REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACKAKOS

CIVIL SUIT NUMBER 249 OF 2010

MWEI KITHINZI. ……...…… 1ST PLAINTIFF/RESPONDENT
GEORGE MUSILA MBITI. …… 2ND PLAINTIFF/RESPONDENT

VERSUS

KYANZAVI FARMERS COMPANY LIMITED. .....…… 1ST DEFENDANT/APPLICANT

NGUMBAU MWENGEI T/A MWENGEI & ASSOCIATES. ….....…...…. 2ND DEFENDANT/3RD RESPONENT

AND

DANIEL MUTHAMA MUATHE T/A DMK MUATHE & ASSOCIATES ..... INTERESTED PARTY

R U L I N G

Before me is a Notice of Motion dated 7th February, 2011 filed by S. N. Gikera & Associates Advocates for the applicant (1st defendant) **Kyanzavi Farmers Company Ltd**. It was filed against **Mwei Kithinzi** (1st plaintiff/respondent), **George Musila Mbithi** (2nd plaintiff/respondent), and **Ngumbao Mwengei t/a Mwengei & Associates** (2nd defendant/3rd respondent). On 1st March 2011, on application, the court allowed **Daniel Muthama Muathe** t/a DMK Muathe & Associates to be joined as an interested party.

The application was filed under section 3A and 80 of the **Civil Procedure Act (Cap 21 Laws of Kenya)**, and **Order 45 Rules 1, and 2,** as well as **Order 51 Rules 1 and 3** of the **Civil Procedure Rules 2010**.

The application has three prayers, one of which has been spent, as follows: -

1. (spent)

2. THAT the order entered by the Honourable Justice Waweru on 28th January 2011 inter alia to the effect that:

(a) Interim injunction do issue in terms of prayers 2 and 3 of the plaintiffs Chamber summons Application dated 20th November, 2010 be reviewed, varied/or set aside.

3. THAT the costs of this application be provided for.

The application has grounds on the face of the Notice of Motion. The grounds are, inter alia, that Justice Waweru issued orders that, inter alia, barred the 1st defendant from engaging the 2nd defendant from auditing the books of accounts and also from accessing and auditing the said books of accounts; that no appeal had been preferred against the said order, though an appeal is allowed; that the order was made in apparent error on the face of the record; that the order is inoperative and overtaken by events as the audit had already been finalized and submitted to the 1st defendant and authorities such as the Kenya Revenue Authority; that though the plaintiffs' Chamber Summons (dated 22nd November 2010) was set for hearing on 14th June 2011, the 1st defendant was scheduled to conduct its Annual General Meeting tentatively on 10th March 2011; and that unless the impugned consent order was set aside urgently, the applicant (1st defendant) and its members stood to suffer irreparable harm.

The application was filed with an affidavit sworn on 7th February, 2011 by James Muiya Muema described as a director of the 1st defendant/applicant. It was deponed, inter alia, that the court order came as a major surprise since it was made on a mention date when no substantive orders can be issued. It was also deponed that the order was made when it was common knowledge that the plaintiff's Chamber Summons application dated 20th November, 2010 had not been duly served on the 2nd defendant and other parties. It was also deponed that the order was made in error apparent on the face of the record in that the 1st dependant's books of accounts had not been audited for the past 4 years and that an audit had already been done and finalized by the 2nd defendant and reports thereof submitted to the 1st defendant and other authorities such as the Kenya Revenue Authority. That the impugned court order was superfluous and the court should not act in vain. That the 1st defendant was highly aggrieved by the order, and that unless the impugned order was set aside urgently, the 1st defendant/applicant and its members stood to suffer irreparable harm

The applicant through their counsel filed written submissions on 4th March 2011. It was submitted that the court on 28th January 2011 issued the orders complained of, which were substantive orders erroneously, the tenor of which barred the 1st defendant from engaging the 2nd defendant to access and audit the books of accounts of the 1st defendant.

It was contended that the issues for determination in this application were two. Firstly, whether the impugned order was made in error apparent on the face of the record. Secondly, whether there were sufficient grounds to warrant the review or setting aside of the said order. Reliance was placed on Order 45 of the Civil Procedure Rules (2010). Counsel contended that the applicant relied on the ground of error on the face of the record, and sufficient reasons in support of the application for review. Reliance was placed on the case of **Nyamogo & Nyamogo Advocates-Vs-Kogo (2001) EA 173** where the Court of Appeal stated that an error on the face of the record was an issue to be determined judicially on the facts of each case. Reliance was also placed on the case of **National Bank of Kenya Limited-Vs-Ndungu Njau – Civil Appeal No. 211 of 1996** where the court held that a review may be granted where the court considered that it was necessary to correct an apparent error or omission on the part of the court. It was contended that the orders impugned were made on a mention date and were of a substantive nature. Therefore, there was an error justifying a review. Reliance was placed also on the case of **Awal Limited & Others-Vs-Kenya Revenue Authority (2006) eKLR** with regard to the making of substantive orders on a mention date. It was contended that the present situation was exacerbated by the fact that the order complained of was made when it was known that the plaintiff's Chamber Summons application dated 22nd November 2011 had not been served on the 2nd defendant and that the applicant had been served barely two days before the mention date.

On sufficient reasons, reliance was placed on the case of **Official Receiver-Vs-Freight Forwarders Ltd. – Civil Appeal No. 235 of 1997** – where it was held that any sound reason could amount to sufficient grounds for review. Reliance was also placed on the case of **Giro Commercial Bank Ltd-Vs-Superfoss Ltd (2005) eKLR** where the court reviewed and set aside an order where the justice of the

matter called for review.

The 2nd defendant (also described as 3rd respondent) **Ngumbau Mwengei t/a Mwengei & Associates** supported the application. He filed grounds in support of the application dated 7th February 2011 on 20th February 2011 through his advocates J N Kimeu & Co. Advocates. The grounds were two as follows: -

1. ***The said application is competent and sound in law.***

2. ***The application is meritorious.***

The plaintiff's/respondents Mwei Kithinji (1st plaintiff/respondent) and George Musila Mbithi (2nd plaintiff/respondent) do not appear to have filed a replying affidavit to the application. They filed their written submissions through their advocates M/s Gatumuta & Company on 10th March 2011. In the written submissions, they gave a background to the matter and the facts surrounding the status of the company (1st defendant), the appointment of auditors and the filing of the application. Since these are not supported by a replying affidavit, they are not for consideration by the court. It is wrong for a party to introduce facts through submissions. These facts should have been contained in an affidavit. Since they did not file an affidavit to support the facts, I will ignore them. I will merely deal with the legal issues raised.

It was contended in the submissions that the order now sought to be reviewed was a valid order for maintenance of the status quo. The resolution to appoint external auditors had been made by the members at the Annual General Meeting and had not been revoked by any subsequent meeting. It was contended that the order granted by court would not interfere with the holding of the Annual General Meeting scheduled for 16th March 2011.

It was contended that if the said order was set aside, it would amount to the court appointing the 2nd defendant as external auditors of the company thus in effect assisting the Directors in perpetrating an illegality. It would also lock out the auditors who were legally and democratically appointed by the members. It would also mean that the company would be having two firms of auditors at the same time. It would cause irreparable suffering to the company and its members, as the actual financial status of the company might never be known.

It was contended that this application was wrongly brought to Nairobi before another Judge from Machakos contrary to the law, specifically Order 45 Rule 2(3) of the Civil Procedure Rules which provides: -

"If the judge who passed the decree or order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other Judge as the Chief Justice may designate"

It was contended that the Judge who made the order, Waweru J, had not left the Judiciary and that no evidence had been tendered by the applicant to show that the Judge would not go back to Machakos. Therefore, in the absence of that information and the lapse of 3 months, as well as lack of directions of the Chief Justice, the application could only be heard in Machakos by Justice Waweru.

It was contended that, in any case, there was no error apparent on the face of the record to justify a review. There was also no evidence of the discovery of new and important matter or evidence that would justify a review.

It was contended that the auditors appointed at the Annual General Meeting - DMK Muathe & Associates were appointed in accordance with the provisions of section 159 of the **Companies Act (Cap 486 Laws of Kenya**) and they could only be validly removed under section 160 of the Act.

Reliance was placed on the case of **Shah-Vs-Dharamshi (1981) KLR 561** wherein the grounds upon which an application for review could succeed were stated. Reliance was also placed on the case of **Geilla-Vs-Cassman Brown & Co. Ltd (1973) EA 358** which gave the parameters upon which courts could grant interlocutory injunctions.

Reliance was further placed **Palmer's Company Law 22nd Edition – Chapter 54** on how decisions and resolutions of companies were made. Reliance was also placed on **Gower & Davies – Principles of Company Law 8th Edition page 778** – wherein the author gave the circumstances under which companies auditors could be removed.

The interested party Daniel Muthama Muathe t/a DMK Muathe & Associates filed a replying affidavit sworn by himself on 10th March 2011. It was filed on the same date. In the said affidavit, it was deponed, inter alia, that the application was defective as the order sought to be reviewed had not been annexed and further the wrong provisions of the law had been cited; that the supporting affidavit did not comply with the mandatory provisions of Order 19 of the Civil Procedure Rules in that it contained allegations in paragraphs 5 and 7 which were not within the knowledge of the deponent. The deponent adopted the contents of his affidavit sworn on 25th February 2011 (which I do not see in the file except an affidavit to another application sworn by same deponent on 28th February, 2011). It was deponed that the deponent was the auditor appointed through a resolution of the applicant on 3rd March 2010 and that the said appointment had not been revoked. It was deponed that subsequent to that appointment, the directors failed to forward to him the books of accounts despite numerous requests and as a consequence the auditing had not taken place. That the appointment and auditing of the books of the applicant by the 3rd respondent was an illegality.

The interested party (wrongly described as 4th respondent) also filed written submissions on 10th March 2011 through their advocates Wambugu & Muriuki Company Advocates. In the submissions the background on the appointment of the interested party as auditors of the applicant were given. It was contended that the directors of the applicant had illegally appointed another auditor and refused to give the interested party the books for the audit. It was contended that there were two issues herein. Firstly, whether there were grounds to set aside the order. Secondly, whether or not the application was defective.

On the allegation of the applicant that there was discovery of new matter in that audit had already been carried out, it was contended that the applicant did not annex relevant documents on the same. Reliance was placed on the case of **Rose Kaiza-vs-Angelo Mpanju Kaiza Civil Appeal No. 225 of 2008 (2009) eKLR** wherein the Court of Appeal held that an applicant had to demonstrate the existence of new and important evidence that was not within his knowledge. It was further submitted that the alleged audit said to have been conducted was a sham.

On the argument that the order impugned was a substantive order made on a mention date, it was submitted that there was no law or rule barring the issuance of such orders, when all parties were present in court on a mention date. Reliance was placed on the case of **Gatimu Farmers Co. –Vs-Geoffrey Kagiri Kimari & Others (2008) eKLR** – where such an issue was raised and ignored by the court.

On the issue that the application was defective, reliance was placed on the case of **Pancras T Swai-Vs-Kenya Breweries Ltd HC Milimani Commercial Case No. 1190 of 1994 (2005) eKLR** where it was held that the order sought to be reviewed must be annexed to the application. It was also contended that wrong provisions of the law were cited. In addition, the affidavit in support of the application did not comply with mandatory provisions of Order 19 of the Civil Procedure Rules.

I have considered the application, documents filed, the submissions of the parties, the authorities cited and the law. This is an application for review of the court's orders made on 28th January 2011.

The first issue which I have to consider is whether this application should have come before Waweru J. in person. The plaintiffs who are 1st and 2nd respondents herein say so. They rely on Order 45 Rule 2(3) of the Civil Procedure Rules. It provides: -

2(3) "If the Judge who passed the decree or made the Order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other Judge as the Chief Justice may designate."

In my view, the words "**attached to the court**" mean either the Court Station or the Court Division, where there are Divisions. So far, Divisions are only in Nairobi. Judge Waweru was in Machakos Station when he made the order. It was the applicants who claim that the Judge is in station, and that the application should have been filed in Machakos and heard by the same Judge. The burden was on them to show or demonstrate that the Judge was still stationed at Machakos when the application was filed. They did not do so. Currently, Waweru J. is stationed in Nairobi. I take Judicial notice of same. The provisions of Order 45 Rule 2(3) of the Civil Procedure Rules could only apply if it was demonstrated that Judge Waweru was stationed at Machakos when the application was filed. As there is no such evidence, the Order and Rule above do not apply.

The second issue is whether the application is defective because the order sought to be reviewed was not annexed. The interested party relied on the case of **Pancras Swai-Vs-Kenya Breweries Ltd** (supra). In that case Njagi J. stated: -

"Secondly, it is now settled law and practice that anyone seeking the review of a decree or order of the court should attach a copy of the decree or order sought to be reviewed. That has not been done in this, and the failure to do so renders the application fatally defective."

The above case was decided before the current Civil Procedure Rules were made in 2010. Besides, the learned Judge did not state the law which makes it mandatory to annex a copy of the order sought to be reviewed. Additionally, the applicant in the application gave a clear quotation of the order they were aggrieved with. I find and hold that since the applicant gave a clear quotation of the order they are aggrieved with, and since none of the parties has challenged the same, that quotation suffices to guide the court on the review requested. I find that the application is not fatally defective on account of the argument.

The third issue is whether the court made substantive orders on a mention date. In my view, from the content of the order complained of, the court did not made a substantive order. In determining whether the court has made a substantive order one has to consider the prayers in the plaint. The substantive prayers in the plaint herein are two. First, a permanent injunction against 1st defendant. Second, is a request that the 1st defendant's directors comply with the law. The 1st defendant is the applicant herein.

The paragraph of the order complained of reads as follows: -

"(a) Interim injunction do issue in terms of prayer 2 and 3 of the plaintiff's Chamber Summons application dated 20th November, 2010."

By any stretch of imagination, the above interim injunction, without more, cannot be said to be a substantive order. It is not an order that determines the rights of the parties. The applicant not having shown how the above orders substantively determined their rights in the suit, their argument cannot succeed.

The fourth issue is whether there is discovery of new matter or evidence. The applicants rely on this ground. They claim that the new matter relates to an audit that has now been done by another auditor Ngumbao Mwengei (the 2nd defendant/3rd respondent).

In **Rose Kaiza-Vs-Angelo Mpanju Kaiza Civil Appeal No. 225 of 2008 (2009) eKLR** the Court of Appeal stated, inter alia: -

"An application for review under Order 44 r. 1 must be clear and specific on the basis upon which it is made. The motion before the superior court was based on discovery of new facts. However, it is not

every new fact that will qualify for interference with the judgment or decree sought to be reviewed."

Indeed, the Rule 1 above, talked about new and important matter or evidence which was not within his knowledge or could not be produced by the applicant at the time the decree or order was made. The Civil Procedure Rules were revised in 2010 after the above decision.

The revised Civil Procedure Rules L.N. No. 151 (2010) under Order 45 rule 1, under which this application was filed retain the same wording. In my view, the new facts or evidence should have been facts or evidence which existed at the time of making the decree or order. There is an obligation to prove the allegation. For clarity, both the previous rules under Order 44 and the present rules under which the application was brought provide under Order 45 Rule for strict proof as follows: -

3(2) "…… Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree or order was passed or made without strict proof of the allegation."

The decision in the case **Rose Kaiza-Vs-Angelo Mpanju Kaiza Case (supra)** is applicable to the present case. The applicants were obliged to state clearly and specifically the basis of the new matter or evidence and strictly prove the same. They have not demonstrated strict proof of their allegations. I addition, what they claim to be new evidence or matter, is what is being challenged in these proceedings as having been done illegally. It is the alleged audit done by Mwengei & Associates which is said to be illegal. In my view, an illegal act said to be committed by an applicant, cannot be a basis for justifying a review of the courts orders, in an application filed by the same applicant or its officers. It cannot be new matter or evidence to justify a review. Therefore, this application has to fail.

For the above reasons, I find no merits in the application and dismiss the same. Costs will be to the plaintiff's interested party.

Dated and delivered at Nairobi this 7th day of April 2011.

…….
GEORGE DULU
JUDGE

<u>In the presence of</u>
Mr. Gikera for applicant
Mr. Kangata for interested party
Catherine Muendo – court clerk