



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 78 OF 2009**

**ALPHA LOGISTICS (K) LTD..... 1<sup>ST</sup> PLAINTIFF**

**PAUL KERAYIAN KANTAI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**UPLIFT EXPRESS LIMITED.....1<sup>ST</sup> DEFENDANT**

**MUSA IBRAHIM T/A BIN HASHAM TRANSPORTERS .....2<sup>ND</sup>  
DEFENDANT**

**R U L I N G**

On 31<sup>st</sup> March 2009, this court dismissed the plaintiff's application for interlocutory and mandatory injunction. The material part of its ruling stated as follows:

*“From the above facts, it is clear that the transportation of the consignment was frustrated by the fact that the two containers contained an excess load of bitumen which could not be transported by road without part of it being offloaded. It appears that the plaintiffs were not prepared either to reduce the load in the containers or alternatively hire a lorry with capacity to transport the consignment and which could be permitted by the Ministry of Roads officials to be transported by road. I was persuaded that the transport contract was frustrated by factors beyond the contemplation of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant was not responsible for the excess load of the consignment. The 1<sup>st</sup> defendant abided by the terms of the contract, and indeed transported the consignment upto Mariakani weighbridge where its lorry was stopped and prevented from being driven further on account of the fact that it was carrying a load that was excess in weight and therefore not permissible to be transported by road. The 1<sup>st</sup> defendant established that it refunded the sum that was deposited with it by the plaintiffs. The 1<sup>st</sup> defendant was compelled to pay a fine of KShs.150,000/= when its lorry was found to be loaded with the consignment which was of an excess weight. I hold that the 1<sup>st</sup> defendant cannot in the circumstances be held liable for the frustration of the contract.”*

The plaintiff was aggrieved by the decision of this court, and on 23<sup>rd</sup> April 2009 filed a notice of motion pursuant to the provisions of **Order XLIV Rule 1** of the **Civil Procedure Rules** and **Section 80** of the **Civil Procedure Act** seeking an order to review this court's ruling of 31<sup>st</sup> March 2009. The grounds in support of the motion are on the face of the application. The plaintiffs state that there was an error

apparent on the face of the record in that the court had not appreciated the plaintiffs' case that indeed the defendants had failed to honour their part of the contract by failing to transport the two containers, namely CRXU 2194794 and CRXU 3460899. It was the plaintiffs' case that due to the error made by the court, it had continued to incur daily demurrage charges which could only be remedied by this court reviewing its said decision. The application is supported by the annexed affidavit of Michael Ng'ang'a, the operations manager of the 1<sup>st</sup> Plaintiff.

The application is opposed. The 1<sup>st</sup> defendant's director, Nathan Chesang swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that there was no error apparent on the face of the record as the court had considered all the evidence adduced before arriving at the said decision. He deponed that the fact that the court may have misapprehended some issues, was ground for appeal and not ground for review. He urged the court to disallow the application.

At the hearing of the application, I heard rival submissions made by Mr. Odhiambo Ochieng' for the plaintiffs and by Mr. Koyyoko for the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant filed objection to the application. Neither the 2<sup>nd</sup> defendant nor his counsel appeared before court on the day the application was scheduled to be heard. I have carefully considered the rival arguments made by the parties to this application in support of their respective opposing positions. I have also read the pleadings filed by parties herein. The issue for determination by this court is whether the plaintiffs established sufficient basis for this court to review its ruling on the ground that there was an error apparent on the face of the record.

The principles to be considered by this court in determining whether there has been an error apparent on the face of the record are settled. In **Nyamogo & Nyamogo Advocates vs. Kogo [2001] EA 173** at page 174, the Court of Appeal held that:

*“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”*

In the present case, it is the plaintiffs' case that this court made an error that is apparent on the face of the record when it failed to consider the fact that the two containers should have been transported in two trips instead of a trip. It was the plaintiffs' case that the grief that befell the 1<sup>st</sup> defendant when its lorry was impounded at the Mariakani weigh bridge was not as a result of failure on the part of the plaintiffs but was as a result of greed by the 1<sup>st</sup> defendant in attempting to transport the two containers at one go instead of transporting them in two trips.

The court's finding which was to the effect that the transport contract had been frustrated by events beyond the control of the 1<sup>st</sup> defendant was not appreciated by the plaintiffs. The finding by the court that the 1<sup>st</sup> defendant had incurred heavy losses on account of the said contract was faulted by the plaintiffs. The plaintiffs were not impressed that the court had reached a finding that the transportation contract could not be given effect to. The plaintiffs took issue with the fact that the court had awarded costs of the application to a company which had ceased operation. This court's evaluation of the complaints raised by the plaintiffs reveal only one thing; that the plaintiffs were aggrieved by this court's failure to appreciate their case in the manner that they desired the court to so consider.

In my view, the grounds put forward by the plaintiffs are good grounds for appeal and not for review. It was apparent to this court that the plaintiffs were seeking to re-argue their application under the guise that

they were presenting an application for review. In actual fact, the plaintiffs were calling upon this court to sit on appeal against its own decision. That cannot be. There is no error apparent in the ruling delivered by this court that stares at the face of the court. It is clear that the plaintiffs are of the view that this court fell in error in failing to appreciate their case. That is a ground of appeal and not a ground of review. It is the province of the appellate court and not a court of first instance. There is no issue in the present application that has persuaded this court that it made an error that is glaringly apparent on the face of the record that can thus be reviewed. The plaintiffs' have failed to convince this court that there is an error apparent on the face of the record.

In the premises therefore, the plaintiffs' application lacks merit. It is hereby dismissed with costs to the 1<sup>st</sup> defendant.

**DATED at NAIROBI this 3<sup>rd</sup> day of JUNE 2009.**

**L. KIMARU**

**JUDGE**