**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 41 of 2006**

**OCCIDENTAL INSURANCE CO. LTD……..APPELLANT**

**VERSUS**

**DHANJI VAGHJI & CO. LIMITED……..…….RESPONDENT**

**R U L I N G**

1. By an amended notice of motion dated 14th May, 2008, Occidental Insurance Company Ltd (hereinafter referred to as the applicant), seeks *inter alia*:

· That this honourable court do review the ruling and order made by Hon. Justice Mutungi delivered on 6th March, 2008, and return a finding that;

(a) The memorandum of appeal herein was filed within time.

(b) The applicant is entitled to a stay of execution herein pending appeal.

· That there be a declaration by this court that no execution can be levied by the respondent's company as it ceased to exist.

2. The application is supported by an affidavit sworn by Sawtantar K. Singh, a supplementary affidavit sworn by Linda Olweny on 29th April, 2008 and a further supplementary affidavit also sworn by Linda Olweny on 22nd May, 2008. There are also grounds stated on the face of the application.

3. In a nutshell the application is premised on two main grounds. First, is the contention that the applicant's appeal which was filed on 26th January, 2006, was filed within the statutory period of 30 days. This is because the judgment subject of the appeal was delivered on 16th December, 2005, and the period between 21st December, 2005 and 6th January, 2006 is under Order XLIX Rule 3A of the Civil Procedure Rules, excluded from the computation of time for the filing of the appeal. For that reason there is an error on the face of the record in the ruling delivered by Mutungi J. on the 6th March, 2008 dismissing the applicant's application for stay of execution on the grounds that there is no valid appeal before the court as the appeal was filed out of time and without leave of the court. Secondly, the contention that new and important evidence has come to light, to the effect that the respondent's company has ceased to exist, and therefore the applicant will suffer substantial loss if the decretal sum is paid as the applicant will not be able to recover the same.

4. The respondent Dhanji Vaghji & Co. Ltd replied to the application through an affidavit sworn by its managing director Naran Dhanji Pondoria. The respondent maintains that the application is an abuse of the process of the court as it is intended to vex the respondent and undermine the court's authority. The respondent further contends that there is no appeal before the court and that in any case the intended appeal has no chances of success.

5. Following a consent recorded before me by both parties counsel, written submissions were duly exchanged and filed and I have been asked to determine this application based on those submissions. In his written submissions counsel for the applicant relying on *Suleiman vs Karasha (1989) KLR 201*, and *Meru Misc. Civil Application No.7 of 2005 Summer Distributors Limited vs Dahel Mohammed Daud* (U.R) urged the court to find that there was an error apparent on the face of the record with reference to computation of time as the period between 21st December, 2005 and 6th January, 2006 was not excluded. Relying on *Civil Appeal No.67 of 2004, John Francis Muyodi vs Industrial commercial Development Corporation* (U.R), counsel for the applicant submitted that the error was one on a substantial point of law which stares one in the face and one which there could reasonably be no two opinions.

6. Counsel further submitted that under Section 79G of the Civil Procedure Act, the court ought to have considered the time required to obtain the decree or order appealed from, and any other sufficient reason given by the applicant, in explaining the delay. The court was therefore urged to find that the appeal was filed within time and admit the appeal. With regard to the prayer for stay of execution pending appeal, it was submitted that there was new and important evidence which had emerged with regard to the existence of the respondent company which evidence was previously not available.

7. The information was that the respondent has ceased its operation in this country since the year 1999 and has since relocated to the United Kingdom. It was therefore maintained that should the order for stay of execution not be granted, the applicant would be unable to recover the decretal amount if successful in its appeal. It was maintained that no prejudice would be suffered by the respondent if the orders sought are granted as the applicant has already deposited a sum of Kshs.1.5 million as security. It was maintained that the applicant's appeal had good chances of success and that the application for review had been brought without undue delay.

8. On his part counsel for the respondent, submitted that the application before the court was totally defective as it was an application filed in Civil Appeal No.41 of 2006 whilst seeking to review a ruling in Misc. No.64 of 2006. It was maintained that the subsequent consolidation of the two suits cannot bestow validity to the application retrospectively. It was further contended that the amended notice of motion was incompetent as it did not comply with Order VIA Rule 7, no endorsement of the date of the amendment having been made. In this regard counsel relied on the case of *Wilfred Dickson Katibi vs Barclays Bank of Kenya & 2 others (2006) eKLR* in which a preliminary objection was successfully taken to an amended defence and counter-claim which did not contain an endorsement.

9. It was further submitted that Order XLIV Rule 1 of the Civil Procedure Rules, was not complied with as the copy of the order sought to be reviewed was not annexed to the affidavit in support of the motion, but was annexed to a supplementary affidavit filed irregularly without leave of the court. It was submitted that the supplementary affidavit was inadmissible and therefore the application fatally defective. In this regard counsel relied on the following authorities:

*(i) Bernard Githii vs Kihoto Farmers Co. Ltd. HCCC No.32 of 1974 (UR)*

*(ii) Housing Finance Company of Kenya Ltd vs Prudential Drycleaners Ltd (2002) 2 KLR 162*

*(iii) Gulamhusein & Another vs Daimbhai (1929-30) KLR 41*

10. Counsel for the respondent also submitted that the application before the court was *res judicata* as it was raising the same issues which were considered in the previous application. It was maintained that both the issue of computation of time, and the allegation regarding the ceasing of the respondent's operations in the country and relocation to the United Kingdom were raised during the hearing of the

previous application. It was submitted that the court could not sit on its own appeal.

11. Counsel for the respondent further submitted that a memorandum of appeal was not a pleading within the meaning of Order XLIX Rule 3A of the Civil Procedure Rules. Counsel submitted that the filing of the application in HCCA No.41 immediately after the ruling in Misc. No.64 was a well calculated move by the applicant to obtain yet another temporary stay of execution order without disclosing to this court that a similar application had already been determined by the same court. It was noted that the applicant took no action in the appeal i.e. HCCA No.41 until the ruling sought to be reviewed was delivered and the temporary stay orders vacated. The court was urged to dismiss the application.

12. In reply to the submissions made by the respondent's counsel, counsel for the applicant maintained that the application was not fatally defective. He conceded that the order sought to be reviewed was made in Misc. No.64 of 2006, but maintained that the prayer to review that ruling was only brought in by an amendment made on 22nd May, 2008 after the consolidation of the two suits on 30th April, 2008. Regarding the failure to endorse the date of amendment on the amended notice of motion, it was contended that this was a defect in form which does not render the pleadings incompetent. It was maintained that no prejudice would be suffered by the respondent, as the respondent can be compensated by an award of damages.

13. With regard to copy of the order sought to be reviewed, it was maintained that the same was properly before the court, having been annexed to the supplementary affidavit which was filed pursuant to leave granted by Hon. Sitati J. on 4th May, 2008. It was submitted that the issue of *res judicata* could not arise, as what was before the court was an application for review of a previous order. It was maintained that there was an error on the face of the record with regard to the application of Order XLIX Rule 3A of the Civil Procedure Rules. It was submitted that a memorandum of appeal is a pleading as defined in Section 2 of the Civil Procedure Act. With regard to the allegation of abuse of the court process, it was contended that the filing of the application for stay in a Miscellaneous Cause was a mistake made by counsel for which the client cannot be blamed. Finally it was denied that the applicant was responsible for the delay in taking action in the appeal.

14. I have carefully considered this application, the affidavit in support and in reply, the detailed submissions filed by counsels and the authorities cited. It is necessary to consider first whether the application is properly before the court. I note that the order made by Mutungi J. on 6th March, 2008 now subject of the review application was made in Misc. Civil Application No.64 of 2006, whilst the amended notice of motion seeking to review the order made by Mutungi J. on 6th March, 2008 was filed in HCCA No.41 of 2006. A careful perusal of the two files confirms the applicant's contention that an order was made for these two files to be consolidated on the 30th April, 2008. It is also evident from the record that the prayer seeking to review the ruling made by Mutungi J. was only brought in by an amendment after the two suits had been consolidated. Nothing therefore turns on the respondent's submissions in this regard.

15. With regard to the alleged failure to comply with Order XLIV Rule 1 of the Civil Procedure Rules, by failing to annex a copy of the order sought to be reviewed, again, that objection fails as it is obvious that the order was annexed to a supplementary affidavit filed on 22nd May, 2008 pursuant to leave granted by the court on 14th May, 2008. I have found some substance in the respondent's contention that Order VIA Rule 7(1) of the Civil Procedure Rules was not complied with as the amended notice of motion was not endorsed with the date of the amendment. In my considered view, failure to comply with that rule has not caused any prejudice to the respondent. The court has an obligation to administer substantial justice. It is therefore necessary that the application be determined on merit rather than technicalities.

16. An issue was also raised that the application before the court was *res judicata* as it was raising the same issues which were considered in the previous application. Under Section 7 of the Civil Procedure Act the plea of *res judicata* arises where the matter directly and substantially in issue has been directly and substantially in issue in a former suit (or in this case in a former application) between the same parties

in a competent court and the issues have been heard and finally decided. In this case, the main issue is whether there is justification for review of the orders made by the court on the 6th March, 2008. While it is true that issues relating to computation of time and the allegation regarding the ceasing of the respondent's operation were raised in the previous application, this court is not determining these issues afresh but is simply considering the previous proceedings and ruling with a view to determining whether there is an error apparent on the face of the record or discovery of new and important matter as to justify the review of the previous ruling. The matters in issue were therefore not substantially in issue in the application canvassed before Hon. Mutungi J. For the above reasons I find that the amended notice of motion dated 14th may, 2008 is not *res judicata* and is properly before this court.

17. The main issue for consideration is whether the applicant has satisfied the conditions under Order XLIV Rule 1 of the Civil Procedure Rules so as to justify the review of the orders made by Mutungi J on 6th March, 2008. Order XLIV Rule 1(1) of the Civil Procedure Rules, is clear as to the circumstances under which an order for review can be made. These are as follows:

(a) Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made.

(b) The existence of some mistake or error apparent on the face of the record

(c) Any other sufficient reason.

In addition, the application must have been brought without unreasonable delay. In this case, the applicant has sought to establish discovery of new and important matter and the existence of some mistake or error apparent on the face of the record. The application was brought timeously as it was filed just 8 days after the ruling of 6th March, 2008.

18. With regard to the alleged discovery of new and important matter regarding the existence of the respondent's company, the same is not new matter. In an affidavit sworn by Richard K. Mwombo on 26th January, 2006, and filed by the applicant in support of notice of the motion dated 26th January, 2006 which was subject of the orders sought to be reviewed, the deponent stated at paragraph 8, that the respondent company was no longer in existence as the directors were alleged to have relocated to India and on that basis, it was contended that the applicant would not be able to recover the decretal sum if successful in its appeal. The application cannot therefore succeed on this ground.

19. Regarding the presence of an error apparent on the face of the record with reference to computation of time, Order XLIX Rule 3A of the Civil Procedure Rules, states as follows:

"*Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the sixth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act.*"

20. It is clear to me that a memorandum of appeal is a pleading as it provides the basis of the appeal. Although the definition of pleading in Section 2 of the Civil Procedure Act does not specifically include a memorandum of appeal that definition is not exhaustive. Moreover, in my view even without going into the issue as to whether a memorandum of appeal is a pleading or not, Order XLIX Rule 3A of the Civil Procedure Rules provides for the omission of the period between 21st day of December, in any year and 6th day of January, in the next year, (both days inclusive), in the computation of time for the amending or filing of any pleadings or "*the doing of any other act*." Such would include an action, such as filing a memorandum of appeal. I find it clear that there is an error apparent on the face of the record as in computing the statutory period for filing the memorandum of appeal in the ruling of 6th March, 2008 the period between 21st December, 2005 and 6th January, 2006 was not excluded as provided under Order XLIX Rule 3A of the Civil Procedure Rules. Had that been done, it would have been clear that the period

between 16th December, 2005 when the judgment of the lower court was delivered and 26th January, 2006 when the applicant's memorandum of appeal was filed, was not outside the statutory period of 30 days. Thus, the memorandum of appeal was filed within time and the appeal is properly before the court.

21. For the above reasons I do allow the application dated 14th May, 2008 and issue orders as prayed in prayer (4). The applicant shall have costs of this application. Those shall be the orders of this court.

Dated and delivered this 29th day of January, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Otieno for the appellant

Mutua for the respondent