



**Kiaraho & another v Bhanji & another (Commercial Civil Case 539 of 2008)  
[2021] KEHC 33 (KLR) (Commercial and Tax) (22 September 2021) (Ruling)**

Neutral citation: [2021] KEHC 33 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE 539 OF 2008  
DAS MAJANJA, J  
SEPTEMBER 22, 2021**

**BETWEEN**

**DANIEL KAIRU KIARAHO ..... 1<sup>ST</sup> PLAINTIFF  
SAMUEL MIRIE GACHATHI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MOYEZ BHANJI ..... 1<sup>ST</sup> DEFENDANT  
GREENWOODS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs have filed an application dated 10<sup>th</sup> January 2018 seeking to review the judgment delivered by Gikonyo J., on 22<sup>nd</sup> November 2016. The application is made, *inter alia*, under the provisions of order 45 rule 1 of the Civil Procedure Rules. The plaintiffs seek the following prayers:
  - [1] That this Honourable Court be pleased to review its judgment dated 16<sup>th</sup> November 2016.
  - [2] That this Honourable Court be pleased to order the 1<sup>st</sup> defendant to execute the share transfer forms in respect of the Company transferring four Hundred and Ninety-Nine (499) shares in the 2<sup>nd</sup> defendant currently held by the 1<sup>st</sup> defendant in favour of Plaintiffs and or their nominee.
  - [3] That this Honourable Court be pleased to order the 2<sup>nd</sup> defendant to register the transfer of shares ordered and enter the names of the Plaintiffs in the register of members with the Registrar of Companies.
  - [4] That in default of prayer 2 the Deputy Registrar of the High Court do execute the transfer form on behalf of the 1<sup>st</sup> Defendant in favour of the Plaintiffs and for their nominees.



- [5] That costs of the application be provided for.
2. The application is supported by the 1<sup>st</sup> plaintiff's affidavit sworn on 10<sup>th</sup> January 2016. It is opposed by the defendants through the 1<sup>st</sup> defendant's affidavit sworn on 30<sup>th</sup> April 2019. The application was canvassed by way of written submissions.
  3. Since the application before the court is for review of judgment, it is necessary to reprise the facts and finding of the court. The Plaintiff were approached by one Farid Mohammed who was a director of the 2<sup>nd</sup> defendant and informed that the 1<sup>st</sup> defendant wanted to sell his one third share of the company. On the basis of the offer, an agreement dated 16<sup>th</sup> April 2008 between the plaintiffs and the 1<sup>st</sup> defendant was prepared where the 1<sup>st</sup> defendant would sell his one third share of the company for KES. 23,570,000.00. The transaction could not be completed on the basis that the 1<sup>st</sup> Defendant had not obtained concurrence of the other directors for the sale of the 1/3 of the company thus precipitating the filing of this suit.
  4. The court heard the parties and delivered judgment in favour of the plaintiffs on the following terms:
    - a) The Plaintiffs shall deposit in court the balance of the purchase price herein being Ksh. 21,213,000 within 14 days from today for payment in accordance to Clause 5(b) of the agreement dated 16<sup>th</sup> April 2008. The 1<sup>st</sup> defendant may however provide details of his account to which these sums shall be paid through normal transmission of money from the court.
    - b) Accordingly , I hereby issue an order for specific performance by the 1<sup>st</sup> defendant of the Agreement of sale dated 16<sup>th</sup> April 2008 entered between the plaintiff and the defendant; in particular, the 1<sup>st</sup> Defendant shall execute the share transfer forms in respect of the company transferring one (1) share held by the 1<sup>st</sup> defendant as at the date of the agreement herein in favour of the plaintiffs and or their nominees within seven days of the last day in (a) above failing which the Deputy Registrar of the court shall execute the said transfer forms on behalf of the 1<sup>st</sup> defendant in favour of the plaintiffs and or their nominees. And, the 2<sup>nd</sup> defendant shall promptly and accordingly register the transfer share ordered herein and enter the names of the plaintiffs in the register of members with the Registrar of Companies.
    - c) In view of the above orders, I hereby issue a permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants by themselves or their agents, or any person acting under their direction or behest or any of them whatsoever from alienating, selling, disposing, charging or mortgaging and or dealing with 1 ordinary share in Greenwoods Limited and LR 1/152 Original Number 1/12/3 except in the manner ordered by this court.
  5. The thrust of the plaintiffs' case is that during the pendency of the suit, there was a deliberate effort by the 1<sup>st</sup> defendant to increased his shareholding in the company to their detriment in order to defeat the judgment. The Plaintiffs point out that the learned Judge observed that

[18] In fact the 1<sup>st</sup> defendant was the architect of the breach for his own benefit; and this became clear when he later proceeded to alter the shareholding of the company and he purported to acquire 50% of the shares himself.
  6. The plaintiffs proceed to demonstrate that their case is buttressed by the CR-12 form dated 28<sup>th</sup> May 2014 which they filed in court by its Supplementary List of Documents. They state that the said CR-12 Form dated 28<sup>th</sup> May 2014 is in respect of shareholding and directorship of the company as revealed in the annual returns by the company dated 18<sup>th</sup> June 2008, while the CR-12 form dated 18<sup>th</sup> December



2014 is in relation to shareholding and directorship of the company as revealed in the annual returns dated 30<sup>th</sup> October 2013. They state that the latter CR-12 Form does not relate to the relevant period of the agreement in question which is 16<sup>th</sup> April 2008. It asserts that the CR-12 Form dated 18<sup>th</sup> December 2014 does not even show the shareholding and directorship of the company as at 28<sup>th</sup> May 2014 or before. Therefore, the CR-12 Form dated 18<sup>th</sup> December, 2014 is completely irrelevant as it deals with a period after the agreement in issue herein.

7. The plaintiffs request the court to invoke the doctrine of *lis pendens* as a basis for review as the 1<sup>st</sup> defendant as the changes in the Company were conducted sometime in the year 2014, six years after the commencement of the suit while the matter was active in court. They submit that the Defendants were at all times aware that the subject matter suit was the shareholding structure of the company and that as parties to the suit they were aware of the proceedings.
8. The plaintiffs pray that the 500 shares held by the 1<sup>st</sup> defendant be transferred to the plaintiffs to one third share of the company purchased or in the alternative the share structure be reverted to the position it was as at the time of the execution of the agreement dated 16<sup>th</sup> April 2008 and confirmed by the CR-12 dated 28<sup>th</sup> May 2014. The plaintiffs rely on the decision in *Odd Jobs v Mubia [1970] EA 476* where it was held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision.
9. The defendants oppose the application pointing out that the orders sought are incapable of being granted because the plaintiffs have not provided any new evidence nor have they demonstrated any apparent error on the record to warrant any review.
10. The defendants submit that in reaching its determination, the court relied on all the evidence presented by the parties. They contend that the Company shareholding was a matter of public notoriety and within the knowledge of the court and formed part of what it considered in reaching a determination. They add that no new and important matters that could not have reasonably been within the knowledge of the Plaintiffs and that have now come to their knowledge have been demonstrated. The defendants maintain that the matters the plaintiffs seek to introduce were within their knowledge and they should have undertaken reasonable due diligence to present the matter they now seek to present.
11. The defendant submit that based on the matters presented, the plaintiffs' recourse lies in appealing the decision as they have indeed evinced their intention to appeal by filing a Notice of Appeal and requesting for copies of typed proceedings to enable them file their substantive appeal. The defendants conclude by stating that the application for review was filed over 3 years ago and the plaintiffs have failed to prosecute it. That it is an afterthought and an abuse of the court process and should be dismissed.
12. The application before the court is one for review of the judgment under section 80 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 45 rule 1 of the Civil Procedure Rules. The principles governing the exercise of discretion to review a decree or order are now commonplace and the parties have cited several decisions to support their respective positions. An applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter or for any other sufficient reason for the court to review. The Court of Appeal in *National Bank of Kenya Limited v Ndungu Njau* explained what constitutes an error of law apparent on the face of the record and the scope of review:

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. Nor 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.

13. I have outlined the gravamen of the plaintiffs' case and it concerns the shareholding of the Company. The documents referred to by the plaintiffs were all available while the suit was being heard. Further, there is no evidence that the documents could not be found despite due diligence on the plaintiffs' part. What the Plaintiffs' want is for the court to reconsider the entirety of the evidence in light of the issues now raised and come to a different conclusion. This, I hold, falls outside the purview of an application for review. The alleged error regarding the shareholding is not apparent on the face of the record. I agree with the defendants that such issues, being matters concerning appreciation of the evidence, should now be the subject of an appeal.
14. Lastly, the plaintiff filed the application in January 2018 seeking to review the judgment over a year after the judgment was delivered in 22<sup>nd</sup> November 2016. I find the delay inordinate in view of the fact that it has not been explained since all the documents that are relied on were available at the time and were indeed produced in evidence.
15. For reasons I have set out, the plaintiffs' application dated 10<sup>th</sup> January 2018 is dismissed with costs to the defendants.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of SEPTEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Mr Ochieng instructed by Ogola Okello & Co. Advocates for the Plaintiffs.

Mr Okullo instructed by Mutea Mwange & Associates Advocates for the Defendant.

