REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA Civil Case 68 of 2006

KHALID AWADH LAABD.....PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF MSA.....DEFENDANT

RULING

This is an application expressed to have been brought under the provisions of Order XXXIX Rule 4, Order XLIV Rule 1 and Order L of the Civil Procedure Rules and sections 3A and 63 (e) of the Civil Procedure Act. The application is by defendant and it seeks the following orders apart from costs:-

1. That the court does discharge, vary and/or set aside that part of the order dated 12th October 2007, that compels the defendant to return assorted scrap metal and valuable documents.
2. Alternatively that the court be pleased to review its ruling and order of 12th October 2007 and set it aside.

The application is premised upon the following grounds:-

(a) That there was material non-disclosures on the part of the plaintiff.

(b) That some of the items ordered to be returned were never taken and have been in possession of the defendant.

(c) That the defendant had in any event returned, on the 16th May 2006, all the scrap metal it had taken from the open space adjacent to plot number 3 and occupied by the plaintiff.

(d) That the orders are incapable of being complied with and their continued existence in force is embarrassing.

(e) That if the orders remain in force, they will cause the defendant to suffer irreparable prejudice.

(f) That the plaintiff will suffer no prejudice if the orders sought by the defendant are given.

(g) That the court did not consider that the items ordered had either been returned or were not sufficiently disclosed.

The application is supported by an affidavit of one Wisdom K. Mwamburi, the defendant's Town Clerk sworn on 22nd April 2008. The affidavit substantiates the above grounds.

The application is opposed and there is an affidavit in opposition sworn by the plaintiff. It is deponed in the affidavit, *inter alia*, that the defendant has not given any new evidence or any other reason why the orders given on 12th October 2007 should be discharged, varied, set aside or reviewed and that the application has been lodged too late. It is also deponed that the defendant is in contempt of court and should not be given audience until the contempt is purged. It is further deponed that the applicant has not exhibited an inventory of the items it confiscated which items included the plaintiff's documents and that all items confiscated have not been returned. In the premises, the orders in force against the defendant are not oppressive or embarrassing and should be maintained otherwise the plaintiff stands to loose scrap metal valued at Kshs. 3,000,000/=.

When the application came up before me for hearing on 29th September 2009, counsel agreed to file written submissions which were duly filed by 19th April 2010. In his written submissions, counsel for the defendant contends that there is an error apparent on the face of the record which error is the finding by the Learned Judge that there had been an admission by the defendant when infact there had been no such admission and that the Learned Judge did not consider that after the ex-parte order was given the defendant fully complied with the same by returning the items in question on 16th May 2006 and there should therefore not have made another mandatory injunction as was done on 12th October 2007. According to counsel, the defendant did not confiscate any documents and an order compelling it to return the same is incapable of being complied with. Instead the order is oppressive and unenforceable.

In response to those submissions, counsel for the plaintiff has contended that the conditions set in Order XLIV Rule 1 for the grant

of an order for review have not been satisfied and that the application has been filed with unreasonable delay which has not been explained.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of this matter. The application for review is predicated primarily on the ground that there is an error apparent on the face of the record. I have perused the ruling of Sergon J dated 12th October 2007. At page 2 thereof, the following passages appear:-

> "The defendant claimed that even if the defendant confiscated the plaintiff's goods and documents damages would be sufficient compensation. There is also a terse admission that the defendant had to clear the road reserve to beautify the city for the public good. ……It is admitted by Mr. Mabeya, Learned advocate that the goods which were taken away by his client from the plaintiff's premises were returned upon being served with the ex-parte orders. The Learned advocate argued that since the order of mandatory injunction does not specify the goods taken away it is difficult to fully comply with the order."
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> It was after making those findings that the Learned Judge concluded at page 3 as follows:-
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> "There is an admission that the defendant confiscated the plaintiff's scrap metal and documents. These (sic) evidence proves that the plaintiff has shown that he has a prima facie case with a probability of success."

The first sentence of the above quotation is what is said to constitute an error apparent on the face of the record. With all due respect to the defendant, that is a misapprehension of the conclusion of the Learned Judge. In view of what he had considered, including counsel's submissions before him, the sentence in my view cannot constitute an error apparent on the face of the record. In any event those are not definitive findings as the Learned Judge was considering an interlocutory application at which only prima facie findings can be made.

In the premises, I find no error apparent on the face of the record.

The defendant has also argued that the defendant having fully complied with the order granted on 12th October 2007, the same is spent and serves no purpose to be maintained. That is the position taken by the defendant and contested by the plaintiff. The defendant's contention at the inter partes, hearing of the plaintiff's application was that all the goods which had been taken away had been returned when the defendant was served with the order of injunction granted ex-parte. That contention was considered by the Learned Judge who, notwithstanding that contention, still allowed the plaintiff's application. The defendant has repeated the same contention before me yet its application is not predicated on the discovery of new and important matter or evidence which after the exercise of due diligence was not within its knowledge at the time the order was passed. No new matter or evidence has in any event been exhibited. The conclusion of the Learned Judge cannot in the premises, be disturbed.

Lastly, the order sought to be discharged, varied, reviewed or set aside was made on 12th October 2007. This application was lodged on 30th April 2008. There was therefore a delay of $6^1/_2$ months. The defendant's application has therefore not been lodged without unreasonable delay.

Whichever way I look at the defendant's application, it is for dismissal. The cases cited in support of the application are clearly distinguishable from the facts in this case and having considered them I appreciate that they enunciated the correct principles of law and correctly applied them to the circumstances which obtained in those cases which circumstances do not apply in this case.

This application is without merit and is dismissed.

The defendant shall pay the plaintiff's costs of the application. It is so ordered.

DATEED AND DELIVERED AT MOMBASA THIS 11TH DAY OF MAY 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Nabwana h/b for Mabeya for the Defendant/Applicant and Kirui h/b for Swaleh for the Respondent/Plaintiff.

F. AZANGALALA

JUDGE

11TH MAY 2010