REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 1794 OF 2000

MASEFIELD TRADING (K) LTD……...…..……... PLAINTIFF

VERSUS

RUSHMORE COMPANY LIMITED...…....1ST DEFENDANT

FRANCIS M. KIBUI……...…2ND DEFENDANT

AND

JACKSON KAHUNGURA……...…INTERESTED PARTY

RULING

On 12th November 2008, this court allowed the plaintiff's application which sought to have a director of the 1st defendant, Jackson Kahungura Kariuki (the interested party) to be orally examined by the court in order to determine whether the 1st defendant had means and assets to satisfy the decree that has been issued in favour of the plaintiff in this suit. It is apparent that the interested party was aggrieved by the said decision of the court and duly filed a notice of his intention to appeal against the said decision to the Court of Appeal.

Along the way, it appeared that the interested party changed his mind. On 27th May 2009, the interested party filed notice of motion pursuant to the provisions of **Sections 80** and **3A** of the **Civil Procedure Act, Order XLIV Rule 1** of the **Civil Procedure Rules** and **Section 401** of the **Companies Act** seeking several orders of the court. The interested party prayed that the court reviews and sets aside its order given on 12th November 2008 requiring the interested party to be orally examined in regard to the assets of the 1st defendant. The interested party further prayed that the court substitutes its said order with an order dismissing with costs the plaintiff's application dated 10th December 2004. In the alternative, the interested party prayed that should the application for review not be granted, the plaintiff be compelled to provide security for costs to the sum of Kshs.2 million before further proceedings are undertaken in this suit. The application is supported by the annexed affidavit of Jackson Kahungura Kariuki, the interested party. The application is opposed. The plaintiff filed grounds in opposition to the application.

According to the interested party, the application had been necessitated by the discovery of new and

important matters that were not placed before the court at the time the application was argued. The interested party argues that the plaintiff had concealed from the court the fact that it was a wholly owned subsidiary of a foreign company that became insolvent, ceased its operations in Kenya and thereafter closed its offices. For this proposition, the interested party relied on documents which it claimed the auditors of the plaintiff had filed with the Kenya Revenue Authority indicating that the plaintiff was no longer in operation. The interested party was particularly agitated that Stan Wijenje, the person claiming to be the general manager of the plaintiff, was also its auditor. The interested party was of the view that the application for examination of director of the 1st defendant dated 10th December 2004 was being prosecuted by persons who are neither employees nor legal representatives of the plaintiff company. The interested party contends that the plaintiff, being an insolvent foreign company, cannot legally execute against the 1st defendant and its officers. The plaintiff filed objection to the application. It stated that the application for review did not lie since the interested party had preferred an appeal against the order that sought to be reviewed. The plaintiff stated that this court lacked jurisdiction to entertain the application for review once an appeal had been preferred. In reaction to the objection raised by the plaintiff, the interested party purported to file a notice of withdrawal of notice of appeal by its notice dated 8th June 2009.

At the hearing of the application, I heard rival arguments made by Mr. Mbigi for the interested party and Mr. Munyu for the plaintiff. The issue for determination by this court is whether the interested party established sufficient grounds to enable this court review its orders of 12th November 2008. Under **Order XLIV Rule 1** of the **Civil Procedure Rules**, this court may review its order if the applicant satisfies the court that he has discovered 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 the order was made. In **Narodhco Kenya Ltd vs Loria Michele CA Civil Appeal No.24 of 1998** (*Msa) (unreported*) the Court of Appeal held at page 4 of its judgment as follows:

"*In our view it is not incumbent upon the judge at the stage of the hearing of an application for review, such as was before the judge here, to inquire fully into the correctness of facts. It would suffice if the court is satisfied that the facts brought up after the event are such as to merit a review of the judgment*."

In the present application, it was the interested party's case that it had discovered that the plaintiff was an insolvent company and was no longer trading in Kenya and therefore cannot be in a position to execute the decree issued in its favour. It was the interested party's case that in view of the fact that the plaintiff did not have employees, it could not execute the decree. It was for these reasons that the interested party was seeking the court to review its said decision. The interested party explained that he was unable to place this information before the court at the time the application was argued because it only stumbled upon the said information after the ruling had been delivered. The interested party was not able to give a satisfactory explanation to the court that he could not obtain the said information upon exercise of due diligence prior to the hearing of the application.

Does the said "*new information*" constitute evidence which would persuade the court to review its order and set aside its said ruling? I do not think so. The fact that the plaintiff has ceased trading and is technically insolvent is not sufficient ground to deny it the right to execute a decree made in its favour by this court. The plaintiff exists in the register of companies. It has not been wound up, either voluntarily or by order of the court. As a company, the plaintiff can only act through its agents, that is, its directors and its employees. In the present application, it is immaterial that the person acting as the general manager of the plaintiff is also its auditor. The interested party has no business inquiring into the internal management of the plaintiff in a bid to avoid a lawful execution process against the 1st defendant. The interested party cannot avoid liability by impeaching the legal status of the plaintiff in circumstances that clearly suggests mischief.

I hold that even if the court were made aware at the time it delivered the ruling that is sought to be reviewed that the plaintiff had ceased operation, this court would not have reached a different decision than it did. The issue for determination in that application was and remains simply this: Did the plaintiff establish sufficient grounds for the interested party to be orally examined to determine the assets of the 1st

defendant with a view to satisfying the decree issued by the court in favour of the plaintiff? In my considered view, the plaintiff discharged the burden placed upon it hence the order issued by the court. The fact that the plaintiff has ceased trading will not change the fact that a court of competent jurisdiction has issued a decree in its favour which is yet to be satisfied. There is no law that I am aware of that prohibits a company that is not trading from enforcing payment of its debts that accrued when it was trading.

The interested party has placed no material before this court to persuade it that there is new evidence or matter that can make it to review its said order of 12th November 2008. The interested party's application dated 27th May 2009 lacks merit and is hereby dismissed with costs

DATED at **NAIROBI** this **29** day of **JULY 2009.**

L. KIMARU

JUDGE