Amaro v Mohamed; Enersense Solutions Limited (Affected Party) (Miscellaneous Application E273 of 2021) [2023] KEHC 34 (KLR) (Commercial and Tax) (13 January 2023) (Ruling)

Neutral citation: [2023] KEHC 34 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E273 OF 2021

A MABEYA, J

JANUARY 13, 2023

BETWEEN

HUSSEIN AILA AMARO ..... APPLICANT

AND

FARIDA IDRISS MOHAMED ..... RESPONDENT

AND

ENERSENSE SOLUTIONS LIMITED ..... AFFECTED PARTY

RULING

1. This is an application dated March 24, 2022. It was brought under sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 and Order 51 Rule 1 of the *Civil Procedure Rules*, and Sections 238(3) and 239(2) of the *Companies Act*.

2. It has sought for the review or variation and setting aside of the orders made on January 28, 2022. It was supported by the affidavit sworn by Hussein Aila Amaro.

3. It was contended that vide this Court's ruling dated January 28, 2022, the application dated April 16, 2021 was dismissed on basis that the applicant could challenge the valuation report submitted by Clyde & Associates in Comm E249 of 2020. That at the time the application dated April 16, 2021 was being disposed of, Comm E249 of 2020 was still existing, but had since been struck out on September 28, 2021 for being filed without leave of court.

4. That such striking out raised new evidence warranting review of the Court's orders of January 28, 2022. That the court also failed to consider some evidence before it regarding the applicant's transfer of his shares in the company to one Mr. Dunstan Ingonyi Majanja, and that amounted to an error apparent on the face of the record.

5. That if that is considered, the Court would have to review its orders of January 28, 2022. That the claim intended to be brought was on behalf of the company and not the applicant. That contrary to the Court's finding, the applicant had particularized the claim against the respondents meddling with the operations of the company.

6. The application was opposed vide the Replying Affidavit sworn by Farida Idris Mohammed on April 7, 2022. It was contended that the application for leave to prosecute a derivative suit on behalf of the company was dismissed on several grounds including; the reliefs were on the applicant's behalf and not the company, the applicant was not a member of the company having transferred his shares, and there was an ongoing case Comm E249 of 2020 wherein the applicant could address his issues on the valuation report.

7. That the suit was dismissed on a technicality not merit, and its striking out raised no new evidence. That the applicant was a stranger to the company and the instant application was for his own behalf and not that of the company.

8. The application was canvassed by way of written submissions. The applicant submissions were dated May 17, 2022 while those of the respondent were dated August 15, 2022. This Court has considered the entire record.

9. It is now well settled that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45 Rule 1 of the *Civil Procedure Rules, 2010* and section 80 of the *Civil Procedure Act*. In this regard, although the Court has power to review its own orders, such power must be exercised within the framework of Order 45 Rule 1 of the *Civil Procedure Rules 2010*.

10. Under that provision, that power is exercisable on discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of an applicant 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. For any of the foregoing grounds, there is a requirement that the application has to be made without unreasonable delay.

11. The applicant has moved on the first two grounds. He contends that in the ruling of January 28, 2022, the Court found that the applicant could address any issues he had with the valuation report in Comm E249 of 2020. That a matter in which the respondent had filed challenging the applicant's transfer of shares to Dunstan Ingonyi Majanja. That though the matter was active at the time when the application for leave was made, the suit has since been struck out on September 28, 2021 at the applicant's instance for lack of leave before filing. That the striking out was new evidence which went to the root of the instant application.

12. This court has seen its ruling of January 28, 2022. At paragraph 17, the Court found that the applicant was not a member of the company. At paragraphs 18, 19 and 20, the Court found that the applicant sought reliefs for his own behalf and not that of the Company. The Court thus found that the first two tests of establishing whether a claim was a derivative suit had not been met.

13. At paragraph 24, the Court found that the applicant had not established a prima facie case against the respondent. The Court further found the applicant guilty of material non-disclosure for failing to disclose that he had transferred his shares in the company.

14. To this Court's mind, those are the grounds upon which the Court dismissed the applicant's application that sought leave to continue a derivative suit on behalf of the company. The availability

of an alternative suit upon which the applicant could take his grievances was not the main reason for the dismissal of that application. That was only a by the way.

15. It then goes without saying that the striking out of that suit for lack of leave before filing has no counter-effect on the Court's findings. The fact that the applicant failed then, as well as now, to meet the test for a derivative suit does not change by the striking off of the alternative suit. The new evidence of the striking out of the suit has no bearing whatsoever on the applicant's capacity to apply for a derivative suit. It cannot therefore justify the setting aside of that ruling.

16. On the second ground that there was an error apparent on the face of the record, the applicant faulted the Court for failing to consider evidence relating to his directorship. Unfortunately, that claim is in the nature of an appeal, and this Court cannot be seen to sit on its own decision.

17. The failure of the Court to consider some evidence that was already on record is an error that can only be rectified by a higher court by way of an appeal. The Court having considered all the material before it and rendered a decision thereon became *functus officio*. Any party dissatisfied with the Court's finding has the option of appeal and not review. That ground is also rejected.

18. The upshot is that the application dated March 24, 2021 is without merit and is hereby dismissed with costs to the respondent.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JANUARY, 2023.

A. MABEYA, FCIArb

JUDGE