REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 117 of 2002

GANIJEE GLASS MART LTD (IN RECEIVERSHIP)......................1ST PLAINTIFF
PAN AFRICAN GLASS INDUSTRIES LTD (IN RECEIVERSHIP)..2ND PLAINTIFF
IJAZ HUSSEIN GANIJEE...3RD PLAINTIFF
VERSUS
FIRST AMERICAN BANK (K) LTD..1ST DEFENDANT
ANDREW DOUGLAS GREGORY..2ND DEFENDANT
ABDUL ZAHIR SHEIKH..3RD DEFENDANT

RULING

On 27th June 2008, Lesiit J allowed the defendants' notice of motion which had prayed for the striking out of the plaintiffs' suit against the 2nd and 3rd defendants. At page 5 of her ruling, the learned judge made the following observations:

> *"In the result, the defendants' application dated 28th of May 2008 succeeds in part. I do order that the plaintiffs' suit against the 2nd and 3rd defendants be struck out for lack of a reasonable cause of action against them. The plaintiffs will bear the cost of the application to the defendants and the cost of the suit to the 2nd and 3rd defendants"*

The plaintiffs were aggrieved by the decision of the court. On 19th August 2009, the plaintiffs filed an application pursuant to the provisions of **Order XLIV Rule 1** of the **Civil Procedure Rules** and **Section 80** of **Civil Procedure Act** seeking to review the said decision of the court by having the same set aside, varied or substituted. The plaintiffs, in particular, sought to review the decision of the court which ordered that *"the plaintiffs will bear the costs of the application to the defendants and the cost of the suit to the 2nd and 3rd defendants"*. The plaintiffs further prayed for an order of the court that taxation of costs arising out of the said decision, including the bill of costs dated 9th June 2009 be postponed until the conclusion of the suit. The grounds in support of the application for review are stated on the face of the application. In essence, the plaintiffs states that there existed an error apparent on the face of the record which this court ought to rectify by reviewing the said decision. The application is supported by the annexed affidavit of Ijaz Hussein Ganijee, the 3rd plaintiff. He swore a further supplementary affidavit in support of the plaintiffs' application.

The application is opposed. The defendants filed grounds in opposition to the application. Essentially, the defendants argue that there is no error apparent on the face of the record that can justify this court to review the said decision. The defendants were particularly irked that the plaintiffs had presented the application for review after unreasonable delay. The defendants state that there were no grounds upon which the court could exercise its discretion and review the said decision. Prior to the hearing of the application, counsel for the parties to this application agreed to file written submissions in support of their clients' respective opposing positions. At the hearing of the application, Mr. Njagi holding brief for Mr. Sharma sought adjournment on the ground that Mr. Sharma was indisposed. Mr. Fraser for the defendants told the court that he was ready and willing to proceed with the application. The court was not persuaded that Mr. Sharma was indisposed and ordered the hearing of the application to proceed as earlier scheduled. Mr. Fraser told the court that he would be relying on the written submission filed in support of his clients' case. Mr. Njagi left the issues for determination to the court.

I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also read the written submissions filed by the advocates of the parties herein. The issue for determination by this court is whether the plaintiffs raised sufficient grounds to enable the court review the decision that is sought to be impeached. It is the plaintiffs' case that there is an error apparent on the face of the court record which should be reviewed by this court setting aside part of the said order of the court that condemned the plaintiffs to pay costs to the 2nd and 3rd defendants. According to the plaintiffs, the 2nd and 3rd defendants should not be paid costs before the conclusion of the case against the 1st defendant. This is because the three (3) defendants had filed one defence to the plaintiffs' suit. The

plaintiffs were of the view that since it was the 1st defendant that instructed the 2nd and 3rd defendants to put the 1st and 2nd plaintiff companies into receivership, the costs of the 2nd and 3rd defendants should be paid by the 1st defendant. The plaintiffs further argued that there was an error apparent on the face of record when the ruling in question stated that plaintiffs advocate had conceded that the 2nd and 3rd defendants had been wrongly been enjoined in the suit and therefore there was no cause of action that can be sustained against them. The plaintiffs argue that their erstwhile advocate had no instruction to compromise the suit in the manner that he did. The 2nd and 3rd defendants are obviously of a contrary view. It is their argument that the decision by the learned judge cannot be impeached on the grounds for review that have been put forward by the plaintiffs.

The principles guiding this court in determining whether or not to review a decision on the ground that there is an error apparent on the face of the record were restated by the Court of Appeal in **Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243** at page 246:

> "*In **Nyamogo and Nyamogo v Kogo [2001] EA 174** this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."*

In the present application, the plaintiffs sued the 2nd and 3rd defendants in their personal capacity. In the plaint, the plaintiffs described the 2nd and 3rd defendants as partners in the firm of KPMG Peat Marwick Certified Public Accountants. He also described them as receiver managers of the 1st plaintiff. In their defence to the suit, the defendants pleaded in paragraph 3 of the defence that the suit did not disclose any cause of action against the 2nd and 3rd defendants. The 2nd and 3rd defendants notified the plaintiffs that at an appropriate time they would make an application to have the suit struck out as against them. True to their word, the 2nd and 3rd defendants did on 29th April 2008 make an application seeking to have the suit against them struck out on the grounds that no cause of action had been disclosed against them. During the hearing of the application, the then advocate of the plaintiffs conceded that indeed the plaintiff did not have a cause of action against the 2nd and 3rd defendants. It was in light of that concession that the court struck out the suit against the 1st defendant. Can the learned judge be faulted for striking out the suit against the said defendants? In such circumstances of this case, I do not think so. Having perused the plaint and the defence in this suit, it is apparent that the plaintiffs wrongly sued the 2nd and 3rd defendants. The learned judge made no error that it is apparent on the face of the record that can make this court review the said decision. The plaintiffs' application in the premises lacks merit and is hereby dismissed.

As regard the issue of who should be condemned to pay costs of the 2nd and 3rd defendants, the court had discretion to direct any of the parties to pay costs. The award of costs is at the discretion of the court. This court has no power to interfere with the exercise of judicial discretion by a court of concurrent jurisdiction. The Court of Appeal in a recent decision, **SK Njuguna & Anor vs. John Kiarie Waweru & Anor, CA Civil Appeal No. 219 of 2008** *(unreported)*held that it cannot interfere with the discretion of a court on issues of costs unless they are justifiable reasons for the court to interfere with the exercise of such discretion. It is therefore evident that the plaintiffs' entire application is for dismissal. It is hereby dismissed with costs.

DATED AT NAIROBI THIS 15TH DAY OF MARCH 2010.

L. KIMARU
JUDGE