REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 524 of 2002

AFFORDABLE HOMES AFRICA LIMITED ....………… PLAINTIFF

VERSUS

IAN HENDERSON …………………......................................………….. 1ST DEFENDANT

SUPERIOR HOMES (KENYA|) LTD ….....................................………… 2ND DEFENDANT

MICHAEL KLESH ………………………..…..… 3RD DEFENDANT

RULING

On 26th October, 2004, this court struck out the action herein with costs, such costs to be borne by the advocates for the plaintiff. By this application, the plaintiff/applicant now seeks a review of the order striking out the action, or that the same be vacated in its entirety. The application is made by way of a notice of motion dated 5th January, 2005, and brought under O.XLVI rule 1(1) of the Civil Procedure Rules, S.3A of the Civil Procedure Act, and all other enabling provisions of the law.

The application is supported by the annexed affidavit of Raymond Hugh Chisholm, and is based on the grounds that the applicant has discovered new and important matters which were not within his knowledge, or could be produced by him at the time the order was made. The applicant also contends that the application has been brought without unreasonable delay, and that the mischief carried out by the 1st defendant/respondent is still continuing and causing irreparable loss and harm to the plaintiff/applicant. The last ground is that it is just and equitable to grant relief.

The application is opposed through the replying affidavits of San Handerson and Michael Klesh, the 1st and 3rd defendants/respondents, sworn on 21st January, 2005.

At the hearing of the application, Mr. Oluoch-Okunya appeared for the applicants Mr. Oluoch-Olunya submitted that there was an error on the face of the record on the basis that court lacked jurisdiction to strike out the suit on a preliminary objection. He cited **NITIN PROPERTIES LTD**. v **KALSI & ANOR** [1995-98]2 EA 257 as authority for that proposition. He also submitted that there were new facts tending to show that there were new facts tending to show that the 1st defendant was in the country when he purported to be traveling out of the country when he purported to be traveling out of the country in a bid to avoid the holding of a meeting of the plaintiff. This demonstrates mala fides on the part of the defendants, and this is good cause why the defendants should not be awarded costs. Counsel relied on **BOSTOCK** v **RAMSEY URGAN COUNCIL** (1900) 69 Q.B.D. 945, and also on **PARKINSON** v **COLLEGE OF AMBULANCE, LIM, & ANOR** (1924) 93 KBD. 1066.

Opposing the application, Mr. Ligunya relied on the two replying affidavits sworn by the 1st and 3rd defendants on 21st January, 2005. He submitted that the application does not raise any new matter or evidence to warrant a review. Secondly, he also submitted that the applicant had moved to include an error on the face of the record which was not pleaded. The applicant cannot raise such a matter at this point in time as it is bound by its pleadings. The defendant's misconduct complained of relates to non-

attendance at a meeting which was called after the suit had been filed. It should have been called before the suit was filed. Counsel then referred to TRADE BANK LTD. (In Liquidation) v **L.Z. ENGINEERING CONSTRUCTION LTD. & ORS**. Civil Appeal (application) No.14 of 1998 as authority for that proposition.

In his reply, Mr. Oluoch-Olunya applied to amend his pleadings to include an error on the face of the record as a ground for review.

I have considered the application, the replying affidavits and the submissions of counsel. The grounds upon which an application for review may be entertained are clearly set out in O.XLIV rule 1((1). These are basically three – ie discovery of new and important matter or evidence; an error on the face of the record; and any other sufficient reason. A person seeking a review of a judgment or an order must bring himself within the four corners of the provisions of this rule.

The first ground upon which the review is applied for in this matter is that of new important matter or evidence. Unfortunately this takes the form of alleged misconduct on the part of the 1st defendant by pretending to be out of the country and thereby avoiding the attendance of a proposed meeting of the company. It is noteworthy that one of the proposed items of the agenda for that meeting was the passing of a resolution to sanction and ratify the action taken in instituting these proceedings in the company's name. The meeting was being called for 15th November, 2004. Three factors play against this move. Firstly, the letter requisitioning the meeting was received the defendants' advocates on 7th January, 2005, which was already after the event. Secondly, and even more important, the ruling in this matter which is sought to be reviewed had already been delivered on 26th October, 2004. Such a meeting, therefore, could not have affected the ruling, even if it was held as proposed. Thirdly, and this is purely cautionary, the authority to use the company's name in litigation should normally be sought before the commencement of the action, even though I would see no harm in ratifying that which has already been done as there is nothing really new in all this within O.XLIV rule 1(1), the first limb of the application for review accordingly fails.

The second ground is that there is an error on the face of the record. This ground was argued outside the ambit of the applicant's pleadings as it was not among the grounds upon which the application was initially based. Indeed the applicant's counsel only sought court's leave to amend those grounds during his reply to the points raised by counsel for the respondent, which points included the one that an error on the face of the record had not been pleaded. To allow the applicant to amend its pleadings at that late stage and after the respondent had closed its submissions would be akin to allowing it to steal a march on the defendants/respondents. Even if it was allowed, I don't think that the matter falls within **NITIN PROPERTIES LTD.** v **KALSI** (supra) in which the Court of Appeal said at p.259 –

"**A plaint can be struck out only if the claim is incontestantly or hopelessly bad …**

It is also clear that a proper application for striking out must be filed if such a course is warranted under O.VI, rule 13(1) (a), (b), (c), and (d) (as applicable) by a summons as stated in Order VI, rule 16 of the Civil Procedure Rules."

The instant matter, I think, does not fall within the grounds espoused in O.VI rule 13(1). I think that it falls on the category of those plaints which are fatally incompetent and now starters on the ground of being unauthorized. This goes to the very root of the matter which, as a point of law, attracts attention to be raised as a preliminary objection within the formula in **MUKISA'S CASE**. And in the event that the procedure adopted by this court was wrong, I think that the proper avenue for redress should have been an appeal rather than an application for review.

As for costs, I need say no more than that the basic principle of law is that costs follow the event, and that they are awarded at the discretion of the court.

For the above reasons, the application for review fails and it is hereby dismissed with costs.

Dated and delivered at Nairobi this 11th day of May 2006.

L. NJAGI

JUDGE