REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC. CIVIL APPLICATION NO. 144 OF 2018

DILPACK KENYA LIMITED……..APPLICANT

VERSUS

FRANTO CHEMICALS……RESPONDENT

RULING

(1) Before this Court is the Notice of Motion Application dated **21st March 2018** by which **DILPARK KENYA LIMITED** (the Applicant) sought the following Orders:-

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. SPENT**
>
> **4. SPENT**
>
> **5. This Court be pleased to Review its Ruling, Order and directions made on 19th October 2017 by which it found that the defence filed herein dated 15th January 2004 stood struck out by 19th July and as such there was no defence on record.**
>
> **6. This court be pleased to enlarge or extend time granted to the Defendant/Applicant to comply with the Orders of Hon Lady Justice J. Kamau made on 21st August 2015.**
>
> **7. In the alternative to prayer 6 above, this court be pleased to enlarge or extend time for the Defendant/Applicant to file a statement of defence witness statement and documents that it may wish to reply upon at the hearing of this suit.**
>
> **8. The costs of and incidental to this application be in the suit.**

(2) The application was premised upon **Articles 50 and 159 of the Constitution of Kenya, 2010, Sections 1, 1A, 1B, 3A, 80 and 95 of the Civil Procedure Act, Order 10 Rule 11, Order 40 Rule 1, Order 45 Order 50 Rule 5, Order 51 of the Civil Procedure Rules** and all enabling provisions of the law and was supported by the Affidavit of even date sworn by **ZACK GICHANE**, the chief Executive Officer of the Applicant Company.

(3) The Respondent **FRANTO CHEMICALS** filed Grounds of Opposition dated **23rd March 2018** and also filed a Replying Affidavit dated **16th April 2018** sworn by **ANTHONY NJERU MUREITHI** the Director of the Respondent Company. Thereafter the Applicant filed a **FURTHER AFFIDAVIT** dated **2nd May 2018** in response to which the Respondent also filed their **FURTHER AFFIDAVIT** dated **17th May 2018**. The Applicant then filed a **2nd FURTHER AFFIDAVIT** dated **26th November 2019** and not to be outdone the Respondent also filed a **2nd FURTHER AFFIDAVIT** dated **16th December 2016.**

(4) The Application was canvassed by way of written submissions. The Applicant filed its written submissions on **17th July 2018** whilst the Respondent filed its submissions Proper on **28th September 2018.** Counsel for both parties appeared in court to highlight those written

submissions on **19th December 2019**.

BACKGROUND

(5) The genesis of this application is the Ruling delivered by **Hon Justice Olga Sewe** on **19th October 2017**. The Applicants position is that there is an error apparent on the face of the record in that the Hon Judge found and held that there was no defence on record, when in fact there was a defence on record. Further Counsel submits that upon retrieving documentation relating to the case the Applicant discovered that the

Respondents claim was fraudulent as the Company had not been incorporated. Counsel urges that these are issues which require a full hearing on merit in order to determine.

(6) Counsel for the Respondent in opposing the application submits that the order which the Applicant is seeking to review was issued on **19th October 2017.** However, the order that actually struck out the defence was actually made on **19th June 2016** by **Hon**. **Justice Jackie Kamau**. The Respondent contends that consequent upon the failure by the Applicant to comply with directions to file a list of witnesses and Documents they intended to rely on at trial the defence stood struck out. It was further submitted that the present application is sub judice given that a similar application was heard and dismissed in the lower court vide the Ruling of **12th February 2018** which judgment has not been set aside or appealed against.

ANALYSIS AND DETERMINATION

(7) I have carefully considered the written submissions filed by both parties as well as the relevant law. The following issues arise for determination:-

(i) Whether the Applicant has met the legal threshold for review of the Court Ruling of **19th October 2017**.

(ii) Whether the Court ought to enlarge time for the Applicant to comply with directions on case Management.

(i) Review

(8) **Section 80** of the **Civil Procedure Act, Cap 21, Laws of Kenya** grants to a court the substantive right to review its decision in certain specified circumstances. **Section 80** provides 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."

(9) Order 45(1) of the **Civil Procedure Rules** sets out the requirements for an application for review as follows:

ORDER 45

REVIEW

"Any person considering himself aggrieved

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 review of judgment to the court which passed the decree or made the order without unreasonable delay".

(2) ……..."

(10) In order to merit orders of review an Applicant must demonstrate that there exists an error on the face of the record. It is the Applicants contention that the finding by **Hon Justice Sewe** in her Ruling that there was no defence on record was erroneous since the Applicants did have on record a Defence filed out of time on **15th January 2014** and thus could have proceeded with the suit save that they would have no right to call witnesses.

(11) In her Ruling of **19th Hon Justice Sewe** found and held as follows:-

> **"The Court record shows that the Defendant did not comply with the above directions. It neither filed its witness statements, nor bundle of documents as ordered. Moreover, it neither sought to regularize its defence that was filed out of time and without leave nor did it timeously file the application for amendment of defence to comport with the court order of 19th June 2015. In the premises, the defence that was filed herein dated 15th January 2014 stood struck out by 19th July 2015 and as such there is no defence on record upon which the instant application may be premised."**[own emphasis]

(12) Earlier on vide a Ruling dated **19th June 2015, Hon Lady Justice Jackie Kamau** had stated as follows:-

> **"I have looked at the fie and note the plaintiff has fully complied with the practice directions Kenya Gazette notice no 5179 of 28/7/14 as was directed by the court on 6/5/15 when the defendants counsel was also present. The plaintiff cannot be held at ransom by the defendant who has also not filed its application for amendment as its counsel informed the court. In the circumstances foregoing, I hereby certify this matter ready for hearing. Matter will be mentioned on 27/11/15 with a view of giving a hearing date in 2016 as the court diary of 2015 is closed. The defendant is hereby directed to file its witness statements cross- referencing the documents it wishes to rely upon and the paginated bundle of documents within 30 days from today. In the event the defendant does not comply as aforesaid, its statement of defence filed on 11/1/2014 will stand struck out unless of course the defendant does not wish to call any witness or file any document in support of its case…"**[own emphasis]

(13) By the above Ruling the Honourable Judge faulted the Applicant for failing to file witness statements or Bundle of Documents as directed. More pertinently the court also faulted the Applicant for failing to regularize its defence which had been filed out of time. The Applicant had not sought for leave to file its defence out of time. Therefore, notwithstanding the failure to file witness statements and documents the Applicants defence was still riddled with irregularities.

(14) In **NYAMOGO & NYAMOGO –VS KOGO [2001] E.A 170** the Court held as follows:-

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

(15) An error on the face of the record is one which is self-evident and requires no explanation. I find no evidence of such apparent error in this case. For this reason, I find that the Applicant has not met the threshold for review.

(16) In order to merit an order of review an Applicant must also demonstrate the discovery of new and important evidence which was not previously within the knowledge of the Applicant. In **PANCRAS T. SWAI –VS- KENYA BREWERIES LIMITED [2014] eKLR,** the Court of Appeal stated as follows:-

> *"In* **Francis Origo & another v. Jacob Kumali Mungala** *(C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review.… ….."*

(17) The Applicant claims that subsequent to the Court's Ruling of **19th October 2017** the Applicant had come into possession of relevant and material evidence showing that the Respondents claim was a fraudulent claim. However, the allegations of fraud have been sufficiently countered by the Respondent. In **ROSEMARY WANJIKU MURITHI –VS- GEORGE MAINA NDINWA [2014] eKLR,** the Court of Appeal held thus:-

> **"Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud."**

(ii) Enlargement of Time

(18) The next question is whether the court ought to exercise its discretion to enlarge the time within which the Applicant could comply with the orders made by **Hon Justice Kamau** in the Ruling of **19th June 2016**. The power of court to grant extension of time is discretionary. In **NICHOLAS KIPTOO ARAP KORIR SALATT –VS- INDEPENDENT ELECTORAL and BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR**, set out the principles for extension of time as follows:-

> **"This being the first case in which this Court is called upon to consider the principles for extension of time. We derive the following as the under-lying principles that a court should consider in exercise of such discretion:**
>
> **1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at**

the discretion of the Court.

2. A party who seeks for extension of time has the burden of laying a basis to be satisfaction of the court.

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

5. Whether there will be any prejudice suffered by the respondents if the extension is granted.

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

(19) The Applicant has not adduced satisfactory evidence of fraud on the part of the Respondent. Further, I find that the Applicant delayed inordinately in seeking orders on enlargement of time before the court as the orders in question were issued way back in **June 2015** yet this application was brought three (3) years later in **March 2018**. No valid reason has been given for this delay. Furthermore, judgment had already been entered in the lower court therefore the matter is now "**res judicata**".

(20) Finally, I find no merit in this present application. I therefore dismiss in its entirety the Notice of Motion dated **21st March 2018** and award costs to the Respondent.

Dated in **Nairobi** this **4th** day of **September**, **2020**

Justice Maureen A. Odero