REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 83 OF 2011

BHUPENDRA SOMABHAI PATEL.....PLAINTIFF/APPLICANT

VERSUS

KINGSWAY TYRES LIMITED .....1ST DEFENDANT/RESPONDENT

MANOJ SHAH.....2ND DEFENDANT/RESPONDENT

RULING

The application before me is dated 13th July 2020. It is an application which was lodged by the Defendants, **KINGSWAY TYRES LIMITED** and **MANOJ SHAH**.

1. The Applicants have asked the Court to Review the Ruling and Orders made on 6th February 2020.

2. The Applicants further request that, upon the review of the Orders made on 6th February 2020, the court would order that there be a stay of execution of the Judgment and Decree herein until the appeal arising from the Judgment was heard and determined.

3. Finally, the Applicants asked the court to award them the costs of the application.

4. On 27th July 2020, when the matter was before me, the Respondent's advocate asked the court for 7 days within which the Respondent would file his response.

5. In response to that request, the Applicants' advocate sought an extension of the interim orders.

6. However, the Respondent was opposed to the extension of any interim orders.

7. In the light of the positions taken by the parties, the court directed the Respondent to file and serve his replying affidavit within 4 days.

8. Thereafter, the Applicants were to file and serve their submissions within 7 days.

9. Finally, within 7 days of service of the Applicants' submissions, the Respondent was to file and serve his submissions.

10. By my calculations, the 4 days within which the Respondent was to file and serve his replying affidavit lapsed on 31st July 2020.

11. However, it was not until 12th August 2020 that the Respondent filed both his replying affidavit and his written submissions.

12. Meanwhile, the Applicants filed their submissions on 7th August 2020. As the Respondent had not yet filed either a replying affidavit or any other response to the application, the Applicants commenced their submissions by pointing out that the application was unopposed.

13. This court's attention was drawn to the decision of Odunga J. in the case of **ESTATE OF NORMA KASOO MWANIA – DECEASED, HIGH COURT SUCCESSION CAUSE NO. 207 OF 2004**, at Machakos.

14. In that case, the learned Judge said;

> ***"….. it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means***

that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."

15. It is well settled that factual evidence can only be controverted by other factual evidence.

16. Ordinarily, therefore, when one party adduces evidence by way of an affidavit, the other party ought to adduce evidence to respond thereto, through an affidavit.

17. However, it is also equally true that simply because facts have not been controverted, that would not necessarily imply that the said facts had proved the case that was being put forward.

18. In the case of **ESTATE OF NORMA KASOO MWANIA** (above-cited) the court expressed itself thus;

> ***"I must however state that where the allegations made even in an affidavit fall short of the legal threshold expected in the matter, the Court may still decline to grant the orders sought, and this must be so even in cases where the application is not opposed."***

19. In this case the Applicants have premised the application on an alleged error apparent on the face of the record.

20. The Applicants cited the decision made by the Court of Appeal in the case of **TABITHA NJERI KINUTHIA Vs SAID SWALEH SAID & ANOTHER, CIVIL APPEAL NO. 22 OF 2017**, at Malindi, as authority on the definition of what is deemed as constituting an error apparent on the face of the record. In that case, the court quoted the following words from its earlier decision in **Muyodi Vs Industrial and Commercial Development Corporation & Another [2006] 1 E.A. 243** at pages 246 – 247;

> ***"In Nyamogo and Nyamogo V Kogo***
>
> ***[2001] E.A. 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively; there being an element of indefinitenes inherent in its very nature, and it must be left to 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 or 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 also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."***

21. The Applicants submitted that this court had committed an error that stares one in the face, and which does not require the intervention of an appellate court. The said error is alleged to be contained in paragraph 14 of the Ruling dated 6th February 2020, which reads as follows;

> ***"After a diligent search, the learned Deputy Registrar of the High Court reported to me that we do not have the Title document of L.R. NO. KISUMU MUNICIPALITY/BLOCK 8/174."***

22. The Applicants have submitted thus;

> ***"The Defendants vide their letter dated 28th November 2011 deposited the original Certificate of Lease; the letter bears the stamp of the Court in receipt. The search result by the the Deputy Registrar indicated that they do not have in their custody the Certificate of Lease. This means that the Certificate of Lease was deposited in court but for one reason or another is displaced. The misplacing of the Certificate of Lease might be the work of a devious third party."***

23. First, the question about whether or not the Defendants had deposited the original Certificate of Lease in court, is not a fact that the Plaintiff would be privy to.

24. It is only the Defendants and the court which would know if the Certificate of Lease was indeed deposited by the Defendants, at the court.

25. Therefore, even if the Plaintiff failed to provide evidence about the Certificate of Lease, that would not necessarily imply that the Defendants had proved that they had deposited it in court.

26. Similarly, if the Plaintiff were to file an affidavit, in which he denied the Defendants' contention, the court could not be expected to accept such an averment at face value.

27. Furthermore, when the learned Deputy Registrar conducted a search which revealed that the Court does not have possession of the Certificate of Lease, I find that that does not imply that the said document had been displaced at the court.

28. By her letter dated 30th January 2020, the learned Deputy Registrar stated thus;

> ***"A thorough search of our records shows that you only deposited with the Deputy Registrar the original logbook of the Plaintiff's motor vehicle KBG 222W and original certificate of deposit dated 19th March 2017 for Account No. 001FDLC120400007 for the amount of Kshs 10,783,768.33 vide correspondence referred 00T/CIV/729 dated 19th March 2018.***
>
> ***In the same correspondence, it has been indicated that you had intend (sic!) to follow up with the deposit of original certificate of lease for the title."***

29. The learned Deputy Registrar had made it explicitly clear that the Defendants had only deposited;

> ***(a) Original logbook for the vehicle KBG 222W;*** and ***(b) Original Certificate of Deposit No. 001FDLC120400007, for the sum of Kshs 10,783,758.33.***

30. Therefore, the conclusion I made in the Ruling dated 6th February 2020 should be understood within that context: that we do not have the Certificate of Lease because the Defendants had not deposited it in court.

31. The said Ruling does not state that the Certificate of Lease was not traced by the learned Deputy Registrar because it had been misplaced.

32. It cannot possibly have been misplaced at the Court when the said Certificate of Lease had never been deposited by the Defendants.

33. I am still completely convinced that the Defendants never deposited the Certificate of Lease at the Court. The reason why I reiterate the said view is that by the Replying Affidavit sworn by **LEONARD ANYONJE** Advocate, on 11th November 2019, he deponed thus;

> ***"4. THAT the Defendants/Respondents deposited in Court the Certificate of Lease/Title Deed of LR Kisumu Municipality/Block 8/174 and the Logbook of the Motor Vehicle KBF 222W within 21 days of the Order vide our letter dated 19th March 2018 (annexed hereto and marked "A1" is a copy of our letter dated 19th March 2018."***

34. Assuming that it is on or about 19th March 2018 that the Defendants deposited the Certificate of Lease, that implies that until that date, the Defendants were still in possession of it.

35. Yet by the Supporting Affidavit sworn by **I. P. OKUNDI OGONJI** Advocate on 13th July 2020, it was deponed thus;

> ***"THAT there is apparent error on the face of the record warranting review as the Defendants/Applicants by a letter dated 28th November 2011 deposited in court the Certificate of Lease ……."***

36. Surely, if the Defendants had already deposited the Certificate of Lease in November 2011, it would not make any sense for Advocate Leonard Anyonje to state on oath, in his affidavit sworn on 11th November 2019, that the Defendants had deposited the said Certificate of Lease vide their advocate's letter dated 19th March 2018.

37. And in any event, the letter of 19th March 2018 did not state that the Defendants were depositing the Certificate of Lease, in Court: that letter explicitly stated thus;

> ***"The Original Title deed for LR KISUMU MUNICIPALITY/BLOCK 174 will follow up later for your deposit with the Deputy Registrar of the High Court in Compliance with the Court Order issued on 28.02.2018."***

38. In the light of the foregoing, I fail to see any error in the conclusion I arrived at.

39. But even if it were presumed that the said conclusion was an error, I hold the considered view that it was certainly not one that stares one in the face.

40. Furthermore, the paragraph (in the Ruling) which is in contention cannot be said to be capable of one single meaning; that the Certificate of Lease had been deposited in court, and it was thereafter misplaced.

41. At the very least, the said Ruling could also be interpreted to mean that the Court did not have possession of the Certificate of Lease, because it had never been deposited with the court.

42. Accordingly, I find that the Defendants have failed to meet the threshold for review.

43. Secondly, I find that the delay of more than five months was inordinate. I note that the Defendants did not provide any factual evidence

to explain the said delay.

44. In their written submissions the Defendants asserted that they had been prevented from filing the application for review early enough;

"….. due to the restrictive safety

measures put in place by the

government in the wake of the

Covid 19 pandemic."

45. In the absence of factual evidence, I find no basis for that submission. The Defendants ought to have specified the alleged restrictive safety measures, and then demonstrated how the said measures had prevented the Defendants from applying for review for more than 5 months.

46. The Defendants failed to show due diligence. Instead, theirs was a case of unexplained inordinate delay.

47. Finally, if the conclusion I arrived at was wrong, that could have been the basis for an appeal: it was not the basis for an application for review of the ruling in question.

48. In the result, the application dated 13th July 2020 lacks merit, and is therefore dismissed. Costs of the said application are awarded to the Plaintiff.

DATED, SIGNED at **DELIVERED** at **KISUMU**

This **10th** day of **September** 2020

FRED A. OCHIENG

JUDGE