



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS**

Civil Case 637 of 2006

ADOPT A LIGHT LIMITED.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBIDEFENDANT

RULING

1. By way of restating a brief background of this matter a ruling was delivered by **Kimaru J** on 27th October 2009 in which the plaintiff's application by way of notice of motion dated 17th July 2009 was dismissed with costs. The plaintiff now seeks for the review and the setting aside of the order of **Kimaru J** and an order that the notice of motion dated 10th July 2009 be heard de novo. This application is brought under the provisions of Sections **3A, 63E and 80 of the Civil Procedure Act and orders 44 rule 1 and 50 of the Civil Procedure Rules.**

2. This application is premised on the grounds that there is an error apparent on the face of the record in the ruling of **Kimaru J** dated 27th October 2009. It is contended that the Judge made an error in determining an application for contempt of court while the application that was argued before him was seeking for enforcement of a mandatory order of injunction issued by **Azangalala J** on 27th November 2007. The application for contempt had been dispensed with when leave was granted and no substantive motion was filed.

3. This application was supported by the affidavit of **Esther Pasaris** sworn On 18th November 2009, According to **Mr. ISSA** counsel for the plaintiff, there is an error apparent on the record and it is discernable from the body of the ruling that **Kimaru J** determined the application for

contempt which had not yet been filed. On that basis the order ought to be reviewed and set aside and the application dated 17th July 2009 be argued afresh. Counsel referred to page 2 of the proceedings where he indicated he had filed two applications dated 17th July 2009. One of the applications was seeking to enforce a mandatory order and the other was seeking leave to institute contempt proceedings.

4. The later application was seeking leave to institute contempt proceedings, it was granted thus it lapsed the notice of motion was certified as urgent and was given an inter parties hearing date. It was seeking to enforce a mandatory order of injunction for reinstating the advertisements by the plaintiff through appointment of an auctioneer who should be assisted by the police. As such no submissions were made in regard to the application for contempt. This application was sorely asking for an auctioneer to be appointed to enforce the mandatory order. **Kimaru J** delivered a ruling and summarized the issues raised in the application for leave to institute contempt proceedings. Thus the judge erroneously determined the wrong application. The court was asked to correct the errors under **Section 80 of the Civil Procedure Act**.

5. This application was opposed, Counsel for the defendant relied on the replying affidavit sworn on 18th February 2010. He contended that there was no error on the face of the record. The Judge meticulously went through the history of the matter. He analyzed the ruling by **Azangalala J**. Commented about the application for leave to file contempt proceedings and especially the fact that the plaintiff was granted leave to file contempt proceedings but they cleverly did not pursue the application for contempt but chose to file the application seeking for the enforcement of an order of this court which was purportedly brought under the provisions of orders 21 rule 28(5) of the Civil Procedure Rules. The Judge found the procedure followed by the plaintiff was somehow convoluted but decided to analyze the merits of the case which was carefully done and eventually the court made a decision after finding the application lacking in merit. That decision according to counsel for the respondent does not represent any error. The plaintiff can only appeal because this court cannot sit on an appeal in respect of its own ruling.

6. This application seeks for the review of an order of this court which is an exercise of this courts discretion which principally is sought under the provisions of sections 80 of The Civil Procedure Act and

more specifically under rules 44 of the CPR which provides as follows:-

“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.”

7. The plaintiff must show that there was a mistake or error apparent on the face of the record, the error must be manifest and does not require any examination in order for this court to review its own order. I have gone through the ruling of **Kimaru J.** The judge appreciated the history of the matter and analyzed the application that was before him which was brought under several sections of the law to wit; **section 3 and 63 of the Civil Procedure Act and order 21 rule 8(5) and 50 of the Civil Procedure Rules.** He even recited the order that the applicant sought and quoted verbatim the provisions of orders 21 rule 28(5). The judge went further to question why the plaintiff despite having been given leave to institute contempt proceedings failed to pursue that matter which the Judge found was a procedural misadventure (to use his exact wording). That notwithstanding he analyzed the merits of the application in particular on page 7 he expressed himself thus:

“This court cannot enforce a particular order of this court when it is apparent that other courts have issued orders whose effect is the contradiction of the particular order that is sought to be enforced . . . This court will in the circumstances be seen to be usurping the powers granted to the defendant to regulate the physical planning of the city under the Physical Planning Act if it allow the application sought by the plaintiff. I am of the view that remedy available to the plaintiff if it desires to enforce the said order of this court is to quantify the damages that it alleges to have suffered by the defendant’s alleged failure to comply with the said order of the court.”

8. As far as the application seeking to enforce the mandatory order of injunction through the appointment of a court bailiff or an auctioneer is concerned, I find a Judge of coordinate jurisdiction

determined the matter. If the court made a mistake in the appreciation of the material that was presented before the court based on both law and facts and arrived at an erroneous decision that is not a subject matter of review but an appeal. This court cannot sit on its own judgment to correct its errors. If the plaintiff was seeking a review on the grounds that the application for contempt was determined before it was filed and argued. That would be understandable.

9. I find the application seeking for committal of the defendants officials was not argued because it was not filed although the court kept referring to it, that was done as a by the way. It does not affect the way the court appreciated the particular application. Accordingly I find no grounds for reviewing the order sought and it is hereby dismissed the application with costs to the defendants.

RULING READ AND SIGNED ON 21ST MAY 2010 AT NAIROBI.

M.K. KOOME
JUDGE