LAND LORDS LIMITED……………………......….…….....1ST PLAINTIFF

ROGER HANNS KIYONGA DDUNGU ...….......…….……2ND PLAINTIFF

- VERSUS –

WAYMAX COMPANY LIMITED …............................ 1ST DEFENDANT

MFI OFFICE SOLUTIONS LIMITED ……........……....2ND DEFENDANT

ATTORNEY GENERAL ………………………………3RD DEFENDANT

RULING

1. This is the 2nd defendant's notice of motion dated 10th August 2011. The motion is expressed to be brought under order 45 of the Civil Procedure Rules 2010 and sections 1, 1A, 2, 3, 3A and 80 of the Civil Procedure Act. The applicant prays that the ruling and order of court dated 22nd July 2011 be reviewed or set aside. The applicant seeks a declaration that the ruling is a nullity. The gist of the matter is that the ruling was issued without jurisdiction or in excess of jurisdiction in that the applicant was not heard. It is submitted that the court delivered a ruling on a matter that was not before the court.

2. The primary facts are disclosed in the affidavit of Arif Madhani sworn on 10th August 2011. In a synopsis, the applicant states that the plaintiff filed an application dated 12th April 2011 for leave to amend the plaint. Prior to that, the plaintiff had filed an application by way of chamber summons dated 25th November 2010. The latter was seeking injunctive reliefs. It was filed contemporaneously with the plaint. An interim order was granted. The chamber summons and the order were served on the 2nd defendant on 1st December 2010. The present deponent swore a replying affidavit on 14th January 2011. The 2nd defendant also filed written submissions in opposition to that application. It is the applicant's case that that was the matter that came for hearing before the Honourable Justice Msagha Mbogoli on 21st June 2011. The parties agreed that the matter be determined on the basis of the written submissions. The applicant was thus surprised when the court delivered a ruling on the earlier application to amend the plaint dated 12th April 2011.

3. The motion for review is contested. There is a replying affidavit of Roger Ddungu, a director of the 1st plaintiff, sworn on 5th December 2011. It is averred that since all parties had filed replying affidavits or submissions to the application dated 12th April 2011, the court was entitled to rule on the matter. It is submitted that the court exercised its discretion under the Civil Procedure Rules to grant leave to amend the plaint. The plaintiffs' case is that no prejudice has been suffered by the 2nd defendant. The amendment sought to the plaint would assist the court to finally and effectually adjudicate the suit. To the plaintiffs, the court was within its mandate and jurisdiction. Both the plaintiff and the 2nd defendant have filed written submissions and lists of authorities in support of their stated positions. On 25th June 2012, I also granted the protagonists a further opportunity to address the court.

4. I have heard the rival submissions. The motion is expressed to be brought under orders 45 and 52 of the Civil Procedure Rules 2010. The parameters within which the court can review its decisions are well settled. The applicant has chosen to come for review under sections 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules. 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 *parimateria* 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 andanother* Civil Appeal No 31 of 1995 (unreported), *Refrigeration Contractors Ltd VsLieta* [2005] KLR 506, *Kuria Vs Shah* [1990] KLR 316 and *M'Anthaka M'Mwoga Vs M'Boore* [2006] e KLR.

5. This court is also enjoined by articles 50 and 159 of the constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. A cardinal precept in article 50 is that parties must be all accorded a hearing in a fair trial. It underpins the canon of equality of arms of all the parties.

6. Applying the law to the facts and the record of the court, I find that the plaintiffs' chamber summons dated 12th April 2011 for leave to amend the plaint had no return date. It was not listed for hearing on 21st June 2011. True, the parties had filed replying affidavits and written submissions on it. But the point is that it was not up for determination on that date. The record of the court and history of the matter shows clearly that the original application by the plaintiff for injunction dated 25th November 2010 was for hearing inter parties on 21st June 2011. I stated earlier that that application was filed contemporaneously with the plaint. The plaintiff had an interim order for injunction. As a logical corollary, and although both applications were before the court, the court should have heard the original application for injunction.

7. It is a redherring for the plaintiff to plead that the court had jurisdiction to deal with the application of 12th April 2011. It might be a suitable application and one that the court could grant. But it masks the wider issue of natural justice: the 2nd defendant was not heard on it and is entitled to its say. It is also not

lost on me that the 2nd defendant had filed taken up cudgels on it and had filed written submissions opposing the application to amend the plaint. I also see prejudice to the 2nd defendant. The grant of leave to amend the plaint would fortify the plaintiffs' pleadings as a basis for the prayer for injunction. The interim injunction granted and the permanent injunction sought are against the 2nd defendant. The pith of the matter is that the 2nd defendant was condemned unheard. The merits and decision of the court's ruling of 22nd July 2012 though well intended were made outside or in excess of jurisdiction of the court. Our constitution and courts have consistently stood by the right of a party to be heard before any decision of a court is made. See *Gideon Munyao Mutiso VsSarah Wanjiku Mutiso* Nairobi, Court of Appeal, Civil Appeal 24 of 1983 (unreported), *Trust Bank Ltd VsAmalo CompanyLimited*[2003] 1 EA 350.

8. I am thus satisfied that there is an apparent error on the face of the record. The error is the decision on an application that was not before the court. I have also found that the 2nd defendant stands to be prejudice. That would be a miscarriage of justice. In the result, I also find that the 2nd defendant has shown sufficient cause for review to issue. The motion was presented on 11th August 2011. The impugned ruling was made on 22nd July 2011. There is thus no laches.

9. For all the above reasons I order that the ruling and order of court issued on 22nd July 2011 be set aside in its entirety. I grant the 2nd defendant costs of the motion to be paid by the plaintiffs in any event.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 2nd day of August 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Musyoki for Kwamboka for the Plaintiffs/Respondents

No appearance for the 1st Defendant.

Ms D.N. Wakoli for Kilonzo Jrfor the 2nd Defendant/Applicant

No appearance for the 3rd Defendant.