



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

Misc. 637 of 2007

KENDATA SYSTEMS LTD APPLICANT

VERSUS

ESTHER N. NGIGE RESPONDENT

RULING

After I delivered my Ruling on 29th November, 2007 on an application dated 16th September, 2007 filed by the Applicant herein, dismissing the said application, the Applicant then filed a Notice of Motion dated 27th March, 2008 seeking a review of the said ruling.

The application is supported by the supporting affidavit sworn by Leslie George Mwachiro a director of the Applicant company and on the grounds mentioned on the face thereof.

The grounds are as under:

- (a) This Honourable court delivered its ruling on 29th November, 2007 dismissing the application dated 10th September, 2007.**
- (b) There is new evidence which could have assisted the Honourable court arrive at a different decision if the court had the benefit of the same.**
- (c) There is sufficient reason to warrant review of the said orders issued on 29th November, 2007.**
- (d) Interest of justice would best be served if the orders sought herein are granted.**

The Respondent then filed a Notice of Preliminary objection dated 30th May, 2008 which was agreed to be heard *in limine*

Mr. Omoti contended that the application has been filed after inordinate delay which has not been explained, that there is no error apparent on the face of the record, that no fresh material or evidence is shown. Moreover, the exhibits attached were in possession of the applicant when the earlier application was canvassed and in any event he has not averred otherwise.

Mr. Mwachiro the director of the Applicant company contended otherwise. According to him there was no inordinate delay and there are facts which could be disputed and thus the matter cannot be finalized at

this stage. Moreover, he contended that there are important documents which were not before the court when the earlier application was prosecuted and determined.

Order 44 Rule 1 of Civil Procedure Rules stipulates:

“1.(1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is

allowed, but from which no appeal has been

preferred; or

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

hereby allowed,

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 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, desires to obtain a judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being respondent, he can present to the appellate court the case on which he applies for the review.”

The new and important matter or evidence which forms part of the application herein by way of annexures are the correspondence between the Applicant company, Pan Africa Insurance Co. Ltd and between counsel of the plaintiff company and Pan African Insurance Co. Ltd. in respect of H.C.C.S. No.801/1995 wherein they were parties. The other document is a replying affidavit sworn by Leslie George Mwachiro himself in a B.P.R.T case No.379/07 between him and one Njengi Properties Limited along with three affidavits of service filed therein.

The last is the Notice of Motion dated 10th September, 2007 which was the subject matter of the ruling sought to be reviewed.

Moreover, I may and should observe that it is clear from the ruling under question that what I was asked to hear and determine was only prayer No.1 of the application which sought an order to commit Esther N. Ngige the Respondent herein to prison for a period of 6 months and/or her property be attached and sequestered for disobedience of the orders by Business Premises Rent Tribunal issued on 16th August, 2007 and 22nd August, 2007.

I entirely agree with Mr. Omoti that the documents which are sought to be put before the court as new and important matter or evidence were or ought to be within the knowledge of the Applicant company and were in its possession. The applicant has not shown by his affidavit, as required by the provisions of Order 44 Rule 1 of Civil Procedure Rules, that they were not within his knowledge (which it cannot aver as they are from or addressed to the company) or that they could not be produced after the exercise of due diligence.

It is trite law that a party coming before the court ought to bring forth its whole case and cannot be allowed to file multiple proceedings concerning the same issue which has been heard and determined.

It is true that the applicant has also averred that there are sufficient reason for such review. In paragraph 5 of the supporting affidavit. The applicant has averred viz:

“5. That there is sufficient reason to warrant the review of the order and *I honestly believe that the interest of justice will be best served if the order sought herein are granted.*”

He has not given any details of the sufficient reason, the onus to prove the same rests wholly on him. I do not think the court is expected to go into a dark alley of speculations in expectation to stumble over a piece of evidence, and I do not intend to venture such an expedition.

Furthermore, it is also true that after the delivery of ruling on 29th November, 2007, the order was issued only on 14th March, 2008 by the Registrar. Thus I may not conclusively determine, at this stage, that there was an inordinate delay, in bringing this application.

The upshot of all the above is that the applicant herein failed to satisfy the court that he has good ground for review as required in law, (Order 44 Rule 1 of Civil Procedure Rule) I allow the preliminary point and strike out the application dated 27th March, 2008.

Dated and signed at Nairobi this 26th day of June, 2008.

K.H. RAWAL

JUDGE

26.6.08