REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 187 of 2007

1. KALUMASS CO. LTD.

2. SPENELLI MASSIMO ALLESANDRO ……..……PLAINTIFFS

VERSUS

1. EMMANUEL CHARO TINGA

2. COUNCILLOR ALI DIDI ……..……...……DEFENDANTS

R U L I N G

The Plaintiffs herein took out a motion dated 12th October 2007 in which they beseeched this court to review its ruling of 21st September 2007 by setting aside the same and substituting it with an order allowing the application dated 30th July 2007. The motion is supported by the affidavit of Spenelli Massimo Allesandro sworn on 12th October 2007. The 1st defendant filed a replying affidavit he swore on 13th December 2007 to oppose the motion.

It is the submission of Mr. Mabeya learned advocate for the plaintiffs that there were errors apparent on the face of the ruling, in that this court came to the conclusion that the application of 30th July 2007 was filed as an after thought yet the same was filed on the basis of matter which arose after the filing of the suit.

It is also pointed out that this court failed to notice that the 1st plaintiff's office was disrupted which in itself amounted to an irreparable loss. The learned advocate also pointed out that there is new evidence which the plaintiffs have discovered to the effect that the 1st defendant had disposed of plot No. Kilifi/Jimba/1146. This was done on 27th August 2007. It is said that by then the 1st defendant had ceased to be a director of the 1st plaintiff hence the authority to sell the aforesaid plot had ceased upon his departure from the company. It is also pointed out that the 1st defendant has annexed a single business permit given on 8th October 2007, just about 17 days after the ruling was delivered. The plaintiffs urged this court to issue orders to maintain the status quo as of 17th July 2007.

Mr. Kilonzo, learned advocate for the 1st defendant urged this court to dismiss the motion because the same did not meet the requirements for review. The learned advocate argued to the effect that there is no error apparent on the face of record. It is further argued that the issues which arose after 17th August 2007 were matters which were within the plaintiffs' knowledge. The 1st defendant's learned advocate further argued that the issue on the sale of Kilifi/Jimba/1146 was not an issue pleaded in the plaint hence it could not have been dealt with during the hearing of the summons dated 30/7/2007. In the end, Mr.

Kilonzo urged this court to rule that it is functus officio in the matter.

I have considered the submissions of both learned counsels. I have also taken into account the issues raised in the Notice of Motion and the supporting plus the replying affidavits. The law applicable in applications for review is well settled, that is to say, that an application for review will only be granted where the applicant has shown that:

(i) he has discovered new and important matter or evidence

which was not within his knowledge or could not be produced at

the time the order was made and that he exercised due

diligence or

(ii) there is a mistake or error apparent on the face of record.

(iii) There is any other sufficient reason.

Let me apply the aforesaid principles to this case. It is the submission of the plaintiffs that there are errors apparent on the face of record in that this court made an error when it concluded that the plaintiffs had filed the application of 30th July 2007 as an afterthought. It is said the issues complained of arose after 17.7.2007. It is also said that this court should have come to the conclusion that there would be an irreparable loss on the part of the plaintiff. I have considered the above submissions vis-à-vis the ruling I delivered on 21st September 2007. It is true that, this court came to the conclusion that the loss envisaged by the plaintiffs was ascertainable in monetary terms. It is also true that this court came to the conclusion that the plaintiffs' filed the Chamber Summons dated 30th July 2007 as an afterthought. In the above findings this court gave its reasons for arriving at those conclusions. The reasons could be right or wrong. Can they be regarded as errors on the face of record? In my humble view I do not think they are errors on the face of record. Those are grounds which can be raised on appeal and not by way of review. The court of Appeal expressed itself over such issues in **Nyamongo & Nyamongo Advocates –vs- Kogo [2000] LLR 3017 (C.A.K.)** as follows:

"**An error apparent on the face of record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and they could reasonably be no two points, a clear case of error apparent on the face of record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."**

I adopt the above view of the court of appeal in this matter.

It has been also argued that the plaintiffs have discovered new evidence which were not within their knowledge at the time of issuing the order. It is said that the property known as Kilifi /Jimba/1146 was disposed of during the pendency of the suit. It is further said that there is a likelihood that the 1st defendant may dispose of the 1st plaintiff's property before this suit is heard and determined. I have considered the above issues. The law is very clear that the ground for discovery of new and important evidence must not have been within the knowledge of the applicant. It would appear the applicant is complaining of acts which took place after the suit was filed. It is obvious the matter complained of were matters which were within the knowledge of the plaintiffs. I am not convinced that the plaintiffs acted

with due diligence to bring out those issues at the time of arguing the application. In any case fresh applications or further affidavits could have been filed to cater for the new circumstances which took placed while the application was pending ruling or even after the ruling was delivered.

For the above reasons I find no merit in the motion. The same is dismissed with costs to the 1st defendant.

Dated and delivered at Mombasa this 23rd day of June 2008.

J. K. SERGON

J U D G E

In open court in the presence of Momanyi for the plaintiff.

Mr. Kadima for the Defendant.