REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA Miscellaneous Civil Application 1 of 2009

MAJALIWA ESTATES LIMITED.....PLAINTIFF

AND

1. JASPER ODUOR OMONDI

2. MOSES WAWERU NDUNGU

3. DALMAS OMONDI OHINGO ALL TRADING AS

OMONDI WAWERU & COMPANY.....DEFENDANTS

RULING

By its Originating Summons filed on 16th April 2009, the plaintiff prayed for orders that (a) the defendants do deliver a cash account, (b) the defendants do effect immediate payment thereafter of the sum of Kshs. 43,928,959.30 due to the plaintiff plus interest at 12% p.a. from the date of filing suit until payment in full, and (c) costs. The application was grounded on the premises, *inter alia,* that the respondent acted for both the plaintiff as a vendor and a 3rd party as a purchaser in respect of some property and pursuant to the agreement of sale received Kshs. 55 million towards the purchase price out of which they paid Kshs. 4 million leaving a balance of Kshs. 43,928,959.30 due to the plaintiff which sum had been admitted by the defendants and which was being claimed plus interest at 12% p.a.

After hearing the parties Sergon J, declined the Originating Summons stating that what remained unaccounted and unpaid was a balance sum of about 5 million. In the Learned Judge's view the only available order in favour of the plaintiff was for an account yet the prayer for that relief had been abandoned. He found that the defendant had paid a substantial part of the proceeds of sale and had satisfactorily explained the delay in releasing the same. It was the Learned Judge's further finding that the defendants were ready and willing to account for the remaining balance to the plaintiff and their advocates. In the premises, he saw no necessity to issue the orders prayed for and therefore dismissed the Originating Summons with each party paying its own costs.

The plaintiff filed a Notice of Appeal against the said dismissal on 1st July 2009. On 20th July 2009, it lodged this application under Order XLIV Rules 1, 3(2) and 4 of the Civil Procedure Rules and Sections 3A and 80 of the Civil Procedure Act. He seeks a review of the said order on the main grounds that, there is an error apparent on the face of the record; that there has been discovery of new and important matter and that there is otherwise sufficient reason to review the said order. The substance of its complaint as presented on the face of the Notice of Motion and in the submissions thereon is that it inadvertently omitted to exhibit a letter dated 6th April 2009 in the affidavit in support of the Originating Summons and that had the said letter been considered by Sergon J, he would not have dismissed the plaintiff's claim. In the plaintiff's view the said letter, read together with other correspondence exhibited before the Learned Judge, amount to a clear admission of the plaintiff's claim.

The defendants hold a different opinion. They submitted that there was no error apparent on the face of the record and the court was right to determine the Originating Summons as it did in the light of the reliefs sought by the plaintiff, the affidavits filed and the submissions made thereon.

I have considered the application, the affidavit filed in support thereof, the Grounds of Opposition and the submissions of counsel. I have keenly read the ruling of Sergon J which is sought to be reviewed. The Learned Judge concluded his ruling as follows:-

"It is also obvious from the material placed before me that the Respondent is ready and willing to account for the

remaining balance to the applicant and its legal advisers. There is therefore no necessity to issue the orders prayed for. The prayer for interest cannot be given in the circumstances of this case."

The Learned Judge did not identify precisely the material that informed his decision. Having not identified the basis for his decision, it is rather speculative to assume that had the letter dated 6th April 2009 been exhibited, he would have arrived at a different decision. In any event does the finding of the *"inadvertently"* omitted letter, satisfy the requirements of the Civil Procedure Rules? The discovery of new and important matter or evidence must be *"after the exercise of due diligence"* andthe matter *"must not have been within his knowledge or could not be produced by the applicant at the time when the decree was passed or order made."* The letter allegedly inadvertently omitted is dated 6th April 2009. It was indeed written by counsel for the plaintiff. The letter was with the plaintiff's counsel before the Originating Summons was lodged. The plaintiff was also alive to the replying affidavit filed by the defendants in opposition to the Originating Summons. The replying affidavit clearly stated the defendant's position on the plaintiff's claim. Yet even after being served with the same it did not see the need to introduce the letter purportedly inadvertently omitted from its supporting affidavit. In the premises, I am not persuaded that there has been discovery of new and important matter or evidence which the plaintiff could not have produced by the time Sergon J made his decision. I am also not satisfied that there was exercise of due diligence.

The plaintiff has also urged the view that the failure to exhibit the said letter amounts to a mistake or an error apparent on the face of the record for which a review order should be made. In Nyamongo & Nyamongo – v – Kogo [2000] LLR 3017 CAK the Court of Appeal held that an error on the face of the record can only be determined on the facts of the case. In this case the *"inadvertently"* omitted letter of 6th April 2009 was not before Sergon J at the time he rendered his decision. In my view it would be stretching the definition of error or mistake apparent on the face of the record too far, to hold that an unexhibited document amounts to a mistake or error apparent on the face of the record. I further detect no sufficient reason to warrant a review of the said order.

The plaintiff has made other complaints against the decision of Sergon J aforesaid including the argument that as the defendants paid most of the plaintiff's claim after the Originating Summons had been lodged and served, judgment should have been given for those sums and that costs on those sums should also have been awarded to the plaintiff on the principle that costs follow the event. The plaintiff submitted in effect that the Learned Judge was wrong to deny it judgment of the admitted sums and costs which had been admitted by the defendant. With all due respect to the plaintiff, those complaints are against the Learned Judge's appreciation of the Law. In National Bank of Kenya Limited – v – Njau [1996] LLR 469 (CAK), the Court of Appeal held *inter alia*, that it cannot be a good ground of review that the court proceeded on an incorrect exposition of the Law and reached an erroneous conclusion thereon.

In this case the Learned Judge made a decision after due consideration of the plaintiff's and the defendant's arguments and deliberately decided that the plaintiff was not entitled to judgment on the admitted sums and the other reliefs it claimed and also dented it costs. That decision may be wrong in Law as contended by the plaintiff. In my view the plaintiff's remedy lies in an appeal against the said decision. The plaintiff indeed lodged a Notice of Appeal against the said decision on 1st July 2009. That Notice of Appeal has not been withdrawn even as the plaintiff lodged and prosecuted this review application. In my view the plaintiff's actions are speculative and contravene the clear provisions of section 80 of the Civil Procedure Act and Order XLIV Rule 1 (1) of the Civil Procedure Rules. Speculation by litigants should not in my judgment be encouraged. I am not alone in this view. Okwengu J in Julia Wagacii Njuguna & Another – v – Housing Finance Company Limited & Another Nyeri HCCC No. 88 of 2005 said of a plaintiff who had filed a Notice of Appeal and lodged a review application simultaneously:

> "The applicant cannot claim that they had not preferred any appeal at the time of making the application for review as both were filed simultaneously. This is clearly a situation where the applicant wants to have it both ways by filing an application for review and an appeal at the same time. That is not provided for under Order XLIV Rules 1 and 2 of the Civil Procedure Rules."

I would hold therefore that during the active life of the appeal, review is not available to the party who has lodged or intimated desire to appeal. The scope of section 80 of the Civil Procedure Act and Order XLIV Rule 1 (1) of the Civil Procedure Rules is already too wide and should not be extended any further.

In the end, I find and hold that this application not only lacks merit, it is also incompetent. It is accordingly dismissed with costs.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF APRIL 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Khanna for the Applicants and Mr. Omolo holding brief for Mr. Omondi for the Respondents.

F. AZANGALALA

JUDGE

23RD APRIL 2010