REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1154 OF 1999

PANISTAR COMPANY LIMITED ……. PLAINTIFF

VERSUS

1. CATHERINE WANJIKU MWANGI)

2. DANIEL MWANGI MURAGE) ……..…….. DEFENDANTS

3. HOUSING FINANCE CO. OF (K) LTD)

RULING

This application is brought under Order 50 Rule 1, Order 44 Rule 1 and Order 39 Rule 1 of the Civil Procedure Rules, Section 3A and Section 63 © of the Civil Procedure Act. It is seeking mainly two orders and an alternative order. The orders it is seeking are first that the Orders made on 20th July 2000 be reviewed and the 3rd Defendant herein be reinstated into the suit. Secondly is the order for injunction to restrain the same third Defendant from selling, disposing or otherwise interfering with the property known as Land Reference No. 209/3540/1 until the hearing of the application and subsequent suit. The third Order sought is an alternative prayer and that is that the status quo be maintained until the hearing of this application. That alternative prayer is no longer available as the application has been heard. There are two grounds for the application. These are first that there is discovery of new evidence and second that the 3rd Defendant intends to sell the suit property. The Affidavit in support of the application is headed Supplementary Affidavit. It annexed only one exhibit namely a letter from the Commissioner of Lands to Panstar Company Limited dated 16th December 1998 approving an extension of lease in respect of the suit property. The Respondent did not attend court for hearing.

I have on my own considered the application, the Affidavit in support of it, the annexture and the submissions by the learned counsel. First the application is seeking a review of an Order which it has not annexed to the application. Order 44 rule 1 is clear that the person seeking a review must consider himself aggrieved by a decree or an order. That in effect means that the order he is aggrieved by and which he wants to be reviewed must be annexed to the application. This is fatal to the entire application. I will set out here what Mbaluto J. stated in the case of Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 Others – HCCC No. 29 of 1995. He stated:

“The most fatal aspect of this application is however the fact that the Plaintiff has not even attempted to comply with Section 80 of the Civil Procedure Act with respect to the extraction of the relevant orders. In the case of G.M. Jivanji vs. M. Jivanji & another (1929-30) 12 KLR 44 the Court of Appeal for Eastern Africa held:

“Apart from my considering whether the course adopted by the learned Judge in relation to the exparte order of the 18th July 1930 was or was not well founded, the question emerges as to the precise character of the grievance which must be experienced by a person applying for review under Order XLII. 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 definition of section 2 of the Civil Procedure Ordinance. Each decree necessarily follows the judgment upon which it is grounded and if a person so aggrieved at the decree his application should be for 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 or 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 ratio decidendi expressed in a judgment cannot be called under question in review unless the resultant decree is a source of legitimate grievance to party to a suit. In these proceedings no resultant decree on the 29th August 1930 had yet come into existence. 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’.

And in the case of Bernard Githinji vs. Kirata Farmers Co-operative Ltd HCCC No. 32 of 1974, a case where an application for review was made before a formal decree had been drawn upon, Nyarangi J. as he then was stated:

“The Appellant should have applied for a decree to be drawn up and issued. At this stage there is nothing upon which the court’s judgment can be arrived”.

In view of what is stated above, the failure by the Applicant to extract a formal decree was fatal to the application and it should be on that count fail”.

In the present application, no order has been annexed and I was not referred to one during the Applicant’s submissions.

Further, the Applicant says new evidence has been discovered. Apparently what it calls new evidence is that the membership of the Company did not discuss the sale of the property and the Company in fact applied for and obtained extension of the lease. The Applicant has not stated whether this was evidence that could not have come to their knowledge through due diligence. It is obvious that before it filed this suit it was aware that the lease had been extended. The suit was filed on 20th August 1999 while the letter extending the lease was dated 16th December 1998. The application dated 10.2.2000 seeking striking out of Plaint as against 3rd Defendant was heard on 11th July 2000 well over 1½ years after the extension. The Applicant cannot say that it could not have known what was with it already when the Order sought to be set aside was made. Equally its members did make certain decisions at a meeting. No evidence of such a meeting has been annexed. No minutes have been annexed. Court is not told when the members met. However whenever they met, if it was before 11th July 2000 when the order sought to be reviewed was made then they cannot deny that they knew of their meeting and were aware of it when the application to strike out Plaint as against 3rd Defendant was made. The order 44 Rule (1) talks of new evidence which could not have been available even after the exercise of due diligence by the Applicant. It does not permit any party to mend fences by introducing afterthoughts into the matter after the decision does not favour the Applicant.

Lastly, Order 44 Rule (1) makes it clear that the application for review should be made “without unreasonable delay”. This reflected a recent amendment to the order. That amendment would not have been made without a reason. Here the order sought to be reviewed was made on 20th July 2000. This application is brought on 21st January 2002 over one year later. No reason has been given for the unreasonable delay. In my humble opinion, looking at this application from whichever approach, it cannot succeed. It is dismissed. As the Respondent did not attend court on the hearing date, there shall be no order for costs to the Respondent.

Dated and delivered this 15th day of February 2002.

ONYANGO OTIENO

JUDGE