REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 160 of 2004

EDNA S. OUMA …….....… PLAINTIFF

VERSUS

THE GOVERNMENT OF THE ARAB REPUBLIC OF EGYPT ……. DEFENDANT

RULING

By a ruling delivered by Emukule, J on 22nd November 2004, the plaintiff's suit was struck out on the grounds that the plaintiff could not maintain a civil suit against the Embassy of the Government of Arab Republic of Egypt by virtue of the Privileges and Immunities Act (CAP 179 Laws of Kenya and Vienna Convention on Diplomatic Relations 1961). On 8th November 2005 the plaintiff/applicant filed a chamber summons and the only prayer outstanding as I see it, is the one seeking for the review of the ruling of 21st September 2004 delivered by Emukule, J.

Dr. Khaminwa appearing for the plaintiff urged this court to review the order so that the suit can be reinstated for hearing because it involved a money claim where the plaintiff had leased her property to the Embassy of Egypt. It was an issue of landlord and tenant and not a claim against a sovereign state. The tenant who was the Embassy of the Government of Arab Republic of Egypt failed to give the plaintiff 3 months notice when vacating the premises thus the plaintiffs premises were abandoned by the defendant and vandalized as a result of which the plaintiff suffered loss by way of special and general damages. Dr. Khaminwa urged the court to be persuaded by a decision by the High Court Harare where in a similar case of **Barker McCormac (PVT) Ltd v Government of Kenya ZLR 1985(1)** Samatta J held that:-

"***The nature of the doctrine of sovereign immunity is a question of international law and intentional law is part of the law of Zimbabwe. The doctrine of restricted sovereign immunity applies to acta jure imperii, ie acts of purely governmental or public nature and not to acta jure gestionis, i.e. acts of a commercial or proprietary nature. The courts distinguish acta jure imperii from acta jure gestionis by referring to the nature of the State transaction or the resultant legal relationships, and not to the motive or purpose of the State activity.***

Under Roman-Dutch law a sale does not break a lease, "the new owner steps into the shoes of the old owner as landlord" the provisions of the lease, express, implied or residual, remain unchanged."

This application was not opposed however, this court has to be guided by the provisions set out under the provisions of Order XLIV (1) which deals with review in the following terms.

"***(1) any person considering himself aggrieved –***

. . .

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 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, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

From the above provisions of the law, it is trite that an application for review must be brought to court within a reasonable time. On this ground alone I find the ruling by Emukule J was delivered on 22nd November 2004 and this application was brought one year later. This in my view is not within a reasonable time. Secondly, an application for review ought to be brought by way of a notice of motion.

On the merit of the application, an applicant must show that there has been a discovery of new and important matter or evidence which after due diligence was not within their knowledge or could not be produced at the time when the order

or decree was passed. The applicant may also show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

The ground relied upon by the applicant in this application is that the judge in arriving at the decision, did not take into consideration the principles set out in the case by the High Court Zimbabwe set out above. However no explanation was given why counsel for the plaintiff had not conducted extensive research because that decision he relied on was passed way back in 1985. In my view this is not a proper ground for review because this court cannot sit on an appeal to review a ruling based on a mistake or misapprehension of the law or failure to appreciate the material that was before the court by a judge of coordinate jurisdiction. That is tantamount to the court sitting on its own appeal to correct its errors arising from its own failure to appreciate the law and precedents. For this reason as well, I find this application lacking merit. The applicant's remedy is in an appeal to the Court of Appeal. The application is dismissed since it was not defended, there will be no order as to costs.

RULING READ AND SIGNED ON 20TH NOVEMBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE