



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 226 OF 2018

MAMA MILLERS LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

SUNRISE SYNTHETICS LIMITED.....DEFENDANT/APPLICANT

RULING

By a Notice of Motion Application dated 25th June 2020, brought under Sections 80,63, 1,1B and 3A of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, the Defendant/Applicant sought the following orders;

1. That the Honorable Court do review and/or vary the orders made in the Ruling delivered on 19th December 2018, which orders placed the Defendant's Preliminary Objection to the suit in abeyance and also ordered that the Preliminary Objection herein raised by the Defendant should be incorporated in the main Suit.
2. That the Defendant's Preliminary Objection be heard and determined on its merit before the Suit can proceed to hearing
3. That the Honorable Court do Review, vary and/or set aside the Orders granting the Plaintiff's prayer No.5 and 6 of the Plaintiff's Notice of Motion dated 9th August 2018, pending determination of the suit which prayers were granted by the Court without the inter parties hearing of the Notice of Motion dated 9th August 2018.
4. That the Orders granting the Plaintiff leave to deposit money in Court "to be collected by the Defendant" be Reviewed and/or Set Aside as it amounts to granting a substantive prayer in the Plaint before the hearing of the case and without the Defendant's consent.
5. That the Orders of the Status Quo be Reviewed and Set Aside, and if necessary, the same do apply only to the portion of the property being claimed by the Plaintiff and not to the whole of the Defendant's property.
6. That the Honorable Court do strike out the Plaintiff's Supplementary Affidavit filed in Court on 12th November 2018 as the same was filed late and without the Court's leave extending time for it.
7. That Costs be provided for.
8. That in the interest of Justice, any other orders deemed appropriate and suitable in the circumstance of this matter be made.

The Application is supported by the Affidavit sworn by **Jayantilal Kachra Shah**, who averred that he obtained the Ruling dated **19th December 2018** on **2nd June 2020**, when he went to peruse the Court file and that is when he came to know the contents of the said Ruling and they have filed this Application as soon as possible after obtaining a copy of the said Ruling.

He further averred that before the hearing of the Notice of Motion Application dated **9th August 2018**, the Defendant filed a Notice of Preliminary Objection Marked as **Exhibit JKS-003**, which, if successful, would have terminated the Plaintiff's case and the main ground for the Preliminary Objection was based on **Section 4** of the **Limitation of Actions Act**.

It was his contention that on **19th December 2018**, the Court delivered a Ruling whereby the Honorable Judge made orders granting the Plaintiff's prayer for Injunction pending the hearing and determination of the Suit, without *inter-parties* hearing and without consideration of

the Defendants Replying Affidavit, objections and submissions. Further, he noticed that the Ruling issued on **19th December 2018**, contained mistakes and serious errors on the face of the record necessitating Review of the issued Orders.

That he has been advised by his Advocates, which information he believed to be true that it was proper that the **Preliminary Objection** be determined first before the Court proceeds with the hearing of the main Suit. That the Honorable Judge had earlier agreed to hear the Preliminary Objection and even ordered for written submissions for the same but the Judge wrote a Ruling stating that **“the Preliminary Objection raised by the defendant should be incorporated in the main suit”**

The Application is opposed vide a Replying Affidavit filed on **6th July 2020**, Sworn by **Bernard Wainaina Mwangi**, the Plaintiff’s Managing Director who averred that there are no grounds disclosed by the Applicant’s Application dated **25th June 2020**, to justify a Review of the Orders on record as required under **Order 45 Rule 1 (1)(b)** of the **Civil Procedure Rules**. That the Defendant’s/Applicant’s remedy was to file an Appeal within 14 days to the Court of Appeal, but it failed to do so.

He averred that there has been unreasonable delay in filing the Application. That the Plaintiff’s Supplementary Affidavit filed on **12th November 2018**, was filed in time, pursuant to leave granted on **29th October 2018** which was to be filed within 14 days.

Parties were directed to file Written Submissions to canvass the instant Application and the Plaintiff/Respondent through the **Law Firm of J.K Mwangi & Co. Advocates** filed its submissions dated **18th December 2020**, while the Defendant/Applicant’s submissions are dated **20th July 2020** through the **Law Firm of John Ogada & Co. Advocates**.

The Court has carefully considered the instant Application, the pleadings in general and the submissions. The key issue for determination is;

- **Whether the Defendant/Applicant has met the threshold for the Review of the Court Ruling dated 19th December 2018.**

The Application is brought under **Order 45 Rule 1 of the Civil Procedure Rules**, which provides that an Order for Review can be entertained when there is discovery of new and important matter or evidence, which after the exercise of due diligence was not within the applicant’s knowledge or could not be produced by him at the time when the **decree** was passed or **order** made.

There is no doubt that on **19th December 2018**, the Court delivered a **Ruling** wherein it held as follows:-

“Preliminary Objection herein raised by the Defendant should be incorporated in the main suit so that the Court is not called upon to use its limited precious judicial time determining interlocutory applications.

Secondly, order of status quo was maintained by allowing prayers No.5 and 6 of the instant Notice of Motion dated 9th August 2018.”

Subsequently thereto the Plaintiff filed an application dated **8th October 2019** for consolidation of this suit with the **ELC No. 225 of 2018**. A Ruling was delivered on **5th March 2020**, disallowing the same. Thereafter the Defendant filed another application dated **17th June, 2020** seeking for my recusal from handling this matter. A Ruling was delivered on **29th October 2020**. However, before the above application could be heard and determined, the Defendant/Applicant filed the instant Notice of Motion Application dated **25th June, 2020** seeking for Review of the Ruling delivered on **19th June 2018**.

The Defendant/Applicant herein seeks to Review this Court’s Ruling that was delivered on **19th December 2018** and subsequent orders issued on **20th December 2018**. **Order 45 Rule 1** of the **Civil Procedure Rules** applies where there are **discovery of new and important matter** or evidence which after exercise of due diligence was not within the knowledge or could not be produced by the applicant at the time the order was made. In the case of

the face of record or any other sufficient reasons to warrant a review of the Court's Ruling delivered on **19th December 2018**.

The second question that this Court ought to consider is whether there is any mistake or error apparent on the face of the record. The Defendant/Applicant maintain that it noticed that the Ruling issued on **19th December 2018**, contained mistakes and serious errors on the face of the record necessitating review of the issued orders. However, the Applicant has not pin pointed the errors on the face of the record. In the case of *Nyamogo & Nyamogo v Kogo (2001) EA 170 cited in Veleo (K) Limited* the Court held as follows:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

Thirdly, the Court has to consider if there is sufficient reason to review the Court's earlier ruling. The Defendant/Applicant has not elaborated any sufficient reasons to warrant a review of the Court's Ruling. If the Defendant/Applicant was dissatisfied with the said ruling, then he should have appealed against that ruling rather than seek for review after a period of more than one year had lapsed since the said Ruling was delivered.

The last condition that the Defendant/Applicant has to satisfy under **Order 45** of the **Civil Procedure Rules** is whether the Application has been made without undue delay. The Ruling sought to be Reviewed was delivered on **19th December 2018**, whereas the application for Review was made on **25th June 2020**. Whereas delay of more than one year appears to be unreasonable, failure to explain the delay may nevertheless cause the delay to be construed as more unreasonable. Thus, the Defendant/Applicant has not given satisfactory explanation for the delay. See the case of *Abdulrahman Hassan V National Bank of Kenya Ltd HCCC No. 446 of 2001 (eKLR)* where the Court held:-

“The Court observed that “an unexplained delay in filing for review of more than three months was unreasonable.”

The Order sought by the Defendant/Applicant are discretionally and the said discretion must be exercised judiciously. As provided by **Section 3A** of the **Civil Procedure Act**, the Court is enjoined to make Orders that are necessary for end of justice to be met and to prevent abuse of the Court process.

Having carefully considered the instant Notice of Motion application dated **25th June 2020**, and having analyzed the Court's findings as above, the Court holds that the necessary Orders herein that would ensure justice is met is to **disallow** the said Notice of Motion application for review.

Consequently, the Court finds the Defendant's/Applicant's Notice of Motion application is **not merited** and the same is **dismissed** entirely with costs to the Plaintiff/Respondent.

Further, the Court notes that this suit was filed in the **year 2018**, and has not taken off because of various interlocutory applications by the parties herein. The Court directs that this matter should be set down for hearing expeditiously and be determined on merit and indeed the said Preliminary Objection by the Defendant will definitely be considered then.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 3RD DAY OF JUNE 2021

L. GACHERU

JUDGE

3/6/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Mwangi for the Plaintiff/Respondent

M/s Hamba holding brief for Mr. Ogada for the Defendant/Applicant

L. GACHERU

JUDGE

3/6/2021