REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 836 OF 2003

RWAMA FARMERS COOPERATIVE SOCIETY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

THIKA COFFEE MILLS LIMITED.....DEFENDANT/RESPONDENT

FAULU MICRO FINANCE BANK LIMITED.....INTERESTED PARTY/APPLICANT

RULING

1. The application for consideration is the Interested Party's Notice of Motion dated 10th March 2020 brought under **Section 80** of the **Civil Procedure Act,** Chapter 21, Laws of Kenya and **Order 45 Rule 1(a) & (b)** of the **Civil Procedure Rules**. The unspent prayers are:

a) THAT this honourable court be pleased to review and set aside its ruling and order on costs made on the 4th November, 2019.

b) THAT the costs of this application be provided for.

2. The application is based on the grounds on the face of it and supported by an Affidavit sworn on even date by **STEVE BIKO NYAGAH**, a legal officer of the Interested Party herein. He deposed that the Interested Party has never been joined as a party to these proceedings but was only named in the Plaintiff's application dated 3rd January, 2019 on the allegation that it had refused to release certain funds to the Plaintiff. He argued that that an order for costs cannot be made against a party that has not been joined to proceedings such as the present suit.

3. Further, he averred that the Interested Party opposed the said application and on 8th January, 2019, the parties consented to the release of the stated funds but only on condition that the same was to be done in compliance with the terms of the decree and not as prayed in the Plaintiff's application. Thereafter, the Plaintiff filed an application dated 25th April, 2019 seeking costs of the earlier application. In response thereto, the Interested Party filed Replying Affidavit sworn by Sheila Maina on the 25th July, 2019.

4. It was further contended that the Plaintiff did not file or serve any submissions on its application dated 3rd July, 2019 as directed by court but in a shocking and surprising turn of events, the court on its own motion and without notice to the Interested Party, delivered a ruling on 4th November, 2019 allowing the application for costs. He contended that the said ruling has an error apparent on the face of the record being that the court stated that the Interested Party herein had not responded to the said application despite there being a Replying Affidavit to that effect on record.

5. Further, he stated that the court proceeded on the mistake that the Plaintiff's initial application dated 3rd January, 2019 succeeded whereas the same has not been disposed of with regard to all the prayers set out in that application.

6. He averred that the said error apparent on the face of the record and the clear mistake by the court, are extremely prejudicial to the Interested Party and thus there is clear basis for review of the court's ruling and order made on the 4th November, 2019. Further, he stated that in any event, the said ruling was delivered without any notice to the Interested Party herein but curiously, the Plaintiff's advocate was present and immediately thereafter filed a bill of costs which is now pending for taxation before the Deputy Registrar of this court. According to him therefore, it is only fair and just in the circumstances that the prayers sought be allowed.

7. In response to the application, the Plaintiff filed Grounds of Opposition dated 12th March, 2020 wherein it opposed the application on the following ground

a) THAT the Interested Party's application is frivolous, vexatious and an outright abuse of the court process. The application is also misconceived, ill-advised, malicious and mischievous and devoid of any merit. Further, it is full of falsehoods made with the sole objective of delaying the taxation of the Plaintiff's Bill of costs.

b) THAT there are no valid reasons and grounds made out by the Interested Party in their application to set aside the ruling of the Honourable court delivered on 4th November 2019.

c) THAT the Interested Party was served with the Plaintiff's Notice of Motion dated 3rd January 2019 and it fully participated in the proceedings before this Honourable Court. The Interested Party was also served with the Plaintiff's Notice of Motion application dated 25th April 2019 and it responded to the same on 25th July 2019 vide a Replying Affidavit but did not file any submissions as directed by the court.

d) THAT the Interested Party was duly served with a notice scheduling the hearing of the latter application for 18th July 2019 and it is on that day that this honourable court directed parties to file and exchange their respective written submissions in respect of the application. However, the Interested Party chose not to file their written submission despite having been given ample opportunity to do so and cannot now be heard to complain of the failure by the court to consider their response to the Plaintiff's said application.

e) THAT the Honourable court made a considered opinion in determining the issue of the proceeding necessitated by the submissions of the Interested Party.

f) THAT in the circumstances, the court should dismiss the Interested Party's application with cost.

Submissions

8. The Application was canvassed by both oral and written submissions. The Interested Party filed written submissions dated 1st July, 2020 whilst the Plaintiff's written submissions are dated 29th June, 2020. During the oral hearing of the Application, the Interested Party was represented by learned counsel, Mr. Njenga whereas the Plaintiff was represented by learned counsel, Mr. Muriuki.

9. In its written submissions, the Interested Party referred to paragraph 6 of the Ruling of 4th November, 2020 where the court stated as follows:

> ***"I have considered and note from the record that when the matter was eventually called out in court on the 6th May 2019, the parties were not in court. Later on 3rd June 2019, the court directed the parties to respond to the application and file skeleton submissions. That was not done. On the 30th July 2019, the due date for ruling, the parties were not in court."***

10. The Interested Party submitted that the above statement is factually incorrect in view of the undisputed fact that it responded to the Plaintiff's application for costs vide a Replying Affidavit sworn by Sheila Maina which Affidavit was served upon the Plaintiff's advocate on 27th July, 2019. It further noted that the Plaintiff now alleges at paragraph 2(vi) of its submissions filed on 1/7/2020 that it had filed written submissions in respect of the said application whereas even the court in the impugned ruling confirms that the same was not done.

11. According to the Interested Party, the foregoing discloses a material mistake and error apparent on the face of the court's ruling of 4th November, 2019. It argued that the court's failure to consider a party's response to an application under its consideration is a grave mistake that contravenes the aggrieved party's constitutional right to be heard under Article 50 (1) and 2(c) of the Constitution of Kenya which provides that any party to a dispute in court must be afforded opportunity to defend itself.

12. The Interested Party further argued that the existence of its Replying Affidavit filed on the 25th July, 2019, almost five (5) months before the delivery of the impugned ruling, constitutes the existence of a new and important matter within the reading and contemplation of Order 45(1) (b) of the Civil Procedure Rules.

13. In addition, the Interested Party stated that there is a clear mistake of fact on the record particularly at paragraph 7 of the impugned ruling where the court found as follows;

> ***"having considered the history of the matter, based on the averments in the affidavit in support of the application, I order that the plaintiff/decree holder be paid costs on the application dated 3rd January 2019, having succeeded in the same."***

14. In its view, the above finding is mistaken because the Plaintiff did not succeed as against the Interested Party on claims made in the application dated 3rd January, 2019 as held by the court. It reiterated that it was not a party to the substantive dispute in this matter and questioned how an order for costs be made against it whereas there is no order on record made under **Order 1** of the **Civil Procedure Rules**, joining it as a party to the proceedings. It was further its contention that **Section 27** of the **Civil Procedure Act** only contemplates the making of an order for costs against a person who is a party to the matter in court. It submitted that this issue was indeed raised in its Replying Affidavit filed on 25th July, 2019 which was unfortunately not considered by the court.

15. Further, it was submitted by the Interested Party that the Plaintiff did not succeed in the Application dated 3rd January, 2020 as it essentially conceded to the Grounds of Opposition filed by the Interested Party on the 8th January, 2009. It stated that at paragraph 3 thereof, it stated that it was at all times ready and willing to remit the funds that were in its custody but only upon the Plaintiff furnishing it with its proper account details.

16. It posited that the Plaintiff had through its advocates asked that the said funds be paid to RWAMA F.C.S but the Court intervened and directed that the funds were to be paid to RWAMA FARMERS CO-OPERATIVE SOCIETY. It argued that in any case, it is not disputed that the Plaintiff was duly paid after providing the correct account details. Further, it argued that the principal prayer in the Plaintiff's application dated 3rd January, 2020 was one in which it sought to cite the Interested Party's officials for contempt of court which prayer was never prosecuted and was subsequently abandoned. It stated that there is no ruling or finding of this court that the Interested Party acted in violation of any law or order of the court.

17. Accordingly, it maintained that this is a material mistake on the record which provides a basis for a review of the order of costs made against the Interested Party. It relied on the case of **Rufus Njuguna Miringu & Another V Martha Muriithi & 2 Others [2012] eKLR** for the court's statement that;

> ***"I also agree with the 1st and 2nd Defendants' Counsel that consent cannot be interpreted to mean that one or the other party has succeeded in a suit. Even if in the present case such settlement has worked out in the Defendants' favour, the successful determination of the dispute is still attributable to both the Plaintiffs and the 1st and 2nd Defendants."***

18. In addition, the Interested Party submitted that there is sufficient reason for review in this matter. It was stated that Order 45 Rule 1(b) jurisdiction to the court to review a ruling or a judgment for sufficient reason. That this may be a general consideration of the justice and fairness of a matter in consideration of all material facts relevant and in issue. It argued that it is the court's constitutional duty to mete out justice and fairness to the parties in a dispute before it depending on the peculiar facts of every case.

19. Learned counsel Mr. Njenga reiterated these submissions in his oral arguments before the court. He urged that in the circumstances, it is only fair and reasonable that the order for costs made on the 4th November 2019 against the Interested Party be reviewed and set aside.

20. In the Plaintiff's written submissions, it reiterated that there is no sound ground to warrant the review being sought by the Interested Party. It relied on the case of **National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported)** cited with approval by the Court of Appeal in the case of **Pancras T. Swai v Kenya Breweries Limited [2014] KLR** where the court held that;

> ***"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review."***
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> ***"... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.'***

21. It also relied on the case of **Evan Bwire vs Andrew Nginda Civil Appeal No. 103 of 2000, Kisumu, (2000) KLR 8340** cited in **Republic v Public Procurement Administrative Review Board & 2 Others (2018) eKLR** where it was held that an application for review will only be allowed on very strong grounds.

22. The Plaintiff argued that the Interested Party's assertion that the court did not consider their Replying Affidavit is not good enough to warrant the review and/or setting aside of the order made on 4th November, 2019 in view of the fact that the said Affidavit has not introduced anything new. Further, it was submitted that the Interested Party's allegation that the matter proceeded *ex parte* is malicious and made in bad faith since the Court record can confirm that the Plaintiff's counsel was present in court when directions were issued.

23. It stated that the proceedings of 6th May, 2019 show that Ms. Obwori Advocate held brief for the Plaintiff's advocates whilst Mr. Mugisha held brief for Mr. Njenga. Further, it submitted that on 1st October, 2019, the Interested Party was duly served with a Mention Notice through the firm of Muchoki Kangata & Company Advocates, which they received on 2nd August, 2019. It noted that an Affidavit of Service was filed in that regard on 16th October, 2019 and the court receipt no. 4462239 to that effect. It was also submitted that on 3rd June, 2019 when Mr. Muriuki appeared for the Plaintiff, the Court directed parties to file their written submissions which order was extracted and served on the Advocates for the Interested Party. However, the Interested Party ignored the court's order and failed to file its written submissions.

24. Additionally, the Plaintiff submitted that the Interested Party having been admitted to the current proceedings when it refused to release to the Plaintiff monies held in a joint account held in it, it is a proper party for all practical purposes to this suit. It noted that in any case, the fact that the Interested Party has been participating in this proceedings points to the fact that they have a stake and an interest in the matter as per the case of **Trusted Society of Human Rights Alliance v Mumo Matemu (2014) eKLR.**

25. The foregoing submissions were restated by learned counsel Mr. Muriuki during the oral hearing of the application. Counsel urged that the Interested Party's application be dismissed with costs.

Analysis and Determination

26. Upon carefully considering the application, the response thereto and the parties' respective submissions, I find that the only issue for determination is whether the application is merited.

27. In considering whether this court should review or set aside the ruling delivered on 4th November, 2019, the starting point is to examine the provisions of **Section 80** of the **Civil Procedure Act** which donates to this court the power to review its own decision. It is also important to consider **Order 45 Rule 1** of the **Civil Procedure Rules, 2010** which prescribes the requirements to be fulfilled by an applicant seeking review.

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

> ***"80. 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***
>
> b) ***by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit."***

29. Order 45 Rule 1 of the **Civil Procedure Rules, 2010** provides that:

> ***"(1) Any person considering himself aggrieved—***
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> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(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."***

30. From the foregoing provisions, it is clear that a review may be granted by the court if there is a discovery of new and important matter or evidence; if there is a mistake or error apparent on the face of the record; or for any other sufficient reason, provided that the application is made without unreasonable delay.

31. The first ground on which the Interested Party's application is based is that there is a mistake or error apparent on the face of the record. What constitutes an error on the face of the record was aptly spelt out by the Court of Appeal in **Nyamogo & Nyamogo v Kogo** ***(2001) EA 174***, as follows:-

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un-definitiveness 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."***

32. Firstly, and as noted by the Interested Party, paragraph 6 the Ruling indeed reveals that the court proceeded on the basis that the Interested Party did not file a response to the Plaintiff's Application dated 25th April, 2020 which was the subject of the Ruling. Did this amount to an error on the face of the record? My answer is no and the reasons for the same glaringly evident from the court record which I have carefully perused.

33. The record reveals that on 3rd June, 2019 when the matter came up in court, there was no appearance for the Interested Party against whom the application had been made. On the said day, the court directed parties to file their responses to the Plaintiff's aforesaid application as well as skeletal submissions and reserved the Ruling in respect of the same for 30th July, 2019. The Interested Party has annexed an undated Replying Affidavit sworn by one Sheila Maina in response to the Plaintiff's aforesaid application which Affidavit bears a court filing stamp for 25th July, 2019, just five days before the date that was first reserved for Ruling. I have not seen any such Affidavit in the court file or even a court filing receipt to that effect. Further, the record shows that when the matter came up in court on 30th July, 2019 as had earlier been scheduled, none of the parties appeared in court. Not even the Interested Party who would have had the opportunity of informing the court that it had since filed its response as earlier directed.

34. In the circumstances, I find that the court's statement at paragraph 6 of the Ruling to the effect that the Interested Party did not file a response to the application is not factually incorrect as alleged by the Interested Party. Further, the said statement coupled with the fact that the Ruling was eventually delivered without considering the Interested Party's non-existent Replying Affidavit, does not amount to an error apparent on the face of the record warranting a review of the Ruling.

35. On the same breadth, I also find no merit in the Interested Party's argument that the court's failure to consider its Relying Affidavit which had purportedly been on record for almost five (5) months prior to the delivery of the impugned ruling constitutes a new and important matter under Order 45(1) (b) of the Civil Procedure Rules. These grounds would hold only if the response was on record but in error the court failed to consider the same.

36. Secondly, I note that the Interested Party argued that a clear mistake of fact on the face of the record exists at paragraph 7 of the

impugned ruling as the court wrongly found that the Plaintiff had succeeded on the application dated 3rd January, 2019 and used that as a basis to order the Interested Party to pay the Plaintiff's costs thereto yet it was not a party to the substantive dispute. In my view, the same does not constitute a mistake on the face of the record since costs follow the event and are awarded at the discretion of the court to indemnify a successful party for the expenses incurred in defending or enforcing their legal rights.

37. Indeed, the record shows that the Plaintiff's Application dated 3rd January, 2019 sought orders to compel the Interested Party to comply with an order issued earlier on 19th December, 2018 regarding the release of monies deposited in the bank together with the interest that had accrued thereon. The Application was compromised by way of a consent between the parties but parties failed to agree on the issue of costs for the same. Consequently, on 9th April, 2019, the court directed the Plaintiff to file a formal application in that regard hence the Application dated 25th April, 2019 which was the subject of the impugned ruling.

38. In my view therefore, the arguments made by the Interested Party in this regard are certainly not grounds for review though may constitute grounds for appeal. As such, I find that there is no mistake of fact apparent on the face of the Ruling as regards the court's finding on costs.

39. Thirdly, the Interested Party urged that there is sufficient reason for review in this matter since the court has a constitutional duty to mete out justice and fairness to parties in a dispute before it depending on the peculiar facts of every case. In the case of ***Sadar Mohamed v Charan Signh and Another* (1963)EA 557**, it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two, that is, error apparent on the face of the record and discovery of new and important matter. In the instant case, the Interested Party has not elaborated any sufficient reasons to warrant a review of the court's ruling of 4th November, 2019.

40. This takes me to the last part being whether the instant application was filed without unreasonable delay. The Ruling sought to be reviewed was delivered on 4th November, 2019 and the instant application was filed on 10th March, 2020, over four months later. The Interested Party attributed the delay to the fact that it was not notified about the date for delivery of the Ruling. From the record, I note that on 31st July, 2019, the court directed the Deputy Registrar to issue a notice to the parties to appear in court on 24th September, 2019 to take the Ruling. I have not seen any such notification on record. As such, I find that the application was filed without unreasonable delay.

Conclusion

41. In the premises, I find that the Interested Party's Notice of Motion dated 10th March, 2020 lacks merit and is hereby dismissed. The costs of this Application shall be borne by the Interested Party. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH JUNE, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Kihara h/b for Njenga for the Interested Party/Applicant.*

2. *Kimunto h/b for Muriuki for the Respondent.*