



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

Civil Case 298 of 2009

GANESHLAL PUSHARAM GALOT.....1ST PLAINTIFF

**TARA GALOT & KEVIN PURCHARAM GALOT *suing on behalf of the Estate of*
LALACHAND PUSHARAM GALOT.....2ND PLAINTIFF**

**LALITA DEVI LALCHAND GALOT *suing on behalf of the Estate of*
LALCHAND PUSHARAM GALOT.....3RD PLAINTIFF**

GALOT INDUSTRIES LIMITED4TH PLAINTIFF

VERSUS

MOHAN GALOT1ST DEFENDANT

SANTOSH GALOT.....2ND DEFENDANT

RITA GALOT3RD DEFENDANT

NINA GALOT.....4TH DEFENDANT

MOHAN MEAKIN KENYA LIMITED.....5TH DEFENDANT

LONDON DISTILLERS KENYA LIMITED6TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....7TH DEFENDANT

RULING

1. On 2nd October 2008, I determined an application by the plaintiffs dated 28th April 2009. I granted orders of injunction restraining the defendants their agents or servants from transferring or dealing in any way with the property of Galot Industries Ltd namely IR 36270(LR 12867/15) – Athi River, IR 36280 (LT 2867/16) Athi river, IR 35284(LR 12867/20) – Athi River, King Woolen Mills Limited – 100,000 ordinary shares and 4,998 management shares, Mohan Meakin Kenya Limited – 216, 320 ordinary shares pending the hearing and determination of this suit.

2. On 19th October 2009, the defendants filed the notice of motion under **Section 3A** and **80** of the **Civil Procedure Act** and under **Order 44** of the **Civil Procedure Rules**. The Applicants are seeking for an order that the ruling delivered on 2nd October 2009 be reviewed and set aside. This application is premised on the grounds that the court omitted to give a ruling on certain issues raised in the Preliminary Objection which was heard together with the main arguments in reply to the application, for which the court ought to have given a comprehensive ruling.

3. Secondly, the court relied on an affidavit sworn by Kennedy Musoti, a state counsel sworn on 14th July 2009 which should not have been considered because it was filed in contravention of **Order 50 Rules 16(1)** of the **Civil Procedure Rules**. The affidavit is also meant to oppose the Plaintiff's application which is irregular. Moreover, the 1st to the 6th Defendants were not given an opportunity to respond to the said affidavit.

4. The court had also ruled that this affidavit was not admissible and the ruling of the court clearly shows the court largely relied on the averments in that affidavit to arrive at the conclusion. There are specific paragraphs, which were lifted from the affidavit by the State Counsel, which the court relied upon to determine the matter in favor of the order of injunction. The 1st to the 6th Defendants were not given a chance to respond to the allegations which are contained in that affidavit of Kennedy Musoti, who is also an interested party in these proceedings because there is a suit between him and the 1st Defendant being CMCC No. 34 of 2009 filed by the 1st Defendant & Another.

5. Counsel urged the court to correct the errors on the face of the record, which are self evident as the Court of Appeal did in the case of **Sardar Mohamed vs. Charan Singh and Another 1959 EA page 793** where it was held;

**“(i) section 80 of the Civil Procedure Ordinance
Confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit.**

(ii) When a rule made by the rules committee pursuant to s.81 (1) of the Civil Procedure Ordinance is capable of two constructions, one consistent with the Ordinance and the other inconsistent, the court should lean to the construction which is consistent on the principle “ut res magis valeat quam pereat”.

Counsel further submitted that there is sufficient reason for the court to review its orders and set them aside and to re-hear the application or replace the orders with an order dismissing the application.

6. This application was opposed by the State Counsel who submitted at length regarding an issue of bad faith on the part of the Defendant’s counsel who had objected to Mr. Gikaria representing the Registrar of Companies in this matter. The defence counsel had made allegations regarding the State counsel, but when the parties appeared before **Kaminwa J** on 13th May 2009, the State Counsel raised the issue of a letter that had been written by the Defendant’s Counsel making spurious allegations, and Mr. Arua withdrew that offending letter. That letter was expunged from the record and Mr. Aura promised to make a written apology to the State Counsel.

7. It was on that basis, that the State Counsel filed a replying affidavit to provide the court with information that is held by the Registrar of Companies. It was submitted that the court had an obligation to look at every document that is on record, however irregularly filed. The State Counsel insisted that new directors were appointed through annual returns. There were no transfer of shares, and annual returns cannot confer the shareholding in a company.

8. The court had to be shown the instruments of transfer in order to determine whether the shares allegedly transferred to the Defendants were regular and that is why the affidavit of **Kennedy Musoti** which contains the information from the Registrar of Companies is important to the court. The Registrar of companies is the custodian of all the company documents including the movement of shares and the change of directors. The affidavit was merely made to enlighten the court and provide the necessary information to enable the court arrive at a just conclusion.

9. On the part of the Plaintiff/Respondent, this application was opposed. Counsel relied on the grounds of opposition on points of law. Mr. Majanja submitted that the ruling by the court took into consideration the issues of law which were raised in the Preliminary Objection and the fact that no ruling was made on each and every ground, cannot be an error on the face of the record. Counsel urged the court if inclined too make any order of review; it should be an order dismissing the Preliminary Objection for lacking in merit.

10. It was further argued that the court is being asked to consider its own appeal by going back to consider whether the ruling left out issues of law. The court is entitled to make mistakes or even misapprehend the law, and that is not a ground for review but a ground of an appeal. Regarding the affidavit sworn by the **Kennedy Musoti**, and the so called suit filed before the Chief Magistrate in Machakos, that suit was filed by the 1st Defendant. The same 1st Defendant cannot now come to court to make allegations of conflict of interest against the state counsel whom he sued and had no choice but to defend himself. The office of the Attorney General was joined in this suit and there are

specific allegations made against the officers. It was therefore necessary for the Attorney General to file a replying affidavit.

11. The power to review an order is a statutory one and it is provided under **Section 80** of the **Civil Procedure Act** and **Order 44** of the **Civil Procedure Rules**. There are specific grounds upon which an application for review can be made as follows:

“(a) where there is a new and important matter;

(b) Where evidence which after exercise of due Diligence was not within the knowledge of an applicant at the time the decree was passed;

(c) Where there is a mistake or error apparent On the face of the record and

(d) For any other sufficient reason.”

(See the case of **Ndung’u Njau v National Bank of Kenya Limited [2008] eKLR**).

12. Bearing the above provisions of law in mind, an applicant seeking for an order of review must show discovery of new and important matter or evidence which after due diligence was not within their knowledge or could not have been produced at the time the order was made. The applicant may also show there is a mistake or error apparent on the face of the record or for any sufficient reasons.

13. This application is based on the grounds that the court failed to consider and give a ruling on the issues raised on the Preliminary Objection. Secondly, the court relied on an affidavit which was filed late, and which the Defendants did not have an opportunity to respond to. And lastly, the deponent of the affidavit **Mr. Kennedy Musoti** has an interest in this matter because there is a suit between him and the Defendant, this fact was not disclosed to the court and I presume it is the one referred to as any the other sufficient reason.

14. As regards the first ground, I find it inappropriate to be asked to justify my own ruling on whether I took into consideration certain points of law raised as preliminary objection to arrive at my decision. My ruling speaks for itself; I cannot sit on my own appeal. That is a matter for the Court of Appeal to determine whether in arriving at that decision, I took all the factors of law into consideration.

15. The other ground regarding the affidavit of Mr. Mosoti, the record of proceedings on 14th July 2009 show that the State Counsel who appeared on behalf of Mr. Gingera applied for an adjournment which was vehemently opposed by Mr. Arua counsel for the Defendant. The court ruled, and I quote **“the application for adjournment is not allowed. The reasons advanced are not plausible. I decline to exercise my discretion. Hearing to proceed at 10.30 a.m.”**

16. That ruling did not exclude the affidavit by the State Counsel; moreover, nothing prevents a court from looking at pleadings and documents that are on the court file. A replying affidavit is in the nature of a defence. A court can look at any defence however irregularly it may have been brought on record. The Defendants did not seek for an adjournment so that they could reply to that affidavit. They cannot now be heard after the application was heard and determined to claim that they were not given an opportunity to respond to the affidavit.

17. A party cannot be allowed to litigate in installments; the applicant should have presented their entire case before the court at once. If the applicant is dissatisfied with the decision of the court, they are entitled to appeal. The court in its ruling appreciated the law and the facts and circumstances of the matter. If there was an error in the way the court interpreted or appreciated the law and facts, this is a matter for appeal. This is what was held in the case of **National Bank of Kenya Ltd vs. Njau [1996] LLR 469**. The Court of Appeal emphasized that:

“It cannot be a ground of review that the court proceeded in an incorrect exposition of the law and reached a wrong conclusion. Misconstruing a statute or other provisions of the law cannot be a ground for review.”

I think I need not say more in this application, I find the application lacking in merit and it is hereby dismissed with costs to the Plaintiffs and the 7th Defendants.

RULING READ AND SIGNED ON 11th December 2009 AT NAIROBI.

M. K. KOOME
JUDGE