



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 620 OF 2007

SHEILA AKINYI MARCO.....1ST PLAINTIFF
CHRISTINE WAIRIMU MBURU.....2ND PLAINTIFF
PAULINE NGANGA.....3RD PLAINTIFF

VERSUS

SASANET LIMITED1ST DEFENDANT
SASANET INVESTMENT COOPERATIVE SOCIETY LIMITED.....2ND DEFENDANT
MICHAEL CHEGE NJOROGE.....3RD DEFENDANT
SAMMY GITAU NJOROGE.....4TH DEFENDANT

RULING

Before is a notice of motion made by the plaintiffs under the provisions of **Order XLIV Rules 1, 2 & 3** of the **Civil Procedure Rules** seeking an order from this court to review its order of 4th February 2009. The plaintiffs further prayed that upon review of the said order, the court should allow the notice of motion by the plaintiffs dated 11th November 2008. The plaintiffs further prayed to be awarded costs of the application and costs of the aborted auction of 11th November 2008. The application is supported by the annexed affidavit of Sheila Marco, and the grounds stated on the face of the application. The application was supported by the 2nd objector, Moses Wangai Njoroge who swore a replying affidavit in support of the plaintiffs’ application. The 5th objector filed grounds in opposition to the application.

At the hearing of the application, I heard the rival arguments made by Mr. Gichuhi and Mr. Mungai on the one hand and by Mr. Mugambi on the other. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The plaintiff wishes the court to review its order of 4th February 2009 by which this court held that the 5th objector was the equitable owner of LR. No. Nairobi/Block 93/1074, Flats No.1, 2 and 4 (hereinafter referred to as the suit property). In the said application, the plaintiffs had sought orders from the court to sell the suit property in satisfaction of a judgment entered in its favour by the court as against the 3rd defendant for the sum of Kshs.7,148,000 /= plus costs and interests. The court held that by the time the plaintiff obtained prohibitory order against the suit property, the suit property had already been

transferred to the 5th objector. The 1st to 4th objectors had a similar but competing claim on the suit property. The court disallowed the applications of the plaintiffs and that of the 1st to 4th objectors to proceed with the attachment and sell off the suit property in satisfaction of the respective decrees entered in their favour by the court.

The plaintiffs and the 1st to 4th objectors were dissatisfied with the decision of this court and duly filed notice of their intention to appeal against the said decision of this court. However, it appears that along the way, the plaintiffs changed their minds and instead of pursuing the appeal, they opted to apply to this court to review its decision. If I got the plaintiffs correctly, they wish to review the decision of this court basically on two grounds; that they had made discovery of new and important evidence that was not within their knowledge at the time the application was argued, and if they had presented such evidence to the court, then, probably the court would have reached a different decision. The second ground that the plaintiffs advanced was that the 5th objector had made material non disclosure to the court and therefore was not entitled to the orders granted in its favour. On their part, the 1st to 4th objectors urged the court to review its decision on the ground that there was an error apparent on the face of the record that the court should consider and reverse its decision. In response to the plaintiffs' application, the 5th objector argued that the application could not be allowed since the plaintiffs had opted to file an appeal against the said decision of this court and therefore the remedy of review was not available to them. The 5th objector submitted that it had disclosed all material facts essential for the court to make a determination in the matter. It was 5th objector's case that the grounds placed before the court were not new or important matters of evidence that would lead this court to reach a decision different than the one it reached.

As regard whether the plaintiffs can file an application for review when they have already filed notice of their intention to appeal against the decision of this court, I hold that the fact that the plaintiffs filed a notice of appeal does not mean that they have filed an appeal to the Court of Appeal. An appeal is deemed to be filed upon the appealing party filing the record of appeal. In any event, even where such a record of appeal has been filed, if a party has sufficient grounds to review which he thinks that he can present to the court, then, in my considered opinion, the law does not bar him. The Court of Appeal in **African Airlines International Ltd vs Eastern and Southern African Trade and Development Bank [2003] 1EA1** at page 2 held that:

*“We would finally add that Mr. Kang’ethe contended that because the applicant preferred a review, it thereby lost its right of appeal. There is no merit in such a contention. The legal position is, we think, well settled. It was succinctly stated in **Sarkar’s Law of Civil Procedure (8ed) Volume 2** at 1592 as follows (omitting the citation of the case law):*

“Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of a court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard the review cannot be proceeded with’.”

It is therefore evident that this court has jurisdiction to entertain the present application for review despite the fact that the plaintiffs filed notice of their intention to appeal against the said decision of this court.

The facts in support of the plaintiffs' application for review on the ground that there is discovery of new and important piece of evidence that was not available to the plaintiffs at the time the application was argued are that the plaintiffs discovered that the 5th objector had filed suit seeking to enforce its proprietary rights over the suit property. It was the plaintiffs' case that the 5th objector failed to disclose to the court the existence of that suit and further failed to disclose the facts that its attempt to obtain interim orders of injunction in the said suit had been thwarted by the court. It was further argued on behalf of the plaintiffs that the then advocate of the 5th objector had failed to disclose to the court that he had been donated a power of attorney by the 3rd defendant to enable him transfer the suit property to the 5th objector. The plaintiffs were of the view that if the said information was disclosed to the court, the court would have reached a different decision. Counsel for the plaintiffs urged the court to overturn its

decision holding the 5th objector to be the equitable owner of the suit property, because in his view, the fact that the 5th objector had entered into an agreement with the 3rd defendant for purchase of the suit property, did not give the 5th objector priority in a claim over the suit property that was superior to that of the plaintiffs who had obtained a prohibitory order attaching the suit property in satisfaction of the decree of this court. On their part, the 1st to 4th objectors argued that the court had made an error apparent on the face of the record when it held that the 1st to 4th objectors had filed an amended plaint without the leave of the court when in actual fact the 1st to 4th objectors had filed the said amended plaint before pleadings were closed. The 1st to 4th objectors were of the view that the finding by this court therefore, constituted an error apparent on the face of the record. The 5th objector was of the view that there was nothing wrong with the decision of the court to entitle review its decision.

Having evaluated the facts of this case and the applicable law, I take the following view of the matter. For an applicant to succeed in an application to review a decision of the court on the ground of discovery of new evidence, he must establish that he had made discovery of the new and important evidence that after the exercise of due diligence was not within his knowledge or could not be produced by him at the time the order was made (see **Touring Cars (K) Ltd vs Munkanji [2001] 1EA 261.**) Would the fact that the 5th objector had filed another suit seeking declaratory orders in regard to the suit property have lead this court to reach another decision than it did? Would the fact that the advocate of the 5th objector have power of attorney from the 3rd defendant to transfer the suit property to the 5th objector persuade this court to reach a decision other than the one it reached? Would the fact that the plaintiffs are of the view that they have priority of the suit property that is superior on account of the prohibitory orders issued in its favour by this court lead this court to reach a different decision than the one it did? I do not think so. I am of the view that the arguments presented to this court by the plaintiffs are actually a rehash of the arguments that they presented to the court when they argued the initial application that is the subject of this application for review. I think, with the greatest respect to learned counsel for the plaintiffs, the plaintiffs are seeking to have a second bite of the cherry. In essence, the plaintiffs appear to be calling upon this court to sit on appeal against its own decision. That cannot be. The grounds presented to this court by the plaintiffs are not new and important evidence that would this court to reach a different decision other than the one it reached.

As regard the 1st to 4th objectors, having assessed their arguments on what they advanced to be an error on the face of the record, I am not persuaded that such error indeed exists. There is no error apparent on the face of the record that stares at the court. According to the Court of Appeal in **Nyamogo & Nyamogo advocates vs Kogo [2001] EA 170**, in considering whether there is an error apparent on the record the court is not required to establish the existence of such error by long drawn process of reasoning or on points where there may conceivably be two opinions. It was clear that the 1st to 4th objectors have an interpretation on the facts of the case that is different from that of the court. They are entitled to their opinion. If they are aggrieved by the decision of this court, they have a constitutional right of appeal. They cannot purport to present their considered view on the facts of the case under the guise that this court committed an error that is apparent on the face of the record that ought to be reviewed.

I find no merit with the application. I proceed to dismiss it with costs.

DATED AT NAIROBI THIS 19TH DAY OF JUNE 2009

L. KIMARU

JUDGE