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

Civil Case 75 of 2007

CMC MOTORS GROUP LIMITED……...……PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI……..……DEFENDANT

RULING

The Defendant herein, City Council of Nairobi hereinafter referred to as the Council by a Notice of Motion dated 1st August, 2007 has applied for the review and or setting aside of the ruling of this court dated 20th July, 2007 and any consequential order, judgment or decree and secondly for leave to defend the suit or defend the Notice of Motion dated 16th April, 2007. The application is expressed to be brought under Order XLIV rule 1 and Order L of the Civil Procedure Rules and Section 3A of Civil Procedure Act.

There are several grounds cited in support of the application, on the face of the Notice of Motion. These can be summarized as follows:

i) there is sufficient reason to review the ruling;

ii) that the plaintiff is seeking to enforce an agreement tainted with irregularity;

iii) the ruling was obtained ex-parte and further, it is contrary to law and public policy of Kenya

that the Defendant has a good defence based on contract which raises triable issues; and;

v) the contract No.DOE/1/2003-2004 for the supply of garbage collection and dump trucks was not signed or properly executed by the Defendant/Applicant therefore the Defendant/Applicant is not bound by the purported contract.

There is a supporting affidavit sworn by the Director of Legal Affairs of the Council, Ms. M. N. Ng'ethe. The highlights of this affidavit are found on paragraphs 6,7,8,9 & 10. In paragraph 6 Ms. Ngethe depones that the minutes of a meeting dated 4th July, 2004 between the Council and the Plaintiff's official, and which the Plaintiff annexed to its affidavit in support of its Notice of Motion, was not valid as the signature on it purported to be that of the Town clerk, did not indicate the name of the person signing as was the normal practise of the Council. In paragraph 7, it is deponed that the name of the Council was indicated as Nairobi City Council Ltd an unknown entity, while the Defendant is City Council of Nairobi. In paragraph 8 it is deponed that the Court's ruling was irregular as it relied on the invalid minutes, and therefore the ruling ought to be reviewed and or set aside. In paragraph 9 it is deponed that the Contract for supply of garbage collection and dump trucks was not signed by the

Council. Paragraph 10 and 11 are best reproduced verbatim. They provide as follows:

10) That the form of Contract Agreement annexed to the Plaintiff's Notice of Motion cannot be a valid and legally binding agreement upon which a properly constituted Court of Law would rely upon to pass judgment against the Defendant/Applicant; when a <u>defence</u> is on record.

11) That it is manifestly clear that the ruling of her Ladyship(Mrs) Justice Lesiit, and any consequential orders or judgment or decree obtained against the Defendant in this matter is erroneous and the said ruling ought to be set aside, for retrial of the Notice of Motion and or the whole case. The same did not address the obvious irregularities, as pointed out.

The application is opposed. The Respondent has filed a replying affidavit and a reply to the further affidavit. Both repeat much of the Respondent's Advocates submissions and I need not repeat them here save for two points. One, the Managing Director of the Respondent's Company depones that it gave a bond and a signed contract to the Defendant Company in compliance of the terms of the tender notice, which were both accepted by the Council and consequently the tender awarded to it. The second point deponed to, in the reply to further affidavit is the fact that, among the council officers who attended the meeting of the Council whose minutes were annexed to the Respondent's supporting affidavit for summary judgment, was the deponent to the Respondent's supporting affidavit, one Ms. Ngethe. These two averments were not controverted by the Council and therefore remain unchallenged.

The Applicant in the instant application has come to court seeking to set aside this Court's ruling of 20th July, 2007, in which the Court entered Summary Judgment in the sum of Kshs.87,464,812/= as prayed for in prayer 1 of the Plaintiff's Notice of Motion dated 16th April, 2007. The Plaintiff's Notice of Motion was heard ex-parte because, despite service, the Defendant filed no replying affidavit. An attempt to derail the hearing of the application was made when an official for the Defendant's unsuccessfully sought adjournment to engage a lawyer. The Court declined the adjournment since no reply to the application had been filed and no reasonable cause shown why this was not done, yet the Defendant had an advocate on record. The fact that no paper had been filed meant the Court could exercise its discretion under Order L and hear the application ex-parte, which is what the court did.

I noted that in the grounds cited on the Notice of Motion and in the affidavit sworn in support of the instant application, no attempt whatsoever was made to explain why there were no papers filed in response to the Plaintiff's Notice of Motion. Further and more important, no request was made for leave to file any papers in response to that application in case the Court were to incline and set aside its ruling as sought.

In regard to the instant application, the Council was represented by Mr. Asinuli Advocate, from the firm of Munika & Co. Advoate, which firm has been on record for the Council from the very beginning of this case. The Plaintiff/Respondent was represented by Mr. Ougo from Oraro & Co. Advocates. Mr. Asinuli started by withdrawing a Notice of Appeal to the Court of Appeal, which was allowed, since under Order XLIV rule 1 an appeal and review could not both lie.

I have considered the oral submissions by these two Advocates together with all affidavits sworn thereto. I propose to consider with the issues raised by the Counsels seriatim. I will begin with the point of Law raised by Mr. Ougo. Mr. Ougo drew the Court's attention to the nature of the application, that it was an application for the review of the Court's ruling of 20th July, 2007 made under the provisions of Order XLIV rule 1 of the Civil Procedure Rules. Counsel submitted that since no explanation was given by the Council why no papers were filed to oppose the Plaintiff's application, no review can lie. Learned Counsel submitted further that the Council's application must fail because not only was the order or decree sought to be reviewed not extracted and annexed to the application, there was no discovery of new and important matter or evidence which, after the exercise of due diligence, was not within its knowledge and could not be produced by it during the hearing of the first application. Learned Counsel cites several authorities to support his submissions.

Mr. Asinuli for the Council opted not to reply to the submissions and therefore the issues raised on Mr.

Ougo's submissions remain unchallenged. Order XLIV rule 1(1) provides:

"***Any persons 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."

Mr. Ougo relied on the case of GULAMHUSSEIN JIVANJI & ANOTHER VS JIVANY, AND ANOTHER [1929-30] KLR 41 where Sir BARTH CJ (KENYA), SIR GRIFFIN CJ (UG) AND PICKERING, CJ (ZANZIBAR) held:

"That it is the duty of a party who wishes to appeal against or apply for a review of a decree or order to move the court to draw up and issue the formal decree or order."

This ruling of the Court of Appeal for Eastern Africa has been followed by various courts including **Nyarangi, J** as he then was, in **BERNARD GITHI VS KIHOTO FARMERS CO. LIMITED NAIROBI HCCC NO. 32 OF 1974** and **Mbaluto, J** in **UHURU HIGHWAY DEVELOPMENT LTD. VS CENTRAL BANK OF KENYA & OTHERS MILIMANI HCCC NO. 29 OF 1995.** The legal position is that failure to extract and annex order or decree to be reviewed renders an application for review procedurally and fatally defective.

The Council did not extract the order or decree that aggrieved it. What has been annexed is a copy of the ruling of this Court, which the Council contents, grieved it. Annexing the Court's ruling does not satisfy the provisions of Order XLIV rule 1 of Civil Procedure Rules.

I started by highlighting the key paragraphs of the supporting affidavit. Two of those paragraphs were repeated verbatim for a reason. It does appear that the Council's view was that the entire ruling was wrong and needed to be set aside, infact, the deponent became almost personal commenting:

"Which a properly constituted Court of Law would rely upon…."and "it is manifestly clear that the ruling of her ladyship….in this matter is erroneous and the said ruling ought to be set aside, for retrial…"

I have already set out the holding of the Court of Appeal in **JIVANJI VS JIVANJI,** supra, The full text of their Lordships Judgment, on the issue of review of a decree or order is as follows:

"***A person applying for a review under that Order must be aggrieved by a decree or order." The words "decree" and "Order" are here used in the sense set out in the definitions in section 2 of the Civil Procedure Ordinance. Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should be for a review of the judgment upon which it is based. But, in my opinion, however aggrieved a person may be at the various expressions contained in a judgment or even at various rulings embodied therein, unless that person is aggrieved at the formal decree o the formal order based upon the judgment as a whole, that person cannot under Order XLII appear before the Judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The ration decidendi expressed in a judgment cannot be called in question in review unless the resultant decree is a source of legitimate grievance to a party to the suit. In these proceedings no resultant decree on the 29th August, 1930, had yet come into existence. Indeed no attempt to draw up any has as yet been made. It is the duty of a party who wishes to appeal against, or apply for a review of a decree or order to move the Court to draw up and***

issue the formal decree or order."

The point being made here is that, however aggrieved the Council was to the various expressions made in the ruling, or the various findings made, and the reasons advanced for each of them, unless the Council was aggrieved at the formal decree or order based on the ruling, it cannot under Order XLIV rule 1 annex the ruling and challenge it. It was not enough that the Court's ruling was annexed to the application; no order or decree has been drawn in this case and none is annexed to this application. The Council has failed in its duty to extract and annex the order or decree to be reviewed, and in so doing, has failed to bring itself within the ambit of Order XLIV rule 1 of Civil Procedure Rules. The application can fail on this ground alone. However, I will consider the other issues raised in this application.

Mr. Asinuli for the Council submitted that the main grounds for review of the Court's ruling was that the application was heard ex-parte and that at the time the court made it's ruling, it was delivered on a false assumption that there was a valid and legally binding contract between the parties, and that the court proceeded to rely upon a formal agreement between the parties annexed by the Plaintiff in its supporting affidavit marked "**MM3"**. Learned Counsel submitted that the agreement was not executed by the Defendant nor sealed by either party to it. Further, that the minutes of the meeting confirming the existence of the said contract were invalid as the person signing for the Council did not indicate his name, and neither were the minutes sealed. Counsel submitted that there could not have been an award of the tender since the award was conditional to a formal agreement being drawn.

Mr. Ougo, in response to this contention submitted that the Council could not be heard to challenge its own documents which they supplied to the Respondent and upon which the Respondent relied to incur colossal sums of money. Counsel submitted that the documents belonged to the Council and the Respondent did not know who or how such documents were signed by them.

In regard to the issue whether or not the Plaintiff's application for summary judgment was heard ex-parte, Mr. Ougo has in his list of authorities a very interesting ruling of the Court of Appeal for Eastern Africa; the case of **DR. MOHAMMED VS LALJI VISRAM & CO. [1937] EALA 1.** In that case, the Defendants Advocate was denied an adjournment of the hearing of the case. The Advocate elected to leave the court. Judgment was entered against his client. A Notice of Motion seeking to set aside judgment was dismissed. On appeal, the Supreme Court reversed the ruling of the Magistrate. On further appeal to the Court of Appeal, it was held:

"***That on the date fixed for the hearing the Defendants had appeared by Counsel who on the facts must be held to have been duly instructed-***

that if Counsel duly instructed, on being refused an adjournment, elects to leave the Court and takes no further part in the case that fact does not constitute the proceedings ex-parte."

In the instant case, the Council's Advocates were served with the Notice of Motion for summary judgment on 16th April, 2006, by 27th July, 2007, when the application came up for hearing, no papers had been filed. On the hearing date an advocate working in the Council's employment sought to adjourn the Notice of Motion hearing but the Court declined on grounds, no papers had been filed despite service of the application more than two months before and that even if the Advocate was there it would make no much difference and, secondly no good cause was shown to justify an adjournment. I do not think that the refusal to grant an adjournment resulted in an ex-parte hearing.

In regard to the issue whether the application for review was open to the Applicant in the circumstances of this case, Mr. Ougo relied on the case of **TANITALIA LTD. VS MAWA HANDLES ANSTALT [1957] EALR 213** where **WINDHAM C.J**, while considering the question of when an application for review may be made held:

"(ii) By rule 1 of Order XL VIII, the Civil Procedure Rules, an application for a review is open to a person only where there has been a discovery of new and important matter of evidence, a mistake or error apparent on the face of the record or "for other sufficient reason," but these words must be

construed ejusdem generis with or analogous to one or other of the two other reasons and the grounds put forward appeared to be outside the ambit of the rule."

It has been argued by Mr. Asinuli for the Council that the documents relied upon by the court in entering summary judgment against the Council were invalid and irregular. Mr. Ougo on the other hand contends that whether irregular or not, the Council was served with the application and the affidavit by which all the documents were annexed. Counsel submitted further that the Council failed to file any papers when it had an opportunity to challenge all the documents. In any event, Mr. Ougo submitted, the Council was aware of these documents all along and so cannot argue that they are a "new and important" matter.

I agree with Mr. Ougo's submissions. As I have observed, the Council was fully aware of the Plaintiff's application and the evidence it was relying on in it's support. It was at the initial stage that the Council should have filed papers raising the issues it is now raising. There is nothing "new" or "important" matter of evidence that has come to the Council's knowledge which they did not know at the time the Plaintiff's application was heard. The documents were served on them and they chose to file no papers to challenge them or at all. Besides, no explanation has been forth coming why the Council did not file papers in opposition to the Plaintiff's application. The Court does not aid the indolent and neither does a party have an option to ignore papers served on it without showing a good cause or giving a reasonable explanation. It is quite clear to this court that the Applicant deliberately sought to evade, obstruct and or delay the course of justice. It would not be judicious for this court to entertain the Applicant who has made no attempt at all to explain itself or to bring itself, within the ambit of the rule or the law it relies on.

I would go further and find that if the issue raised by the Council challenges the admissibility of the documents relied on or that the court proceeded on an incorrect exposition of the Law and therefore reached an erroneous conclusion of law, then the avenue open for the Council was not review of the Court's ruling, but an appeal against it to the Court of Appeal. No one can put this point across any better than **KWACH, AKIWUMI** and **PALL JJA** in **NATIONAL BANK OF KENYA LTD. VS NDUNGU NJAU CA NO. 211 OF 1996** who held:

"***A review may be granted whenever 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. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground of review.***

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matter in controversy and exercised his discretion in favour of the Respondent. It he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment, which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

In case I may be wrong in the conclusions I have reached on this matter so far, I will now consider whether any useful purpose will be served by setting aside the ruling of the court delivered on 20th July, 2007. The Council's supporting affidavit depones that it has a good defence on record, to the Plaintiff's claim. I have considered this matter afresh by examining in details the Council's filed defence. I do not come to a conclusion any different to the one I did when considering the motion for summary judgment. As I noted, the only paragraph of the defence filed by the Defendant Council which provides a defence, is paragraph 5. Paragraph 1 and 2 are admission to particulars of the parties. Paragraph 3 admits that the Council caused publication in the local dailies of an advertisement inviting sealed bids from interested eligible bidders. Paragraph 4 is a general denial of the contents of the plaint. In paragraph 5 the defendant Council averred as follows:

"***5. The Defendant denies the contents of paragraph 8 of the plaint and puts the Plaintiff to strict proof thereof and denies in toto particulars of sums enumerated in paragraph 8 thereof.***

Entirely without prejudice the Defendant is not averse to accepting delivery of the said garbage collection and dump trucks on condition that it is allowed to pay for the same by reasonable manageable installments to be negotiated, from the date of actual delivery and without interest on the price and or any other penalties being imposed against the Defendant."

I do not wish to repeat what I said in my ruling for summary judgment but suffice it to say that the Defendant was negotiating suitable terms of payment and for the delivery of the trucks the subject matter of the suit. The Council averred that it was not *"averse to accepting delivery of the trucks on condition…."* That is not a denial. If anything it was an admission of the Plaintiff's claim. There was no other averment in the defence denying the Plaintiff's claim and even if there was, it could not have been of any assistance to the Council as it could be interpreted to mean that the Council was approbating and reprobating the Plaintiff's claim to suit itself. Even if the minutes of the meeting now challenged were not there, and the documents relied upon by the Plaintiff to seek judgment were not there, judgment would still have been entered on grounds of lack of any reasonable defence to the Plaintiff's claim. Infact a proper evaluation of my ruling will reveal that I entered summary judgment against the Defendant Council and not judgment on admission. I find that the Council has no defence to the Plaintiff's claim and therefore no useful purpose will be served to set aside my ruling of 20th July, 2007.

I find that the application lacks in merit as the Defendant Council did not bring itself within the ambit of Order XLIV rule 1 of Civil Procedure Rules for review or setting aside of the ruling as sought. Consequently I dismiss the application with costs to the Respondent.

Dated at Nairobi this 2nd day of November, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

Mr. Simiyu for Oyugi for Respondent

Ms. Omwothi holding brief Asinuli for Applicant

LESIIT, J.

JUDGE

Omothi: We seek 30 days stay of execution.

Simiyu: No objection

COURT

30 days stay of execution granted.

LESIIT, J.

JUDGE