was prosecuted by way of written submissions by **Mr. P N Mugo**, learned Counsel for the applicant and **Mr. Chege**, learned Counsel for the defendants. The main objection to the application is that none of the grounds relied on by the applicant support an application for review and that the learned judge having released the file to be heard by another Judge there is no justification for referring the matter back to her. Relying on **Eastern and Southern Development Bank vs. African Green Fields Limited and Others [2002] 2 EA 377**, it is submitted that mere adoption of a wrong procedure does not warrant a review.

I have now considered the application, the affidavits both in support of and in opposition to the application as well as the submissions and authorities cited. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the Civil Procedure Rules, certain requirements must be met. The said provision states as follows:

“(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.

(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.”

The foregoing provisions are based on section 80 of the Civil Procedure Act Cap 21 Laws of Kenya which states 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.”

The foregoing provision unlike the provisions of Order 45 aforesaid does not prescribe the conditions upon which an application for review may be granted. In the case of **Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998** the Court of Appeal held that section 80 of the Civil Procedure Act enables a court to make such orders on review application which it thinks just so that the words “or any sufficient reason” as used in Order 44 rule 1 of the Civil Procedure Rules are not *ejusdem generis* with the words “discovery of new and important matter” etc. and “some mistake or error apparent on the face of the record” and that those words extend the scope of the review. Accordingly, the said court held that there is no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly section 80 of the Civil Procedure Act confers an unfettered right to apply for review and so the words “for any sufficient reason” need not be analogous with the other grounds specified in the Order.

In dealing with the delegated legislation made under the Act **Farrell, J** in **Sardar Mohamed Vs. Charan Singh Nand Singh & Another HCCA No. 51 of 1959 [1959] EA 793** was of the following view, with which view, I respectfully associate myself :

“In terms section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on section 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of the other sections. Under section 81(1) of the Ordinance the Rules Committee has power to make rules “not inconsistent with the provisions of this Ordinance”. If a rule is inconsistent it is to that extent *ultra vires*; and if the Ordinance confers unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires*. If, however, a rule is capable of two constructions, one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle “*ut res magis valeat quam pereat*”. If the words “Or for any other sufficient reason” can be given a liberal construction, there is nothing in Order 44, rule 1(1) in any way inconsistent with section 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the two grounds specified are such as would entitle an aggrieved party to apply for review”.

The reason why I directed that the proceeding do start de novo was because I was unable to follow the typed proceedings of my learned sister **Hon. Justice Khaminwa**. That is not the same thing as stating

that the proceedings as recorded by the learned Judge cannot be followed. It simply means that the typist for some reason did not comprehend or decipher the Judge's handwriting. Again the reason why the learned Judge referred the matter back to the Commercial Division was the same reason that she was going on a long leave and did not want to leave the parties in limbo for an indefinite period. Unfortunately no serious steps were undertaken during the learned Judge's absence. The learned Judge is now back in the station though in the Civil Division of the High Court where I myself am temporarily sitting. It is not disputed that at least one of the parties who gave evidence has since left the jurisdiction of the Courts of this world. He has however, left the evidence behind. That evidence, according to applicant, is useful to him. The defendants, however, opine that that evidence is worthless. The decision whether or not that evidence is useful cannot be made at this stage. I, however, agree with the applicant that the possibility of injustice being occasioned to him if the said evidence is not considered is not too remote.

Since the learned Judge who heard the evidence, recorded the same and saw the witnesses testify is back within the station and since no benefit will be derived by myself in hearing the matter afresh as one of the witnesses has crossed over to the other world beyond recall, I do find that the circumstances herein amount to "any other sufficient reason" for the purposes of Order 45 rule 1(b) aforesaid.

Again the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Since the enactment of the said provisions the Court of Appeal has made pronouncements on the same. In **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, the Court of Appeal held *inter alia* that:

"the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

The same Court in **Kenya Commercial Bank Limited Vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case".

It therefore follows that in deciding whether or not to grant an application for review the overriding objective as expressed in the foregoing provisions must be considered. Some of the aims are justice, expedition and finality of proceedings.

Having considered the foregoing I am satisfied that the circumstances of this case cry loud for review of my directions made on 15th February 2012. I accordingly allow prayer (b) of the Motion dated 26th March 2012, review my directions made on 15th February 2012 by setting the same aside. With respect to prayer (c) in my respectful view, I cannot direct **Hon. Lady Justice Khaminwa** to hear and dispose of the matter. Accordingly, I direct that the matter be placed before the **Hon. Lady Justice Khaminwa** for appropriate directions. Since prayer (d) was dependent on the outcome of the foregoing I will not consider the same. The costs of this application will be in cause.

Ruling read, signed and delivered in court this 15th day of June 2012.

G.V. ODUNGA

JUDGE

In the presence of:

Mr. P N Mugo for applicant

Mr. Chege for respondents