REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 368 OF 2015

DAS HANDLING LIMITED……..…….PLAINTIFF/APPLICANT

VERSUS

AFRICA EXPEDITION (K) LTD…..…….1ST DEFENDANT/RESPONDENT

ANDREW HART……..…….2ND DEFENDANT/RESPONDENT

RULING

1. The Plaintiff approached this court by way of a Notice of Motion dated 18th February, 2019 and filed on 19th February, 2019 brought under the provisions of Articles 50 and 159 of the Constitution, Sections 1, 1A, 1B, 3A and 80 of the Civil Procedure Act, Order 45 Rule 2, Order 50 of the Civil Procedure Rules, 2010 and all enabling provisions of law. It seeks the following prayers;

> ***a) THAT this court be pleased to review the Ruling and Orders of this Honourable Court made on 17th July 2017 by the Honourable Justice G.L. Nzioka wherein the Honourable Judge acknowledged possible agency relationship between the Andrew Hart (2nd Defendant) and the Africa Expeditions (Kenya) Limited but proceeded to strike out the suit as against the Africa Expeditions (Kenya) Limited.***
>
> ***b) THAT this Court be pleased to review and recall the order striking out the suit as against the Africa Expeditions (Kenya) Limited until the hearing and conclusions of the suit.***
>
> ***c) THAT this court be pleased to stay the order awarding costs to the Africa Expeditions (Kenya) Limited subject to the final determination of this Court in this suit.***
>
> ***d) THAT this Honourable Court be pleased to make such further or other Orders as it may deem just and expedient in the circumstances of this case.***
>
> ***e) THAT the costs of the Application be provided for.***

2. The application is supported by grounds on the face of it as well as a Supporting Affidavit sworn on 18th February, 2019 by Marc Deleu, the Plaintiff's Managing Director.

3. The application is opposed by way of two Replying Affidavits sworn by Mark Mukuha on 14th March, 2019 and Nelly Chepkoech on 27th March, 2019.

Applicant's case

4. It is deponed that **AFRICA EXPEDITION (KENYA) LIMITED** and **AFRICA EXPEDITION (Uganda) LIMITED** were affiliated and operating under as AFEX group – a Lonrho Group. That in 2012 **AFRICA EXPEDITION (KENYA) LIMITED** entered into a contract with United States Department of Defence through Flour Corporation, an American defence contractor, under which **AFRICA EXPEDITION (KENYA) LIMITED** would provide logistical support for the delivery of camp construction equipment.

5. That in April of 2012, Marc Deleu was approached by Andrew Hart, the 2nd Defendant and a director of the 1st Defendant as well as an

official of Lonrho Group, for the provision of cargo handling services in Uganda. The 1st Defendant was the primary beneficiary of the services provided by the Plaintiff. All the negotiations regarding the cargo handling services were conducted by Andrew Hart in his capacity as managing director of the entire Africa Expeditions Group of Companies. The negotiations culminated into an agreement dated 28th March, 2012 between **AFRICA EXPEDITION (Uganda) LIMITED** and the Plaintiff. It is deponed that **AFRICA EXPEDITION (Uganda) LIMITED** acted as branch office for the operations of **AFRICA EXPEDITION (KENYA) LIMITED.**

6. That the Plaintiff provided the services as agreed and the same was worth US$1,160,479.70 which was sent by invoice to the 1st Defendant. The 1st Defendant paid US$509,700 leaving a balance of US$650,779.70. Andrew Hart as well as other officials of the 1st Defendant corresponded with officials of the Plaintif on the same severally and the 1st Defendant promised to pay, but never honoured the promise.

7. That in the course of negotiations, **AFRICA EXPEDITION (Uganda) LIMITED** closed down operations in Uganda but this did not hamper the negotiations regarding the outstanding bill as negotiations continued with **AFRICA EXPEDITION (KENYA) LIMITED.**

8. It is deponed that the Honourable Court in a ruling delivered on 17th July, 2017 struck out **AFRICA EXPEDITION (KENYA) LIMITED** as a Defendant in the suit after having already alluded to the existence of an agency agreement. This should not have been allowed as **AFRICA EXPEDITION (KENYA) LIMITED** was in fact the principal in the agency relationship and by allowing it to remain a defendant, the court will have the opportunity to evaluate the evidence of this agency relationship appropriately at trial. That **AFRICA EXPEDITION (KENYA) LIMITED** was the primary beneficiary of the services rendered by the Plaintiff and it would be a miscarriage of justice to allow **AFRICA EXPEDITION (KENYA) LIMITED** to escape from its recognized legal obligation to make payment for those services without the benefit of full trial.

9. It is also deponed that **AFRICA EXPEDITION (KENYA) LIMITED** was awarded costs. This was despite the fact that the Court allowed both the Plaintiff's application to include Andrew Hart as a Defendant as well as the 1st Defendant's application to be removed as a Defendant. Both parties were successful as both applications were granted, therefore the order for costs was not merited. The Plaintiff prayed that the order for costs should be stayed and made subject to the final determination of the suit.

Respondent's case

10. The Application was responded to by the 1st Defendant's counsel, Mark Mukuha and Nelly ChepKoech in their Replying Affidavit and Further Replying Affidavit sworn on 14th March, 2019 and 27th March, 2019 respectively. It is averred that the application contains material non-disclosure and distortion of pertinent facts. That the same is frivolous, vexatious and bad in law, unmaintainable and riddled with unbridled and undisguised abuse of the court process. That though the application is anchored under the provisions of Order 45 Rule 2 of the Civil Procedure Rules, it does not meet the parameters set out therein. That further, though the application is disguised as seeking orders for review, it appears to be an appeal or an application seeking leave to produce fresh evidence against the 1st Defendant's application dated 9th March, 2019. It is also averred that the application does not contain a copy of the Ruling or extract of Decree, which is a fatal omission and cannot be termed a mere procedural technicality but a substantive flaw.

11. It is also contended that the Plaintiff has failed to explain why it has taken over 1 year and 7 months since delivery of the Ruling on 17th July, 2017 to lodge the current application and the delay is therefore inordinate and inexcusable.

12. Further, that in the Ruling of 17th July, 2017, the court only acknowledged the possible connection of Andrew Hart and **AFRICA EXPEDITION (KENYA) LIMITED** and did not allude to the existence of an agency relationship where **AFRICA EXPEDITION (KENYA) LIMITED** was disclosed as the principal. That the court pointed out that **AFRICA EXPEDITION (KENYA) LIMITED** was a separate entity from **AFRICA EXPEDITION (Uganda) LIMITED** and not privy to any agreement with the Plaintiff. That the court went to state that no agency relationship existed between the 1st Defendant and any other party thereto. It was the view of the Respondent that the court analyzed the subject agreement and reached the conclusion that the Defendant was not a party to the contract and furthermore, no evidence was tendered to prove it appointed **AFRICA EXPEDITION (Uganda) LIMITED** to act as its agent. It is pointed out that the Plaintiff has failed to explain why **AFRICA EXPEDITION (Uganda) LIMITED** has not been enjoined in these proceedings.

13. It is deposed that the Plaintiff is attempting to introduce fresh evidence by stating that the two **AFRICA EXPEDITION (KENYA) LIMITED and AFRICA EXPEDITION (Uganda) LIMITED** were affiliated entities operating as AFEX group – a Lonrho Company, also where it alleged that **AFRICA EXPEDITION (Uganda) LIMITED** acted merely as branch of **AFRICA EXPEDITION (KENYA) LIMITED**, without laying any foundation for the same. That the Plaintiff further attempts to introduce new evidence by deponing that Andrew Hart was an official of Lonrho Company and that he was the Managing Director of the entire Africa Expeditions Group of Companies, without explaining why it is introducing new evidence at the review stage. That the introduction of new evidence is done without laying proper foundation of why it never produced the same at the time of filing suit or even when it filed its application dated 19th May, 2016 seeking orders to amend the Plaint.

14. Further that the Plaintiff has attached emails from Kelly Chinery who is not a party to the suit.

15. The 1st Defendant contends that it is evident from the documents attached to the Plaint that there was no evidence of any payment made out to it and that all invoices attached thereto were drawn out in favour of **AFRICA EXPEDITION (Uganda) LIMITED.**

16. That the Plaintiff has failed to explain what steps it has taken since the Ruling delivered to file an Amended Plaint, extract summons or even serve the 2nd Respondent with pleadings thereto.

17. Also, that since the Ruling of 17th July, 2017, the 1st Defendant filed a Party and Party Bill of costs dated 28th September, 2018. That the

Deputy Registrar delivered its ruling on 24th August, 2018 wherein it taxed the Bill of Costs at Ksh.1,728,038.80. That a Certificate of Taxation dated 29th October, 2018 was issued certifying the amount taxed. That the 1st Defendant vide letter dated 31st October 2018, and received by the Plaintiff on 1st November, 2018, demanded the settlement of the taxed amount but the same has not elicited a response. That the 1st Defendant made follow up demands vide letters dated 11th December, 2018 and 22nd January, 2019 which have also been ignored and/neglected by the Plaintiff. That the Plaintiff has not filed a Notice of Objection nor filed a reference against the Ruling hence the Certificate of Taxation dated 29th October, 2018 has not been set aside, altered or challenged.

18. That the 1st Defendant filed an application dated 8th February, 2019 on 12th February, 219 seeking to execute the Certificate of Taxation as a Judgment and the same is registered as Misc. Application No. 91 of 2019 **AFRICA EXPEDITION (KENYA) LIMITED Vs. DAS HANDLING LIMITED** and the same was served on the Plaintiff on 18th February, 2019. The same was scheduled for hearing on 22nd May, 2019. The Plaintiff responded to the application vide a Replying Affidavit sworn on 12th March, 2019 by Marc Deleu. That the present application by the Plaintiff is an attempt to deny the 1st Defendant the opportunity to enjoy its fruits of litigation.

Determination

19. The application, by consent of the rival counsel, was canvassed by way of written submissions. The plaintiff filed its submissions on 27th February, 2020 whilst the 1st Defendant filed on 10th March, 2020. Several case law was cited which the Court will refer to where necessary. Respective counsel also highlighted their submissions before Court on 6th October, 2020.

20. Considering the application by the Plaintiff, the grounds of opposition by the Defendant, the parties' advocates' rival submissions and the law applicable as well as the authorities cited by the Defendant, I have demarcated three issues for consideration, namely:

a) Whether there was inordinate delay in filing the instant application.

b) Whether the application by the plaintiff is merited on grounds of error apparent on the face of the record.

c) Who should bear the costs of the application.

Was there inordinate delay?

21. The contentious Ruling was delivered on 17th July, 2017 and the present application was filed on 19th February, 2019. This is a period of 1 year and 7 months.

22. The Plaintiff submitted that the delay in filing the application was occasioned by a mistake by the advocate handling the matter when there was communication breakdown after the ruling was delivered. That the said advocate thereafter left the firm after which it came to the attention of the advocate handling the matter now that the application for review had not been filed. It is urged that the Court applies fundamental principles of justice as enshrined in the Constitution and specifically in Article 159 (2)(d) of the Constitution in finding in favour of the Plaintiff. The Article reads:

> ***"(2)In exercising judicial authority, the courts and tribunals shall be guided by the following principles-***
>
> ***(d) Justice shall be administered without undue regard to procedural technicalities."***

23. It further relied on Article 50 (1) of the Constitution as well as the decision in ***Martha Wangari Karua Vs. IEBC Nyeri Civil Appeal No. 1 of 2017*** (Court of Appeal) where the Court observed that:

> ***"The rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be."***

24. It was submitted that it is trite law that the mistake of counsel should not be visited upon the client and thus implored this court to consider the present application. It relied on the decision of ***Belinda Murai & Others Vs. Amoi Wainaina (1979)e KLR*** where the Court of Appeal held as follows;

> ***"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress."***

25. The 1st Defendant submitted that the allegations by the Plaintiff on mistake are baseless and the same has not been supported in evidence.

It relied on the case of ***Habo Agencies Limited Vs. Wilfred Odhiambo Musingo (2015) e KLR*** where Waki, JA, as he then was, held thus;

> ***"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. It is true as submitted by Mr. Wambola that mistakes of counsel may be excusable. The epic dicta of Madan, J.A. in Murai v. Wainaina (No.4) [1982] KLR 38, quickly come to mind:-***
>
> *"A mistake is a mistake. It is not a less mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."*

26. They submit that the Plaintiff has always been aware of the Ruling and participated fully in defending the party and party bill of costs filed by the Respondent. It refers to the Plaintiff's submissions dated 29th January, 2019, an Affidavit sworn on 8th February, 2018 in opposition to the Party and Party bill of costs. It further submits that the Plaintiff's counsel was served with the Certificate of Taxation which was received on 1st November, 2018. It also refers to several letters dated 11th December, 2018 following non-fulfilment of the Certificate of Taxation. It is submitted that the Plaintiff's conduct implied that it had agreed with the contents of the Ruling and is therefore estopped from denying knowledge of the same.

27. It is further submitted that it was only after it filed proceedings for the recognition of the Certificate of Taxation as a judgment for purposes of enforcement that the Plaintiff has now approached the court for review.

28. Additionally, that the delay of 1 year and 7 months has not been explained and as such the Application must fail. The case of ***Stephen Gathua Kimani Vs Nancy Wanjira Waruingi t/a Providence Auctioneers (2016) e KLR*** was cited to buttress the submission**.**

29. Order 45 Rule 1 of the Civil Procedure Rules, 2010 on review provides as follows;

> ***"(1) 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay."(Emphasis added).***

30. In the case *of* ***Ivita v Kyumbu (1984) KLR 441***, Chesoni J. (as he then was) held as follows:-

> ***"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too..."***

31. As correctly pointed out by the 1st Defendant, the Plaintiff actively participated in the prosecution of the party and party bill of costs. The Plaintiff was therefore at all material times aware of the Ruling and its full tenor. The excuse put forward of mistake of the Advocate on record is not sufficient to excuse the delay of 1 year and 7 months. It therefore follows that the application was not made within a reasonable time as required by the law.

32. Be that as it may, the court must address itself to whether the impugned Ruling is laced with apparent error on the face of the record to warrant a review.

Was there an error apparent on the face of the record?

33. The Plaintiff submits that the court in its ruling on 17th July, 2017 recognized the possibility of an agency relationship between the Defendants but erroneously went ahead to allow the inclusion of the agent being Andrew Hart while excluding the principal from the proceedings. That the court further erred in law by finding that the agency relationship between the 1st and the 2nd Defendants was not an exception to the doctrine of privity of contract. That the relationship was one of Chief Executive Officer(CEO) and employer as the 2nd Defendant was the 1st Defendant's CEO. It is submitted that the 1st Defendant, through the 2nd Defendant, was involved in the negotiation and the part payment on the debt owed to the Plaintiffs when Africa Expeditions (Uganda) closed their offices in Uganda.

34. The Plaintiff submitted that, at all material times, the parties understood that the services were rendered to and for the benefit of the 1st Defendant. It relied on the decision in ***Darlington Bourough Council Vs. Witshire Northern Limited (1995) 1 WLR 68*** where Lord Steyn held:

"The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. The principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."

35. On the submission that the 2nd Defendant was the managing director of the 1st Defendant and that it would be a miscarriage of justice to try the 2nd Defendant while excluding the 1st Defendant, the case of ***In Garnac Grain Company Inc. Vs. H.M. Faure & Fair Dough Limited and Bunge Corporation (1967) 2 All E.R. 353*** was cited in which Lord Pearson held;

"The relationship of the principal and agent can only be established by the consent of the principal and agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves and even if they have professed to disclaim it; the consent must, however, have been given by each of them, either express or by implication from their words and conduct."

36. The Plaintiff points out that at page 29 of the Ruling the court recognized that the 2nd Defendant was associated with the matter through correspondence and based on that allowed his enjoinment in the suit.

37. That the Court at page 20 of the Ruling held that the agency relationship can be implied and then proceeded to remove the principal, the 1st Defendant, leaving its agent. It is submitted that having established a *prima facie* case of agency between the Defendants, the removal of the 1st Defendant would undermine the continuation of the suit because of the triable issue of agency raised.

38. The Plaintiff referred to the case of ***Nabiswa Wakenya Moses Vs. The University of Nairobi & 2 Others Misc. Application No. 226 of 2016(2019) e KLR***, in which it was held that an error apparent on the face of the record must be such an error which it must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. Further, that in the case of ***Nyamogo & Nyamogo Vs. Kogo [2001] EA 170*** discussing what constitutes an error on the face of the record the court held:

"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness 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 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 appeal."

39. The 1st Defendant on the other hand submits that there was no acknowledgment of a possible agency relationship between the Defendants. That the court acknowledged the possible connection of Andrew Hart and Africa Expeditions (Uganda) Limited and made a determination that there was no agency relationship established between the 1st Defendant and any other relationship at page 19 paragraph 25 of the Ruling. That the Court further questioned why the Plaintiff further failed to pursue Africa Expeditions (U) Limited. It submits that the Court in its Ruling noted that the 1st Defendant was a distinct and separate entity from Africa Expeditions (U) Limited and was not privy to any agreement with the Applicant.

40. The 1st Defendant contends that the afore stated issues were considered by the court and a determination thereof rendered. Further that an error apparent on the face of the record should be obvious and not one subject to a long process of reasoning or on points where there may conceivably be two opinions. It relied on the cases of **Grace Akinyi Vs. Glady Kemunto Obiri & Another (2016) e KLR** where Justice Anthony Ombwayo cited with approval a Court of Appeal decision as follows;

"In Court of Appeal, Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Njau, the Court of Appeal 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-evidence and should not require an elaborate argument to be established. It will not be 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 proceeds on an incorrect expansion of the law".

41. It also relied on the decision in ***Francis Njoroge Vs. Stephen Maina Kamore (2018) e KLR*** where Justice Njuguna in which the case of ***Nyamogo & Nyamogo Vs. Kogo (supra)*** was referred to.

42. It submits that an error of law such as the law contended to by the Plaintiff is not a ground for review but one which can only be determined on appeal. It relies on the case of ***Executive Committee Chelimo Plot Owners Welfare Group & 288 others v Langat Joel & 4 others (sued as the Management Committee of Chelimo Squatters Group) [2018] eKLR*** where the court cited with approval the following decision;-

"In Origo & Another V Mungala (2005) 2KLR cited in Jameny Mudaki Asav V Brown Otengo Asava & Another (2015 eKLR

the court held as follows:

'Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end."

43. It further submits that the Plaintiff has purported to introduce fresh evidence without laying foundation or why it is producing the same. That Order 45 Rule 1 of the Civil Procedure Rules only allows review on discovery of new and important evidence which after an exercise of due diligence, was not within the knowledge of the Applicant at the time when an order or decree is made. That the Plaintiff has failed to demonstrate that it discovered new evidence which was not within its knowledge. That the emails it produced were at all times within its possession. That the Plaintiff failed to demonstrate that the new evidence it seeks to rely on was not available to both Court and itself at the time the Ruling was delivered. It relied on the decision of **Republic Vs. Advocates Disciplinary Tribunal Ex Parte Apollo Mboya (2019)e KLR** where the court stated:

"For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court."

44. It concludes that based on the afore stated, the present application is bad in law and prayed that the same be dismissed.

45. It is important that I duplicate the relevant excerpts of the impugned Ruling of 17th July, 2017 in considering the application as under.

"26. In this particular case, the Plaintiff/Respondent argues that the relationship arose as a result of "correspondence from the Chief Executive Officer of the Defendant herein to the Plaintiff/Respondent and part payment on the Debt on behalf of the Agent." However, the question that arises is: Why hasn't the Plaintiff sued the alleged agent: Africa Expeditions (U) Ltd, who expressly signed the subject contract. An agency who authorized to act on behalf of a principal to create a legal relationship with a third party, and the principal who is the person to whom such an act is done or who is represented. The third party who is the recipient of services/goods transacted by the Agent. Appointment of an agent may be express e.g. by Power of Attorney, implied, by ratification or by necessity or estoppel/holding out. I have not seen any such evidence herein of the Appointment of Africa Expeditions (U) Ltd, as the Agent of the Defendant. It is not sufficient for the Plaintiff/Respondent to submit the Court should merely 'lift the veil of incorporation." A veil is not lifted to bring a Party into a contract to which it is not privy.

27. The veil of incorporation is lifted when a company has been formed to avoid legal obligations (See Jones Vs. Lipman 1962) or when fraud is perpetrated behind the veil, or in the case of group enterprises, the veil may be lifted in order to look at the economic realities of the group itself, the veil will also be lifted when it is just and equitable to do so (See D.H.N. Foods Products Ltd Vs. Tower Hamlets). Other reasons for lifting the veil are in relation to: Trusts, or to determine the nature of shareholding, statutory support (reduction of number of members) fraudulent and wrongful trading, tax evasion etc. However, in this case, the Plaintiff/Respondent has not cited the grounds upon which this court may lift the veil on the Defendant/Applicant's Company. Even, then the main question stands; was the Defendant privy to the Contract herein, to even warrant the lfting of the veil?"

46. The Court then went on to strike out the name of the 1st Defendant. In considering the issue of joinder of the 2nd Defendant the court stated at paragraphs 32 and later at 35 as follows;

"32. Interestingly, the Defendant's filed submission dated 4th January 2017 opposing the Application 'presumably' on behalf of the proposed 2nd Defendant, as the submissions are signed by "Steve Kimathi LJA Associates Advocates, Advocates for the Defendant." I shall treat them as filed on behalf of the proposed 2nd Defendant. The argument advanced therein is that, it is wrong to impose liability on the proposed 2nd Defendant especially when the company is a separate legal and distinct entity from its director's and agents. That, it is disputed that the proposed 2nd Defendant was acting on behalf of the Defendant in his capacity as a Managing Director. The case of Valentine Opiyo & Another Vs Masline Adhiambo t/a Ellyam Enterprises (2014) e KLR was cited.

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35. Be it as were, I have noted in the Draft Amended Plaint marked "WN2", the proposed 2nd Defendant is described as the "CEO of Africa Expeditions Ltd now Afex Kenya Ltd". Whether these Companies had any relationship with the expunged defendant "Africa Expedition (Kenya) Ltd" herein is not clear. Be that as it may, the proposed 2nd Defendant, has been associated with this matter through the correspondence he exchanged with the Plaintiff Company. It will be in the interest of Justice, to allow the amendment so that the issues concerning his involvement in the matter may be fully canvassed and dealt with. To release the 2nd proposed Defendant from the suit at this stage may be prejudicial to the Plaintiff."

47. In ***Republic v Public Procurement Administrative Review Board & 2 others [2018] Eklr,*** the court held as follows;

"22. Also, to succeed in a review application, an applicant has to show that there was a mistake or error apparent on the face of the record. The power of review is available when there is an error apparent on the face of the record. The order the subject of this application does not suffer any such error apparent on the face of the record. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law or exercised his discretion would amount to exercise of Appellate Jurisdiction, which is not permissible."

48. It is evident from the impugned Ruling that the Court considered the issues now raised by the Plaintiff in support of the present application. It is also evident that the Plaintiff is aggrieved by the conclusion the Court arrived at after consideration of the facts and evidence before rendering its verdict on the removal of the 1st Defendant. However, these are issues that clearly make good grounds for appeal. As clearly enunciated in the cited cases above, the Court on an application for review is not asked to reappraise the evidence and the applicable law. It must be that the court is being asked to look at materials that were not available to it at the time of making the order or decree, or if the materials were available, it made an error on the face of it in considering the issues before it.

49. In my honest view, if I were to review the Ruling within the scope sought by the Applicant, I would be usurping the powers of the Court of Appeal. It is correct to state that the Applicant is aggrieved by the conclusion of Hon. Nzioka, J on the removal of the 1 st Defendant from the suit. Arguments for and against her decision were laid before her and she ably considered them. The Plaintiff now opines that the good judge arrived at a wrong decision, which decision is amenable to an appeal as opposed to a review. I find no error apparent on the face of the record to warrant a review of the impugned Ruling. The Plaintiff has failed to prove any grounds for review under Section 80 of the Civil Procedure Act or Order 45 Rule 1 of the Civil Procedure Rules.

Who should bear the costs of the Ruling?

50. Though the Plaintiff raised the issue of costs awarded in the contested Ruling, it did not submit on the same.

51. The 1st Respondent submitted that under Section 27 of the Civil Procedure Act, costs follow the event. That the issue of costs is at the discretion of the court. It relied on the case of **Cecilia Karuru Ngayu Vs. Barclays Bank of Kenya & Another (2016) e KLR,** a decision of a concurrent court. That it has incurred costs to defend the present application which it terms an abuse of court process. As such, the Plaintiff should be ordered to meet the costs of the same.

52. Section 27(1) of the Civil Procedure Act provides as follows;

> ***" (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***
>
> ***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."***

53. It is settled law that the Court has unfettered discretion to award costs, (***see Republic vs Rosemary Wairimu Munene, Exparte Applicant vs Ihururu Dairy Farmers Co-operative Society (2014) eKLR, JR Application NO. 6 of 2014)***.

54. ***In Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd*** the court had this to say:-

> ***"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.***

55. The Plaintiff has failed to demonstrate why the court should depart from the settled principles enunciated above.

Conclusion

56. In view of the foregoing observations, I find that the application is without merit. There is no good ground set forth to review the Ruling of 17th July, 2017. The instant application is hereby dismissed with costs to the 1st Defendant.

DATED AND DELIVERED AT NAIROBI THIS 4TH DECEMBER, 2020.

G.W.NGENYE

JUDGE

In the presence of:

1. Miss Mutugi for the Plaintiff/Applicant.

2. Miss Mabango for the 1st Defendant/ Respondent.