REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 1540 OF 2000

CLAUS U. KRIEGER (T/a CONTACT PRODUCTION AFRICA) ……PLAINTIFF

V E R S U S

EPSILON BROADCAST ENGINEERING (K) LIMITED ……...……...…….DEFENDANT

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

This is an application by notice of motion dated 3rd November, 2004 brought by the Plaintiff. It seeks a review of the judgment of Ibrahim, J delivered on 4th May, 2004. By that judgment, which was delivered after a full trial, the learned judge struck out the plaint upon the ground that the affidavit verifying the same was incurably defective (he just struck out the affidavit). Having so struck out the plaint, the court did not go into the merits of the suit.

The application is brought under Order 44, rule 1 if the Civil Procedure Rules (the Rules). That rule provides at subrule (1):-

"**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 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."

The grounds for the application appearing on the face thereof are:-

(i) That the learned trial judge erred in striking out the verifying affidavit and the plaint from the court record after having relied upon them.

(ii) That the learned trial judge misdirected himself in striking out the verifying affidavit and the plaint long after the Plaintiff had given *viva voce* evidence verifying the matters stated in the plaint.

(iii) That the learned trial judge erred in allowing the preliminary point of law to be argued after close of the Plaintiff's case, and after the matters in the plaint had been verified by *viva voce* evidence.

(iv) That the learned trial judge erred in failing to consider the Plaintiff's evidence in arriving at his decision.

(v) That the learned trial judge erred in upholding the preliminary point of law on the defects in the verifying affidavit after going through a full trial.

(vi) That the learned trial judge erred in punishing the litigant for his advocate's mistakes.

There is a supporting affidavit sworn by the Plaintiff.

The Defendant has opposed the application as set out in the grounds of opposition dated 16th November, 2004. Those grounds are:-

1. That the application is misconceived and incompetent.

2. That it is frivolous, vexatious and an abuse of the process of the court.

3. That it is incurably defective and does not lie as the same does not fall within the ambit of the provisions governing applications for review.

4. That it otherwise lacks merit.

I have considered the submissions of the learned counsels appearing, including the cases cited. The grounds for the application as set out above show clearly that the Plaintiff's complaint in this application is that in striking out the verifying affidavit and the plaint after the trial had been completed Ibrahim, J erred in law. Alleged wrong interpretation of the law by a judge after the matter in issue has been fully argued before him cannot constitute discovery of a new and important matter or evidence; nor will it amount to a mistake or error apparent on the face of the record; nor can it be a sufficient reason for review. Ibrahim, J himself, let alone another judge of co-ordinate jurisdiction, would not have the power to correct such alleged wrong interpretation of the law. Only the Court of Appeal has jurisdiction to put right such alleged wrong interpretation of the law in an appeal duly lodged before it.

If I were to consider the merits of the present application, I would be purporting to sit on appeal over the decision of my brother judge of equal jurisdiction. I simply do not have that jurisdiction. Even Ibrahim, J himself would not have jurisdiction to sit in appeal over his own decision.

The application is clearly misconceived. What the Plaintiff should have done is to appeal against the judgment of 4th May, 2004. The application by notice of motion dated 3rd November 2004 is therefore struck out with costs to the Defendant. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS ……..DAY OF SEPTEMBER, 2007