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

Civil Case 569 of 2005

KENYA PIPELINE COMPANY LIMITED…….……PLAINTIFF

VERSUS

GREY SOIL INVESTMENTS LIMITED…….…….....1ST DEFENDANT

KENYA TIMES MEDIA TRUST LIMITED…....…....2ND DEFENDANT

SOVEREIGN GROUP LIMITED ……..….3RD DEFENDANT

TRANS-NATIONAL BANK LIMITED…….....4TH DEFENDANT

R U L I N G

The application under consideration has been brought by the Plaintiff. It is the Notice of Motion dated 17th December, 2007. The application has been brought under Order XLIV rule 1, Order L, rule 1 of the Civil Procedure Rules and Sections 80 and 3A of the Civil Procedure Act. It seeks the following orders:

1. THAT this Honourable Court be pleased to review, set aside, and/or vary its order made on 12th June, 2007 in so far as the same:

a) Orders the Plaintiff to pay Thrown away costs and costs of the application to amend plaint to the 1st, 2nd and 4th Defendants.

b) Orders the Plaintiff to pay thrown away costs and costs of the application to amend plaint before taking any other hearing date in this matter and/or substitute the same with an order that the defendants awarded the thrown away costs to have the same agreed upon with the plaintiff and filing an agreement, the same be taxed.

c) Orders the plaintiff to pay costs of the application dated 19th April 2006 to the 3rd Defendant and/or substitute the same with an order that the 3rd Defendant's application dated 19th April 2005 is hereby withdrawn and the plaintiff to pay the 3rd defendant costs of the said application.

2. THAT costs of this application be provided for.

There are four grounds upon which the application is premises. It is supported by an affidavit sworn by Mary Kiptui on even date.

The application is opposed. The 1st Defendant, 3rd and 4th Defendants each have filed grounds of opposition. Part of the grounds raised by these Defendants includes contention that there is no error apparent on the face of ht record, that an order made in the exercise of courts discretion is not amenable to review, that the court lacks jurisdiction to review the order and that there has been inordinate delay in bringing this application.

Each of the parties filed written submissions, except the 1st Defendant. The Advocates to the parties highlighted their submissions in court.

A brief background of the application is as follows. The Plaintiff filed an application dated 29th September, 2006 seeking to amend its plaint. On the 12th June, 2007, the court granted the Applicant and gave the Plaintiff 14 days within which to file and serve its amended plaint. In addition the court ordered the Plaintiff to pay thrown away costs and costs of the application to all four Defendants before any hearing date is taken in the matter. The court also ordered the Plaintiff to pay costs to the 3rd Defendant for its application dated 19th April 2006, in which the 3rd Defendant had applied to strike out the plaint. After that order was made the 2nd, 3rd and 4th Defendants each filed a Bill of Costs. The 2nd Defendant sought costs totaling Kshs. 1,064,311/60, the 3rd Defendant Kshs.992,817 and the 4th Defendant Kshs.1,124,781/-.

The Plaintiff contends that with 33 other cases to go, the 2nd, 3rd and 4th Defendants claim for costs was colossal, and if all other Defendants followed suit the Plaintiff will not be able to meet such demands. Counsel submitted that the Plaintiff was ready to pay reasonable incidental costs to the Defendants. The Plaintiff now seeks orders of the court to review, set aside and or review its orders of 12th June, 2007 in so far as the same:

THAT this Honourable Court be pleased to review, set aside, and/or vary its order made on 12th June, 2007 in so far as the same:

a) Orders the Plaintiff to pay Thrown away costs and costs of the application to amend plaint to the 1st, 2nd and 4th Defendants.

b) Orders the Plaintiff to pay thrown away costs and costs of the application to amend plaint before taking any other hearing date in this matter and/or substitute the same with an order that the defendants awarded the thrown away costs to have the same agreed upon with the plaintiff and filing an agreement, the same be taxed.

c) Orders the plaintiff to pay costs of the application dated 19th April 2006 to the 3rd Defendant and/or substitute the same with an order that the 3rd Defendant's application dated 19th April 2005 is hereby withdrawn and the plaintiff to pay the 3rd defendant costs of the said application.

The Plaintiff's contention is that there is an error apparent on the face of the record and/or that there are sufficient reasons to justify a review of the said order. The Plaintiff contends that the 1st, 2nd and 4th Defendants did not oppose the Plaintiff's application to amend its plaint nor did they pray for an award of costs. The Plaintiff also contends that at the time of filing the application to amend the plaint, the 1st Defendant had not yet entered appearance in the suit and neither did it participate in the proceedings of 12th June, 2007.

In regard to the 3rd Defendant, the Plaintiff's complaint is that it was ordered to pay costs of an application dated 19th April 2006 to the 3rd Defendant yet the application is still on record and has not been withdrawn.

The Plaintiff contends that the order requiring it to pay the thrown away costs and costs of the application before taking any hearing dates in the matter had greatly burdened and prejudiced the Plaintiff as the order relates to 32 other cases to wit **HCCC Nos. 570 to 587 of 2005** and **HCCC Nos. 591 to 603 of 2005**, pursuant to an order by Hon. Ochieng, J. made on 3rd November, 2006.

The courts power to review its own order is provided under section 80 of Civil Procedure Act which provides.

"***80. Any person who considers himself aggrieved-***

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

Reliance has been placed on the case of **Mereka & Co. Advocates Misc. Appl. No. 111 of 2004** where Hon. Njagi J. held:

"***My understanding is that every court has an inherent power to vary or amend its own order so as to carry out its own meaning, and where language has been used which is doubtful to make it plain."***

Further reliance was placed on the case of **Republic v Registrar of Societies exparte Justus Nyangaya & 3 Others [2005] eKLR** at page 20 where Hon. Nyamu, J., as he then was stated:

"***In the Kenya Bus Service case (ibid) this court had occasion to compare ordinary jurisdiction of the court and the inherent jurisdiction at pages 20 and 21 and a quote of what the court stated would not be out of place;***

"*where there is no specific provision to set aside, the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Acts of Parliament or statutes the interest powers stem from the character or the nature of the court itself-it is regarded as sufficiently empowered to do justice in all situations."*

I agree with the Plaintiff's preposition which is supported by the two authorities cited above, that this court has inherent power to review its own order where there is no specific power to review. In the instant case, I think that section 80 of the Civil Procedure Act gives this court statutory power to amend its own orders in order to do justice in all the circumstances of the case and where the interests of justice so demands.

The 2nd Defendant relied on the case of **National Bank of Kenya v Njau [1995-98] 2 EA 231** for the preposition that the discretionary order of a court cannot be subject to review. Counsel for the 4th Defendant invoked section 27 of the Civil Procedure Act and submitted that since award of costs is discretionary, it cannot be reviewed. That is a misconception of the law and of the ratio decidendi of the cited case. The Justices of Appeal in that case, at page 249 held:

"***A review may be granted wherever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self evident and should not require an elaborate argument to be established. In the instant case, the matters in dispute had been fully canvassed before the learned Judge who made a conscious decision on the mattes in controversy and exercised his discretion in favour of the Respondents. If he had reached a wrong conclusion of the law, it could be a good ground for appeal but not review. An issue hotly contested cannot be reviewed by the same court which had adjudicated upon it."***

The justices of appeal were saying that where a matter is hotly contested and fully argued before a judge, the same cannot be reviewed by the same court. Instead it ought to go on appeal. While the principle in the cited case of **National Bank of Kenya v Njau**, supra, applies to this case, the issue of costs was not contested or argued by the parties before the court prior to the ruling of 12th June, 2007. That argument is not fitting to the facts of this case. The Plaintiffs have therefore correctly moved the court for a review of its said order.

The 4th Defendant has argued that there is no error apparent on the face of the record and for that preposition Mr. Kibet relied on the case of **Njoroge & 104 others v. Savings and Loan (K) Limited [1990] KLR 78** where the Court held:

"***To warrant a review of an error alleged to be on the face of the record, such an error ought to be so clear as to be without any disputes; where the very existence of an error is contestable by parties, I think, such a matter is a ground which should be canvassed on an appeal."***

I have already set out what Mr. Wekesa for the Plaintiff submitted on this point and I need not repeat it here. I will get to this point later.

The 2nd and 4th Defendant have challenged the Plaintiff's application on grounds there has been inordinate and unexplained delay of 6 months in bringing it. Mr. Kibet for the 4th Defendant relied on the case of **National Bank of Kenya v Orengo [2005] eKLR** for the preposition that an application for review brought late, without explanation, should be disallowed. Mr. Wekesa for the Plaintiff sought to distinguish the cited case of **National Bank of Kenya v Orengo** supra, on grounds the delay involved in the cited case was 6 years while that in the instant case was only 6 months. Mr. Wekesa urged the court to consider the Plaintiff's attempt to reach an amicable agreement with the 3rd Defendant on costs before filing the instant application as the cause of the delay.

I am satisfied that the cited case of **National Bank of Kenya v. Orengo**, supra, is distinguishable from the instant one. It is not denied that attempts were made by the Plaintiff to reach an amicable settlement on the issue of costs with the 3rd Defendant. The Plaintiff's explanation for the delay is in the circumstances excusable and acceptable.

Mr. Bowry for the 3rd Defendant urged that the amendment which gave rise to this application was entered by consent of the parties and that therefore to set it aside should be done using the principles of setting aside consent orders. Counsel relied on the case of **Ngure v Gathaga**. That submission is not correct. The order to amend was not contested by any party. That is not the same as a consent order. Mr. Bowry's submission on that point is, with due respect, misplaced.

Mr. Bowry has submitted that the Plaintiff should not be allowed to selectively challenge the order of the court as it has complied with one of the orders and amended its pleading. Mr. Bowry submitted that the Plaintiff ought to comply with the remaining part of the order of the court and pay costs or allow for the Bill of Costs to be taxed.

Mr. Sigei raised an interesting point in his submissions that since the Plaintiff had offered costs for the application to amend its pleading, it was estopped from seeking to evade the costs especially after the court granted it the order to amend its plaint. I do not think that the doctrine of estoppel applies to this case and neither can that argument be used to compel the Plaintiff to pay amounts claimed by the parties in this case.

The issue is whether there is an error on the face of the record and secondly, what constitutes thrown away costs. I will answer these two questions together as they are entertained.

Costs thrown away by amendment would reasonably mean costs of the action which had been rendered abortive as a result of the amendment, in this case, to the plaint and which costs the Defendants would never have been called upon to pay if it had not been for the amendment to the plaint. The Defendant

should be reimbursed the unnecessary costs occasioned due to the necessity to amend its pleading as a result of the amendment of the plaint. The costs to be re-imbursed are the drawing charge of the amended pleading and can be equated with (but are not the same as instructions fees) additional instructions made necessary to plead to the amended pleading. The reason for this is these instructions would not have been necessary but for the amended pleading. The original instructions are wasted to that extend and the Defendants are entitled to the drawing charge of his amended pleading in terms of the order made by the Court.

An order for payment of thrown away costs does not however entitle a party in whose favour the order for costs was made to claim a separate instruction fee for drawing an amended pleading in consequence of the opponent's amendment. The reasons for this are:

1. To allow instructions fees at an interlocutory stage would mean

(a) prejudging the result of the case and, (b) awarding instructions on a pleading which has not succeeded.

2. A party is entitled to claim instruction fees to defend (or sue) when he succeeds in the action provided he secures the order of costs in his favour. There would therefore be no justification for a party to raise an item of instruction fee on an interlocutory application on the basis that the suit as originally framed was decided in his favour on an interlocutory application. This is so because instructions in a case do not end up with the filing of the pleadings but they continue until the final disposal of the case.

Having found and or stated the above the parties entitled to thrown away costs as described in my riling above, are those who will amend their pleadings as a result of the Amendments to the plaint. In the case of the 1st Defendant, it is not entitled to any thrown away costs as it had not given any instructions nor filed a statement of defence. The 2nd, 3rd and 4th Defendants are entitled to these costs for the drawing charge of the amended pleadings they will have to file in light of the amendments in the amended plaint. Having stated so, any other costs sought outside of the drawing charge are not justified and neither are the three Defendants (as above) entitled to claim them.

In addition, the 3rd Defendant will be entitled to costs for the application dated 19th April, 2006 seeking to strike out the (original) plaint, which the 3rd Defendant has wasted due to the application being rendered useless by virtue of the amendment to the plaint. The court also ordered costs of the application to be paid to all the Defendants. None of the Defendants had filed any papers to oppose the Plaintiff's application to amend the plaint. For that reason, none of the Defendants were entitled to the costs for the Plaintiff's application contrary to what the court ordered.

The final issue to determine is whether there is an error apparent on the face of the record. From what I have ruled so far, it is quite obvious that there are several errors apparent on the face of the court record of 12th June, 2007. I will correct the errors in the final order in this ruling.

Having come to the conclusion I have of this matter, the Plaintiff's application dated 17th December, 2007 succeeds in part and I order as follows: -

1. The order for payment of thrown away costs and costs of the application to the 1st Defendant be and is hereby set aside.

2. The order for payment of thrown away costs and costs of the application to amend the plaint to the 2nd and 4th Defendants is varied to read that the 2nd and 4th Defendants be paid thrown away costs drawn in line with the ruling herein.

3. Orders that the Plaintiff pays thrown away costs before taking any other hearing date in this matter is varied to read that the Plaintiff to pay thrown away costs to the 2nd, 3rd and 4th Defendant to be agreed upon by the parties within 30 days from date hereof and in default same be taxed. If

the parties are unable to agree and the costs have to be taxed, the bar to the Plaintiff not to take hearing dates in the matter until the costs ordered herein are paid will immediately terminate and or stand vacated.

4. Orders that the Plaintiff do pay costs of the application dated 19th April 2006 to the 3rd Defendant is varied to read that the Plaintiff will pay costs of the 3rd Defendant's application dated 19th April, 2006 upon the 3rd Defendant filing notice of its withdrawal of said application.

5. Since the Plaintiff has succeeded in this application in part, I order that each party should bear its own costs of the application.

These are the orders of the Court.

Dated at Nairobi this 30th day of April, 2009.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Ngugi holding brief Mr. Wekesa for the Applicant

Mr. Bowry for the Respondent/3rd Defendant

Wenmo holding brief Mr. Kibet for Respondent/4th Defendant

Mr. Sigei for Respondent/2nd Defendant

Majanja holding brief Maleche for REspondnent/1st Defendant

LESIIT, J.

JUDGE