IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT NO 1010 OF 2002

FRANK W MBOGO T/A WHITESHIELD ENTERPRISES.....PLAINTIFF

VERSUS

MARAGUA TOWN COUNCIL.....DEFENDANT

RULING

This is an application dated 21st March, 2003 for an order that the ruling delivered herein on 6th March, 2003 be reviewed on account of an error apparent on the face of the record and that there are sufficient reasons to review the ruling. The application is brought under the provisions of Order XLIV Rules 1, 2 and Order XX1 Rule 22 of the Civil Procedure Rules (the Rules) and is supported by the annexed affidavit of the applicant. An applicant, in an application such as this one must show any one of the following:-

> **1. That he has discovered a 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 when the order was made against him**
>
> **2. That there is a mistake or error apparent on the face of the record**
>
> **3. That there is sufficient reason to warrant the orders sought.**

In the affidavit in support of the application, it is deponed that counsel for the applicant failed to grasp the substance of the instructions and nature of the applicant's case and that had the said advocates applied to the court for leave to amend the Plaint to include the fact that the contract to supply the Massey Ferguson MF 285 5 75 HP tractor had been varied by the parties on 21st January, 2002, and that the defendant/Respondent had agreed to be supplied with a Massey Ferguson MF 290 instead, the court could have arrived at a different decision. There is annexed a letter dated 21st January, 2002 to that effect.

It is further deponed that had the said advocate also annexed the insurance payment receipt and import documents (FWM 2), the court could have arrived at the decision that the defendant was fully aware, but did not disclose to the court, that the tractor that was to be delivered to it was a Massey Ferguson MF 290 and not model MF 285 S as is stated in the affidavit of the defendant's Town Clerk on 20th December, 2002. The applicant believes that these negligent omissions by his counsel have resulted in a serious miscarriage of justice to him.

The defendant/Respondent filed grounds of opposition. One of those grounds is that the applicant has preferred an appeal against the ruling of the court now sought to be reviewed. The Respondent's counsel urged the court to find that, as the notice of appeal which was filed by the applicant had not been withdrawn, the applicant cannot move this court for review orders as an application under Order XLIV

can only be brought where no appeal has been filed.

If the court were hearing an application under Order XLI Rule 4 of the Rules, for stay of execution of the decree, pending the determination of an appeal, then for purposes of Rule 4 of that order, an appeal to the court of appeal would be deemed to have been filed when, under the Rules of that court, a notice of appeal has been filed. We do not have a similar provision under Order XLIV Rule 1 and 2 of the Rules. The notice of appeal filed by the applicant herein is an expression of the intention of the applicant to appeal. It is not known if he will pursue it.

Another point raised was with regard to there being no formal order annexed to the application. Counsel for the Respondent referred the court to the case of **Gulamhusein Mulla Jivanji & Another vs Ebrahim Mulla Jivanji & Another** where the court of appeal for Eastern Africa, held that it is the duty of a party who wishes to appeal against or apply for review of a decree or order to move the court to draw up and issue the formal decree or order. No formal decree or order was annexed to the present application, however, during the hearing, both counsel kept on making reference to the ruling of the court, and they would read portions of it to the court. As that ruling was typed, this was possible and the fact that the application was heard by the same judge who delivered the ruling now sought to be reviewed. However, if this application was for hearing before a different judge, and the ruling of the court had not been typed, I do not know how this could have been possible without a copy of the decree or order sought to be reviewed. As the two counsel did not appear to be in any difficulty as they referred court to various portions of the ruling, I am of the view that the application, in the circumstances was not defective.

Counsel for the applicant raised matters which in my view should have been dealt with on appeal e.g the application having been brought under Order VI Rule 13 (1) (b) and (c) and argued as if it was one under Order XXXV such that the applicant did not know the kind of application against him taking into account the fact that, it was not shown on the application that it was also under Order XXXV. In my view, that cannot constitute an error or a mistake on the face of the record. Of all the matters that he raised, I am unable to find that any of them constitutes an error or mistake on the face of the record. The fact that the applicant's counsel, then on record, was negligent and did not properly present the applicant's case cannot be a ground of review. If the court were to find that every time an advocate conducts a case inadequately, that is ground for review, I can imagine the number of applications for review that would flood the courts. That would be a very dangerous precedent.

Counsel has accused Plaintiff's counsel of failure to disclose that the agreement which the parties entered into had been varied by the parties by a letter which the defendant had written. This letter was in the possession of both parties and has not just been discovered by the applicant. However, the Respondent was under duty to disclose this fact to the court so that a miscarriage of justice does not occur. He did not do that. I remember counsel for the applicant applied for adjournment of the application that gave rise to the ruling that is sought to be reviewed. She had received further instructions and wanted to bring certain facts to the attention of the court. Perhaps she wanted to annexe further documents so that the court has all the material before it. The application for adjournment was refused.

For the reason that the Respondent is alleged to have written a letter changing the terms of the agreement, which letter was not brought to the attention of the court by the Respondent, as it too was under a duty to bring the contents of that letter to the attention of the court, that constitutes sufficient reason to review the ruling delivered on 6th March, 2003.

I therefore allow the application dated 17th March, 2003 and review the order that entered judgment against the Plaintiff at Kshs.1,500,000/= with interest. I set aside the said judgment and order that the application dated 21st March, 2003 be heard a fresh before a different Judge. The costs of the application to be in the suit.

Delivered this 19th May, 2003 in presence of Thongori for applicant and

Letangule for Plaintiff/Respondent absent.

S. C. ONDEYO

JUDGE

19.5.2003