



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 225 OF 2018**

**SOLOMON WANYOIKE WAINAINA.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**SUNRISE SYNTHETICS LIMITED.....DEFENDANT/APPLICANT**

**RULING**

Vide a Notice of Motion application dated **25<sup>th</sup> 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 19<sup>th</sup> December 2018, which orders placed the Defendants 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 Defendants 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 9<sup>th</sup> 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 9<sup>th</sup> 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 12<sup>th</sup> 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 premised on the grounds stated on the face of the application and also by the Supporting Affidavit sworn by **Jayantilal K. Shah**. He averred that he obtained the Ruling dated **19<sup>th</sup> December 2018**, on **2<sup>nd</sup> 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 that they have filed this application as soon as possible after obtaining a copy of the said Ruling.

He averred that the Plaintiff prayed in the Plaint that it be permitted to deposit the alleged balance into the Court for the Defendant to collect it as the Defendant has refused to collect the same. That the disputes between the parties could only be resolved in accordance with the remedies contained in the Sale Agreement.

That the Plaintiff also filed a Notice of Motion dated **9<sup>th</sup> August 2018**, seeking orders of Injunction against the Defendant, pending the determination of the Suit and was granted temporary *Ex-Parte* Orders pending Interpartes Hearing. That on **19<sup>th</sup> 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, preliminary objection and written submissions.

Further, he noticed that the Ruling issued on **19<sup>th</sup> December 2018**, contained mistakes and serious errors on the face of record necessitating review of the issued orders.

It was his contention that it was proper that the Preliminary Objection be determined first before the Court proceeded with the hearing of the main suit. Further 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"*

Additionally, he alleged that the Defendant was condemned unheard by the Honorable Judge. Firstly, its Preliminary Objection was never determined, secondly, Injunction Orders were granted against it ex parte, thirdly, Status Quo was ordered against it without its views, submissions or positions being taken into consideration.

The application is opposed vide a Replying Affidavit filed on **10<sup>th</sup> July 2020** sworn by **Solomon Wanyoike Wainaina**, who averred that there are no grounds disclosed by the Applicant's Application dated **25<sup>th</sup> 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 remedy was to file an Appeal within 14 days to the Court of Appeal, but it failed to do so, yet the Defendant's Directors and their Counsel were in Court.

The Court directed the parties to file Written Submissions to canvass the instant Application. The Plaintiff/Respondent through the **Law Firm of J.K. Mwangi & Co. Advocates** filed its submissions dated **18<sup>th</sup> December 2020**, while the Defendant/Applicant submissions are dated **20<sup>th</sup> July 2020**, filed through the **Law Firm of John Ogada & Co. Advocates**.

The Court has carefully considered the instant Application, the pleadings in general, the rival submissions and the relevant provisions of law. The issue for determination is; ***whether the Defendant/Applicant has met the threshold for the Review of the Court Ruling dated 19<sup>th</sup> December 2018.***

The Application is also 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.

It is evident that on **19<sup>th</sup> December 2018**, the Court delivered a **Ruling** wherein it held that;

**"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 9<sup>th</sup> August 2018."**

There is also no doubt that subsequently thereto, the Plaintiff/Respondent filed an application dated **8<sup>th</sup> October 2019**, for consolidation of this suit with **226 of 2018**, and a Ruling was delivered on **5<sup>th</sup> March 2020**, disallowing the same. Further the Defendant filed a Notice of Motion dated **17<sup>th</sup> June 2020**, seeking for my recusal from handling this matter on the basis that I had issued injunctive orders in favour of the Plaintiff without having heard the matter interpartes. A Ruling was delivered on **29<sup>th</sup> October 2020**.

The Defendant/Applicant herein seek to Review this Court's Ruling that was delivered on **19<sup>th</sup> December 2018**, and the subsequent orders issued on **20<sup>th</sup> 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 Applicant's knowledge or could not be produced by the Applicant at the time the order was made. In the case of **Daniel Macharia Karagacha Vs Monicah Watithi Mwangi, Civil Appeal No.159 of 2000** the Court of Appeal held that :-

**"Review is only available where there is an error of law apparent on the face of the record or there is a discovery of new and important matter of evidence which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application."**

The 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 maintains that it noticed that the Ruling issued on **19<sup>th</sup> December 2018**, contained mistakes and serious errors on the face of record necessitating review of the issued orders. However, the Applicant has not pinpointed 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 undefiniteness 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.”**

Further, the Court has to consider if there is sufficient reason to review the Court’s earlier ruling. The Applicant have not elaborated any sufficient reasons to warrant a review of the Court’s Ruling. The Defendant/Applicant seem to have been aggrieved by the Ruling of the Court delivered on **19<sup>th</sup> December 2018**, and the available remedy for him was to appeal against the said Ruling, which it did not appeal but sought for recusal of the Judge.

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 **19<sup>th</sup> December 2018**, whereas the application for review was made on **25<sup>th</sup> June 2020**. The delay of more than one year appears to be unreasonable, and failure to explain the said 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 Defendant/Applicant’s Application is based on the fact that the Learned Judge did not consider crucial information e.g. declining to determine Defendant’s Preliminary Objection, issuing **Status Quo Orders** and giving Injunction Orders Ex parte. These are not grounds for Review but grounds for Appeal. Moreover, failure to analyze evidence is not a ground for Review.

Whether the Defendant/Applicant shall suffer irreparable injury or will be highly prejudiced by the Ruling is a matter for the Court of Appeal to determine as it is clear that the Applicant is dissatisfied with the decision of the Court and can only Appeal against the said decision. **Order 45, Rule 1(b)** is clear that for the Court to review its decision, certain requirements should be met as earlier discussed.

The Court further finds that the necessary Orders herein to ensure that justice is met is to disallow the Defendant/Applicant’s Notice of Motion for Review of the Ruling delivered on **19<sup>th</sup> December 2018**.

Having carefully considered the instant Notice of Motion application dated **25<sup>th</sup> June 2020**, the written submissions, and the relevant provisions of law, the Court finds and holds that the said application is **not merited** at all. The said application is dismissed entirely with costs to the Plaintiff/Respondent.

Further the Court notes that this is a **2018**, matter which has been delayed by various interlocutory applications. The Court directs the parties to set the suit herein for hearing expeditiously and avoid delaying the suit with various interlocutory applications, indeed the said preliminary objection by the Defendant will be determined 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 **15<sup>th</sup> 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**

