REPUBLIC OF KENYA

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

Civil Suit 454 of 2004

BELGO HOLDINGS LIMITED…….…….....…..……
PLAINTIFF

VERSUS

ROBERT KOTCH OTACHI……..……1ST DEFENDANT

WILSON BIRIR…….……2ND DEFENDANT

R U L I N G

The Plaintiffs, by a Notice of Motion application dated 15th July, 2008 seeks to have the ruling of Hon. Kariuki P. J. made on 16th May, 2008 reviewed or set aside, and that the defence filed herein be struck out and judgment entered in favour of the Plaintiff as prayed in the plaint, save as to damages. The Plaintiff has invoked section 80 of the Civil Procedure Rules which provides:

"***80. Any person who considers himself aggrieved-***

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

The application is based on the following grounds.

i) The Defendants are guilty of contempt in the face of the Court;

ii) Oyugi & Company have acted for the First Defendant and his Company in at least three other High Court cases during last year and still continue to do so;

iii) Defendants' contention during the hearing of the Application dated 11th January 2008 that they had no knowledge of the court orders for discovery and inspection are obvious falsehoods;

iv) No litigant should be allowed to obtain and or retain an advantage gained as a result of contempt of Court; and

v) After being admittedly aware of the Court orders for discovery and inspection since at least

10th April 2008 the Defendants have still not given discovery or inspection.

The Applicant has relied on the further grounds contained in the affidavit dated 15th July, 2008 and the supplementary affidavit dated 24th November, 2008 both sworn by James Ochieng Oduol, a partner in the firm of Advocates representing the Plaintiff. I have considered the contents of these affidavits.

The application is opposed. The 1st Defendant has sworn a replying affidavit on his behalf and on behalf of the 2nd Defendant, dated 24th September, 2008. I have considered the contents of this affidavit.

Mr. Oduol gave a brief background of the case. The Plaintiff by an application dated 11th January, 2008 sought to have the defence struck out on account of the Defendants failure to give discovery. Earlier on Hon. Warsame, J. gave an order for discovery directing that the Defendants should make discoveries of documents mentioned in their affidavit dated 20th July, 2005. Mr. Oduol submitted that the order was served on Mr. Oyugi for the Defendants but no discovery was made. The Plaintiff's application was dismissed by Hon. Kariuki, J. in his ruling of 16th May, 2008. Mr. Oduol submitted that in that ruling the Hon. P. Kariuki, J. gave the Defendants the benefit of doubt on account of the fact the Defendants were not in terms with their Advocate.

Mr. Oduol submitted that the Plaintiff has since discovered that the 1st Defendant and the former Advocate, Oyugi & Co. Advocates were in good terms. In support of this application the Plaintiff has annexed correspondences and pleadings showing that the advocate is actively prosecuting cases on behalf of the 1st Defendant. Mr. Oduol urged that the Defendants breached their duty of candor to the Court and failed to make full disclosures and that in the circumstances the Defendant's affidavit was false in material particular.

Counsel relied on the case of **Eastern Radio Services v Tiny Tots [1967] EA 392 & Coastal Aquaculture Limited v National Bank of Kenya Limited & 9 Others [2006] eKLR** for the preposition that if it is shown that refusal to give discovery is willful and deliberate then pleadings of the concerned party should be struck out.

The 1st Defendant addressed the court on behalf of both Defendants. He relied on his replying affidavit. He also referred court to his earlier affidavit dated 10th April, 2008 and emphasized paragraph 5 where he averred as follows:

"5. THAT, on 18th April 2007, I and my Co-Respondent held another meeting with Mr. Oyugi of Oyugi & Company Advocates whereby I and my Co-Respondent failed to agree with Mr. Oyugi as he threatened to cease acting for I and my Co-Respondent alleging that the case was taking too much of his time and he demanded that we pay him his full fees immediately."

The 1st Defendant has submitted that the order for discovery made by Warsame, J. has to date not been served upon the Defendants.

The 1st Defendant urged that the application for review of Kariuki, J's order has been made after 2 months from date of ruling sought to be reviewed, and that the delay was not explained.

The 1st Defendant drew the court's attention to the fact that the order of 16th May, 2008 by Kariuki, J. sought to be reviewed has not been annexed to the instant application. He urged that omission was fatal to the application. For that preposition he relied on the case of **Bernard Githii on behalf of Mutathini Farmers Co. v Kihoto Farmers Co. Ltd., HCCC NAI No. 32 of 1974**.

The 1st Defendant urged that the ruling of Hon. Kariuki, J. was that the case should go to full hearing and should not be disposed off through shortcuts. The 1st Defendant urged the court to dismiss the application for lack of merit.

I have considered the application together with the submissions by Applicant's advocate. The Applicant invoked section 80 of the Civil Procedure Act which provides the substantive law which gives the court unfettered powers to review its own orders. Though not *ejus dem generis* to section 80, the procedural law is provided under order XLIV rule 1 (1) of the Civil Procedure Act. Under the said rule:

"***1. (1) 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 the judgment to the court which passed the decree or made the order without unreasonable delay."

An objection has been raised by the Respondents that the order sought to be reviewed was not annexed to the application. Mr. Oduol for the Applicants has urged that the order is within the court record and therefore needed not be attached to the application. In the leading case of **Bernard Githii on behalf of Mutathini Farmers Co. v Kihoto Farmers Co. Ltd., HCCC NAI No. 32 of 1974**, supra, Nyarangi, J. as he then was held:

"***There is no decree drawn up and attached to the application. It is not as clear as it ought to be what aggrieves the applicant. There has to be a decree or order in discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the Applicant and could not be produced by him at the time the decree was passed or order made etc. before an application may be made for a review of a judgment"***

I respectively agree with the views of Nyarangi, J. It is trite that the decree or order sought to be reviewed must be annexed or attached to the application in order for the Applicant to clearly show what has aggrieved it. Before making the application, there must have been a decree or an order drawn which aggrieved the Applicant and that is the order or decree that it ought to have annexed to this application in its support. Failure to annex that decree or order is fatal to the application. In the case of **Gulam Hussein M. Jivanji and Another v Ebrhaim Mr. Jivanji and Another, Law Reports of Kenya, 1929-30, Vol. 12, page 41** the CJ stated *inter alia*:

"***But, in my opinion however aggrieved a person may be at the various expressions contained in a judgment or even at various rulings embodied therein, unless the person is aggrieved at the formal decree or formal order based upon the judgment as a whole that person cannot ….appear before the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable."***

The Applicant needed to bring itself within section 80 of the Civil Procedure Act by annexing the decree or formal order which has aggrieved it in order to make the application for review. This was not done. All the Applicant has stated in its application is that the ruling and the order of the Honourable Court be reviewed or set aside. Even if I may be wrong on that point, the ruling of the Learned Kariuki, J. is on record. Paragraph 6 and 7 at page 5 of the ruling gives a precise ground upon which the Plaintiff's application was dismissed. The learned judge states as follows:

"***6. The court's jurisdiction under Order 10 rule 20 of the Civil Procedure Rules should not be exercised except in extreme cases and as a last resort and then only where the court is satisfied that a party to the suit is avoiding a fair discovery or is guilty of willful default. As I have already observed, Oyugi & Company, Advocates, ceased to represent the Defendants by order made on the 26th***

February, 2008 but even before that date, the Defendants say that their Advocates failed to inform or advise them with regard to the orders made on the 22nd June 2007. Given the apparent acrimony between the Defendants and Mr. Oyugi, it is not inconceivable that he would have failed to act on such orders to the detriment of the Defendants. In these circumstances, and given that the Defendants are not now represented by counsel, I cannot say with any certainty that the Defendants are avoiding a fair discovery or that they are guilty of willful default. I am therefore, inclined to give the Defendants the benefit of doubt in declining to allow the application.

7. With regard to the Plaintiff's assertion that judgment should be entered on the basis that the Defendants are deemed to have admitted the documents specified in the Notices to Admit respectively dated the 24th October, 2007 and 27th November, 2007, it is clear, even from the two supporting affidavits, that the facts in this case are contested and in issue. The Plaintiff's allegations that the Defendants are in impostors as its directors and that they forged certain documents are denied in the defence and also in the 1st Defendant's affidavit sworn on 20th July, 2005. To determine the truth, it seems to me that evidence must be led before the trial judge.

8. In the result, the Notice of Motion filed on 27th January 2008 fails and is herby dismissed with no orders as to costs."

From the tenor of the ruling of the learned Judge, and with due respect to the learned Advocate for the Plaintiff, the reason why the Plaintiff's application was dismissed was not merely because the learned Judge gave the Defendants the benefit of doubt on account of not being in good terms with their previous advocates. In addition to the above, the learned Judge was saying that it was his view that the matter should go to trial since the Defendants had denied that they forged the documents in issue. It is therefore not correct to say that since the Plaintiff has since 'discovered' that the 1st Defendant is in good terms with his previous advocate in this suit, that this should be a basis to review the learned Judge's order. There were various findings by the learned judge which must be looked at as a whole, and conjunctively and therefore, the Plaintiff is wrong to select sections of the ruling of the learned Judge in order to support its application. It is my view that if the Applicant was aggrieved by the ruling of the learned Judge, the only option open to him was to file an appeal against the said ruling.

The Applicant has not brought itself within section 80 of the Civil Procedure Act or order XLIV rule 1 of the Civil Procedure Rules in that he has failed to annex any ruling or order or decree to support its application that it is aggrieved and that there is a need to review the ruling or order of the court. Secondly, the grounds upon which the application was made is in my view a misapprehension of the learned Judge Kariuki's ruling. The learned Judge's ruling is very clear that the matter should go to trial regarding the documents which are both contested and are in issue in the matter. In the circumstances, this application fails.

In conclusion, therefore, the Plaintiff's application dated 5th July, 2008 be and is hereby dismissed with costs to the Defendants.

Dated at Nairobi this 30th day of April 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Karanja holding brief Mr. Ochieng Oduol for the Applicant

Defendants in person

LESIIT, J.

JUDGE