



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.196 OF 2018

JABETH INVESTMENT LIMITED.....PLAINTIFF

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT

AUTHORITY KILIFI COUNTY.....1ST DEFENDANT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....2ND DEFENDANT

RULING

1. By this Notice of Motion application dated 22nd January 2019, the National Environment Management Authority (the 2nd Defendant) urges this Court to be pleased to review and set aside Order No. 3 of the Orders issued by this Court on 25th October 2018.

2. The Application which is supported by an affidavit sworn by the 2nd Defendant's Advocate Erastus Gitonga is premised on the grounds stated in the body of the application thus:-

1. This application is made or premised on the principles that Courts should not make orders in vain and that parties shall not mislead the Courts into making Vain Orders;

2. That the Order No. 3 which is couched as a declaration is impossible of performance by the applicant and the applicant hereby seeks its setting aside;

3. That Order No. 3 was made on misrepresentation of facts by the Plaintiff and the same issued ex-parte as the respondents were yet to file their reply;

4. That the Plaintiffs failed to inform this Honourable Court that the Orders sought in Order 3 relates to release of items that are exhibits in a Court of law and so held under the powers and direction of the Inspector General of Police;

5. That the foregoing issues constitute the grounds of an application for review as the same were not made known to the Court when it was making its Orders on 25th October 2018;

6. That notwithstanding the Order No. 3 issuing on 25th October 2018, the Plaintiff has yet to set down the application dated 17th October 2018 for inter-partes hearing; and

7. That this application is brought without inordinate delay taking into consideration that this Court had taken a long leave in November and then the December Vacation.

3. The application is opposed. By a Replying Affidavit sworn and filed herein on 19th February 2019 by its director Rodgers Kimindia Kaibunga, the Plaintiff company terms the application as misconceived, unmerited, bad in law and an abuse of the Court process. The Plaintiff avers that on 5th October 2018, the 2nd Defendant's agents, employees and or servants impounded the music equipment subject of the said Order from its Sinbad Hotel and Bar in Malindi.

4. The Plaintiff denies that it misled the Court into issuing any order as it was within its knowledge that the confiscated music equipment was in the custody of the Defendants who failed to attend Court when the matter came up for inter-partes hearing. The Plaintiff accuses the Defendants of filing this application as a delaying tactic meant to prevent the 2nd Defendant from complying with the orders issued by this Court.

5. I have perused and considered the application before me and the response thereto. I have equally perused and considered the written submissions as filed herein by the Learned Advocates for the parties.

6. The application before me was precipitated by the Orders made by this Court on 25th October 2018 in regard to an application filed by the Plaintiff herein dated 17th October 2018. When the said application was brought before this Court on 18th October 2018 under Certificate of Urgency, the Court directed that the same be served urgently for inter-partes consideration on 25th October 2018.

7. On the date slated for hearing however, the Defendants were not in Court. Upon being satisfied that the Defendants had been served as per the directions of the Court issued on 18th October 2018, this Court allowed the Plaintiff's application in terms of Prayers Nos. 2,3, and 4.

8. While the application before me is expressed to refer to Order No. 3, it is clear to me from a reading of the 2nd Defendant's application that what they object to is the grant of Prayer No. 4 of that application. The confusion in the numbering of the orders cannot however be attributed to the Applicant as it is clear to me that it arose from the manner in which the Plaintiff extracted the Orders herein. Prayer No. 3 of the extracted orders issued by this Court on 25th October 2018 reads as follows:-

3. That a declaration be and is hereby made that the Act of the employees and or agents of the Defendants is illegal and that a mandatory order be and is hereby made compelling the Defendants agents, servants(sic) to return the music equipment namely Laptop, MacBook Make Apple, Music Mixer, Rene Control Effect Machine to the Plaintiff.

9. According to the 2nd Defendant's Advocate Erastus Gitonga, that order is incapable of performance as the goods sought to be released are exhibits in ***Malindi Criminal Case No. 964 of 2018; Republic –vs- Faith Kariuki*** and are so held under the powers and discretion of the Inspector General of Police who is neither a servant nor employee of the Applicant.

10. In support of that position, Counsel has attached to his Supporting Affidavit as Annexure 'EK 2' a Copy of a Charge Sheet which indicates that the said Faith Kariuki was on 8th October 2018 charged with the offence of Failing to Comply with a Lawful Order contrary to Section 137 (b) of the Environmental Management and Co-ordination Act, Cap 387 of the Laws of Kenya.

11. As it were, the 2nd Defendant's application is expressed to be brought under Order 45(1) of the Civil Procedure Rules. That Order 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 orders; may apply for a review of the Judgment or order to the Court which passed the decree or made the order without unreasonable delay.

12. In my understanding, an application for review under Order 45 Rule 1 must be clear and specific on the basis upon which it is made. As the Court of Appeal stated in ***Rose Kaiza –vs- Angelo Mpanju Kaiza (2009)eKLR:-***

“Applications on this ground must be treated with great caution and as required by Rule 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the grounds of a discovery of new evidence, it must be established that the applicant had acted with due diligence, and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the Petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made”

13. In the matter before me, Counsel for the Applicant alleges without stating the source of his information that the items which are the subject of this Court's orders are being held under the powers and discretion of the Inspector General of the Police. I am unable to see how that can amount to new evidence that after due diligence could not be availed to this Court when the orders herein were made.

14. The Charges in the Criminal Case referred to were instituted on 8th October 2018 and the Applicant must have been aware of the same when this matter came up for hearing inter-partes on 25th October 2018. A perusal of the Charge Sheet annexed to the Applicants Supporting Affidavit clearly reveals that the complaint in the criminal case is the Republic through the Applicant and they cannot therefore feign ignorance of the same.

15. It is also evident that while the Applicant was served and was aware of this case in October 2018, they did not file the present application

until some three (3) months later in January 2019. I did not find any reasonable explanation why there was that undue delay in the filing of the present application.

16. The upshot is that I did not find any merit in the application. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 29th day of April, 2020.

J.O. OLOLA

JUDGE