REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 56 OF 2019

MARY WANJIRU KIHUGU.....1ST APPELLANT

JOHN MBUGUA NJENGA.....2ND APPELLANT

LUCY GICUKU MAINA.....3RD APPELLANT

FRANCIS KIMANI.....4TH APPELLANT

DAVID GITHINJI WANJOHI.....5TH APPELLANT

MARY JESIRE KIPYEGON.....6TH APPELLANT

CO-OP HOLDINGS CO-OPERATIVE SOCIETY LIMITED.....7TH APPELLANT

VERSUS

REGENCY CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED.....RESPONDENT

(AS CONSOLIDATED WITH CIVIL APPEAL NO. 57 OF 2019)

RULING

1. The substantive prayer in the Notice of Motion dated 30th April 2021 filed by the 1st – 6th appellants (hereinafter the applicants) seeks review of this court's judgment delivered on 17th March 2021.

The application is anchored on grounds stated on its face and the depositions made by the 2nd applicant on his own behalf and on behalf of the other applicants in the supporting affidavit sworn on 30th April 2021.

2. The applicants' main contention is that there is an obvious error in paragraph 67 of the court's judgment regarding the number of shares the applicants purchased from the respondent. According to the applicants, the court's holding that they purchased 605,800 shares worth KShs.90,870,000 for a paltry sum of Kshs.1,234,000 was a mistake since it was not disputed that the applicants purchased 6,058 each valued at Kshs. 150 and not 605,800 shares.

3. The applicants claimed that this error was material and that it affected the substance of the judgment as it formed the basis of the court's finding that sale of the shares was fraudulent having been premised on a misrepresentation of fact that the applicants had paid the full purchase price for the shares which they had not considering the huge variance between what was paid and what was due.

4. The applicants urged us to allow the application as failure to do so would allegedly result in unjust enrichment to the respondent which will benefit from refund of dividends paid to the applicants as well as general damages ordered by the court while at the same time retaining proceeds of sale of the shares; that in order to avoid a miscarriage of justice to the applicants, the error should be corrected and an order be made that the amounts received by the respondents as proceeds of sale of the shares be set off against the dividends paid to the applicants.

5. The application is contested by the respondent. *Mr. Joseph Kibagendi*, the respondent's vice chairman swore a replying affidavit on 29th June 2021. The deponent admitted that the court's holding at paragraph 67 that the applicants purchased 605,800 shares instead of 6,058 class A shares was indeed an error but claimed that this was a typographical error which did not warrant interference by this court by way of review since the finding that the applicants made false representations of fact in the course of the sale transaction was still correct

notwithstanding existence of the error; that the court cannot at this stage make a determination that the amounts received as dividends should be set off against the amount received by the respondent as proceeds of sale of the shares; that inviting the court to make such a determination is tantamount to asking it to sit on appeal on its own decision.

6. The respondent advanced the view that the application amounted to an abuse of the court process as it was meant to unjustifiably delay execution of the decree issued herein; that the application was also misconceived and should be dismissed with costs.

7. The 7th appellant chose not to file any response to the application.

8. By consent of the parties, the application was prosecuted by way of written submissions which all parties duly filed and which we have carefully considered. We have also read the impugned judgment. In our view, the key issue arising for our determination is whether the application has met the threshold for review as provided for by the law.

9. The law governing review of court orders in civil proceedings is set out in *Section 80* of the *Civil Procedure Act* (the Act) as read with *Order 45 (1)* of the *Civil Procedure Rules* (the Rules). *Section 80* of the Act gives the court power or jurisdiction to review its own orders while *Order 45 (1)* of the *Rules* defines the parameters within which that power should be exercised.

Section 80 of the *Act* reads as follows:

> ***"Any person who considers himself aggrieved—***
>
> ***(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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."***

10. *Order 45 Rule (1) (b)* stipulates that a party seeking review of court orders must satisfy any of the following conditions:

i. That he had discovered a new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be provided at the time the decree or order subject matter of the application was issued;

ii. That there was some mistake or error apparent on the face of the record;

iii. That there exists other sufficient reason(s) to warrant the review sought; and

iv. That the application was made without unreasonable delay.

11. Starting with the latter requirement and looking at the court record, there is no doubt that the application was filed without unreasonable delay considering that it was filed on 3rd May 2021 about one and a half months after we rendered our judgment on 17th March 2021. It is also instructive to note that none of the parties has complained that there was delay in filing the application. We thus find that the application was filed timeously.

12. After considering the material placed before us, we find that the application is premised on grounds that there is an error apparent on the face of the record at paragraph 67 of the judgment which should be corrected by way of review.

13. What constitutes an error apparent on the face of the record has been defined in many High Court and Court of Appeal authorities.

In ***National Bank of Kenya Limited V Ndungu Njau, CA No. 211 of 1996, [1997] eKLR***, also referenced by the 7th applicant, the Court of Appeal distinguished between an error that can be subject of review and errors of law which can only be corrected on appeal. The court stated as follows:

> ***"A review may be granted wherever 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 a ground for review."***

See also: ***Nyamongo & Nyamongo Advocates V Kogo, [2001] 1 EA 173***.

14. Having read our judgment and considered all the submissions made by the parties, we agree with the applicants and this has also not been disputed by the other parties that reference to 605,800 shares in paragraph 67 of the judgment was indeed an inadvertent error on our part as the number of shares in dispute even before the tribunal were 6,058 class A shares not 605,800 shares. The indication of the wrong figure which was apparently a typographical error led to an erroneous calculation of the expected value of the sold shares as KShs.90,870,000.

15. In our judgment, we found that this expected value compared to KShs.1,234,000 which the applicants admitted to having paid for the

shares was further evidence of fraud and misrepresentation of facts by the applicants. The applicants have urged us to review this finding which according to them affected the substance and final orders issued by the court.

16. Looking at the entire judgment and particularly paragraphs 3, 9, 11 and 62 in which the court appreciated the correct number of shares in contention, we are satisfied that reference to 605,800 shares and the consequent erroneous calculation of the expected value of the shares at paragraph 67 of the judgment indeed amounted to an error apparent on the face of the court record. We make this finding because the error is self evident and does not require any elaboration. Consequently, we review the aforesaid paragraph and correct the error by substituting the reference to 605,800 shares with 6,058 class A shares valued at 150 each.

17. That said and whereas it is true that we found the huge variance between the amount paid for the shares and the amount erroneously calculated as their expected value as evidence of fraud and false representation of fact, we are of the firm view that our findings regarding fraudulent acquisition of the subject shares by the applicants were not affected by the existence of the said error.

18. The findings regarding fraudulent acquisition of the respondent's shares still hold true as they were reinforced by other evidence on record concerning the manner in which the entire transaction was conceptualized and executed. It should be remembered that the subject shares were class A shares which according to the Respondent's By Laws could only be held by registered co-operative societies and not individuals like the applicants. The applicants' claim *inter alia* that the sale was done above board and in accordance with the Respondent's By Laws was clearly a false representation of facts.

19. In view of the foregoing, we find no reason to interfere with the aforesaid finding or any of the orders made in our judgment. We say so well aware of the applicants' submissions that in reviewing our judgement, we should order that the refunds of dividends to be paid by the applicants as ordered in our judgment be set off against the amounts received by the respondent as the shares sale proceeds to avoid unjust enrichment by the respondent.

20. We have given this prayer careful consideration. We however find no legal basis upon which to grant such an order at this stage considering that in their counterclaim before the tribunal and in their memorandum of appeal, the applicants did not specifically pray for a set off of the aforesaid two amounts as a remedy. The prayer was not addressed in the appeal and it cannot be introduced at this late stage in an application for review.

21. In any event, it is a policy of the law that courts should not aid parties who execute illegal contracts or engage in illegal activities to derive benefit from their illegal actions - See: ***Kenya Pipeline Company Limited V Glencore Energy (U. K) Limited [2015] eKLR***. Having found that the entire sale transaction herein was tainted with illegalities, in addition to our holding in paragraph 20 above, we are satisfied that the applicants are not deserving of the order sought.

22. In the end, the application partially succeeds to the extent specified in paragraph 16 above.

On costs, given the circumstances that necessitated filing of the application, we find that the most fair order to make in this case is that each party should bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2021.

C. W. GITHUA

JUDGE

B. THURANIRA JADEN

JUDGE

In the presence of:

…… *for the 1st – 6th appellants*

…… *for the 7th appellant*

…… *for the respondent*

……: *Court Assistant*