Ederman Company (K) Limited v Devkan Enterprises Limited (Miscellaneous Civil Application 41 of 2013) [2024] KEHC 4642 (KLR) (Commercial and Tax) (6 May 2024) (Ruling)

Neutral citation: [2024] KEHC 4642 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS CIVIL APPLICATION 41 OF 2013

JWW MONG'ARE, J

MAY 6, 2024

BETWEEN

EDERMAN COMPANY (K) LIMITED ..... APPLICANT

AND

DEVKAN ENTERPRISES LIMITED ..... RESPONDENT

RULING

1. By a Notice of Motion dated 27th May 2019 the Landlord has moved this court seeking to have the court vary, set aside and vacate the orders of the Hon. Lady Justice Farah Amin dated 15th April 2019 and allow the its application dated 20th June 2016 and the Tenant's Application dated 11th March 2016 be heard together and a joint determination be made thereon.

2. In its supporting affidavit sworn by Zeyun Yang, the Landlord argued that the Hon. Judge in her ruling failed to consider the said Application by the Landlord and the supporting Affidavit and its annextures, and therefore the Landlord was not heard and was hence not treated equally before the law contrary to Article 27 and 50 *Constitution*.

3. In response thereto the Tenant/Respondent filed a Replying Affidavit sworn on 31st May 2019 opposing the present application.

4. Pursuant to the directions of the Court the parties filed written submissions. The Court upon careful consideration of the written submissions and the application and the affidavits filed in support and opposition thereto has identified one issue for determination, to wit;

> " whether the court should vary, set aside and vacate the orders of the Hon. Lady Justice Farah Amin dated 15th April 2019?"

5. The background of instant suit is that Hon. Lady Justice Kamau delivered a Ruling in the matter herein on 12th July 2013 whereupon both parties applied for review of the ruling. The tenant filed its Chamber Summons application dated 11th March 2016 and the Applicant landlord filed an application dated 20th June 2016 as well. The Applicant herein further filed a Replying Affidavit to the Tenant's application on 20th June 2016 and a Notice of Preliminary Objection on 23rd February 2016.

6. Subsequently, both parties appeared before the Honourable Lady Justice Farah Amin and directions were taken that both applications would be heard together and each party was at liberty to file submission if they so wished. A ruling date was given in court. The Hon. Judge was thereafter transferred to Voi and took the court file with her for purposes of writing the ruling.

7. Upon the delivery of the impugned Ruling, the Landlord noticed that the court had not considered its Application dated 20th June 2016. It is upon this realization that the Landlord has filed the current Application for review.

8. Section 80 of the *Civil Procedure Act* provides as follows: -

> " Any person who considers himself aggrieved—
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

9. Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows: -

> " 1.
>
> (1) Any person considering himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of 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 the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

10. It was the Applicants submissions that there was an error apparent on the face of the record, being that, the Applicant's application dated 20th June 2016 was not in the court file and this is not an error or mistake occasioned by the Applicant. The aforementioned mistake has subsequently caused the Application to be left unheard and consideration not put to it resulting to the ruling that ultimately affects the Applicant.

11. On the other hand, the Respondent submitted that the landlord was seeking to reopen the claim as opposed to an error apparent neither did the Application meet the threshold of new and compelling evidence which was not available or within the knowledge of the landlord.

12. The question that this court now seeks to answer is "whether there was an error apparent on the face of the record?" In *Chandrakhant Joshibhai Patel -v- R* [2004] TLR, 218 it was held that an error stated to be apparent on the face of the record:-

> "...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reading on points on which may be conceivably be two opinions."

13. Having perused the impugned Ruling by Hon. Lady Justice Amin; I note that at paragraphs 10 and 16 of the said ruling, that the court stated that the Landlord had not filed any application and that the Respondent did not appear to oppose the review. In addition, I note that the ruling went further to state that the Preliminary Objection that had been raised by the Landlord was against the adoption of the award.

14. Upon perusal of the court record, I have observed that from that indeed there was an Application dated 20th June 2016 was in the file having been filed on 20th June 2016 as evidenced by the Court stamp on the receipt, as well as a receipt from the High Court registry for the Commercial Division of the same date. The Court is therefore satisfied that in the instant case, it is proper to conclude that the error is self-evident on the face of the record itself.

15. Thus, the court finds that the applicant has established that there was an error apparent on the face of the record and having found that adverse orders were made against the applicant, the court finds and holds that the application for review has merited and the same is allowed as prayed.

16. In light of the above, the Court orders and directs that the Landlord's Application dated 20th June 2016 be heard together with the Tenant's Application dated 11th March 2016 and a joint determination be made thereon.

17. Arising from the fact that the error was occasioned by an omission by the court in omitting to consider the 20th June 2016 Application by the Landlord and not either of the parties before the court, each party shall bear its own costs.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF MAY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the presence of:-

1. Mr. King'ara for the Landlord/Applicant.

2. Ms. Dave for the Tenant/ Respondent.

3. Amos- Court Assistant