REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPLICATION NO. 56 OF 2015

HANG NAN XIANG.....DECREE HOLDER/RESPONDENT

VERSUS

COK FA-ST COMPANY LIMITED.....JUDGMENT DEBTOR

PETER GASHERO MURAYA..... APPLICANT

LUCY GITHINJI.....APPLICANT

RULING

1. This ruling relates to a notice of motion application dated 5th December 2018, brought under the provisions of; Order 45 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The application is premised on the grounds on the face of it and an affidavit of the even date, sworn by Lucy Githinji, a director of the judgment debtor (herein "the company").

2. The applicants are seeking for orders that;

(a) There be stay of execution of the judgment and decree herein;

(b) The Honourable court be pleased to review its ruling and orders made on 31st October 2018;

(c) Costs of the application be provided for.

3. The applicants aver that, the decree holder (herein "the respondent") filed an application dated 17th March 2017, seeking for orders that the applicants herein; Peter Gachero Muraya and Lucy Githinji, be summoned to court and examined on oath, as to the means and assets of the judgment debtor (herein "the company") to satisfy the decretal sum and produce the company's books of accounts.

4. The applicants filed a replying affidavit and submissions on the application and a date for oral examination was set for 7th June 2018. On that date, the applicant's counsel sought to have the matter placed aside to 11.00am. as he was held up in another court, but the Honourable court declined the request and proceeded to examine the applicants in the absence of their counsel and the books of account, which were in the custody of their counsel.

5. The Honourable court in its considered ruling delivered on 31st October 2018 held that. ".....I am satisfied that the two directors having failed to produce the necessary records and/or documents of the judgment debtor's company as required under Order 22 Rule 35 of the Civil Procedure Rules and having been accorded then an opportunity to do the same, this case is thus suitable for this court to order and hereby order that the corporate veil in relation to the judgment debtor be lifted and the two directors be held personally liable to satisfy the decree of this court in this matter."

6. The applicants argue that, had the audited accounts been produced, the ruling dated 31st October 2018, would probably have been different. That they have not in any way run the company's affairs fraudulently and/or with the aim of frustrating this case. To the contrary the existence of this case and attachment of the company's assets in execution of the decree has completely destroyed the company's business. Further the subject ruling of the Honourable court is "unnecessarily harsh and punitive and unfair" and should be reviewed.

7. However, the Respondent filed a response vide a replying affidavit dated 31st January 2019, sworn by Jiang Nan Xiang, the decree holder (herein "the respondent") who argued that this application is bad in law, as it contravenes the express provisions of; Order 45 Rule 1 of the Civil Procedure Rules, 2010 (herein "the rules that stipulates the grounds for lodging an application for review.

8. That the applicants have not demonstrated how the company's audited accounts could not be produced after, exercise of due diligence at the time when application dated 17th March 2017 was heard and neither have the applicants shown any other sufficient reason, in support of their claim, that can result of the ruling.

9. The respondent averred that the dispute between the parties herein has been pending before the Honourable court and Arbitral Tribunals since 2012. That, on 25th July 214, Hon. Justice Ringera (retired), delivered a final award in the matter for Kshs. 42,593,468.27 and costs in favour of the claimant and the final award adopted on 30th April 2015, as a judgment of the Honourable court. Therefore, the judgment debtor has been aware of its indebtedness of the decretal sum of; Kshs. 53,560,976.30 as far back as 2014 and taken all steps possible to frustrate the respondent from enjoying the fruits of that decretal sum.

10. The respondent maintained that this subject application is non-starter, not merited and is a total abuse of the court process. That the respondent extracted the decree herein on 13th September 2016 and served the company and the applicants with a notice to attend court to show cause why warrants of attachment and sale should not be issued against the company but there was no response, whereby he Honourable court allowed the respondent to s commence execution.

11. Briefly thereafter, the company through the applicants employed one of the ploys used to stall the execution of decree filed an application seeking for stay of the execution and gave a proposal to liquidate the decretal sum in installments of; Kshs. 300,000 per months. That the proposal was a decoy meant to bring execution to a halt because the judgment debtor/company was essentially asking for fourteen (14) years to pay back the decretal sum.

12. That in support of the application to pay the amount in instalments the applicants made a blanket financial statement of the 1st Judgment debtor's inability to settle the decretal sum. No financial statement nor audited accounts evincing the inability to pay in lump sum the decretal sum was placed before the Honourable court.

13. That upon hearing the application for payment by installments, the Honourable court directed the company to file its financial statements to assist it in reaching a determination on the company's financial viability and thereby determine whether the company could liquidate the decretal sum in reasonable installments. Neither the judgment debtor nor the applicants/directors, furnished the Honourable court with any of the requested statements, thus occasioning the Honourable court on the 18th November 2016, to dismiss the application, directing that, the decree holder proceed and execute as per it's application for execution of decree.

14. However, the respondent could not realize the decretal sum due to the incompetent acts of the auctioneers, coupled up with the deceptive tactics employed by company and the applicants. As a result, whereof; on 17th March 2017, the respondent lodged a complaint against the auctioneers with the Auctioneer Licensing Board, which is yet to be determined.

15. Further, the respondent filed an application dated 17th March 2017, seeking that the directors of the company; Peter Gashero Muraya and Lucy Githinji be summoned to court, for examination on oath as to the means and assets of the company to satisfy the decretal sum and produce the company's books of account to determine whether there are other assets which could be attached, in order to settle the decretal sum and costs or to be compelled to meet the same personally.

16. The Honourable court allowed the respondent's application and held that, the company directors be personally liable based on the fact that the applicants herein had failed to produce the necessary records and documents of the company as required under, Order 22 rule 35 of the rules. The order was made after numerous opportunities were accorded to applicants.

17. As the respondent has been deprived of the fruits of his judgment for almost five (5) years and been incapacitated financially, the present application should be dismissed and the Respondent be allowed to recover his money.

18. The parties disposed of the application by filing submissions whereupon the applicants reiterated the averments in the affidavit in support of the application and submitted that; Section 80 of the Civil 80 of the Civil Procedure Act and Order 45 Rules sets out the criteria to be met for review. The applicant must establish there has been discovery of new and important matter or evidence which after due diligence was not within the Applicant's knowledge or could not be produced at that time."

19. The only way the Applicants could have demonstrated to the court the means, assets and books of account of the judgment debtor company was through production of the company's audited accounts for the relevant period. They were prevented from doing so by factors beyond their control. In particular refusal by the Honourable court to wait for their Advocate.

20. The auditor had given the directors and the accounts a clean bill of health in his opinion at page (5) of the audited accounts. That this is a clear case where the court should in the interest of justice exercise its discretion in favour of the applicants and review its ruling aforesaid.

21. However, the respondent submitted that, the respondent recognizes that, Section 80 of the Civil Procedure Act gives the court power to review and Order 45 of the Civil Procedure Rules sets out the rules for review. The rules provide strict grounds which one needs to demonstrate, that;

> *(a) There has been discovery of new and important matter or evidence which after due diligence, was not within the Applicant's knowledge or could not be produced at that time;*

(b) There is some mistake or error apparent on the face of the record; or

(c) There was any other sufficient reason; and

(d) The application had been brought without unreasonable delay;

(e) The decree or order sought to be reviewed must be attached to the application.

22. That these preconditions must be well demonstrated as the effect of review is to re-open the application or case afresh. Thus, as the rule of thumb in evidence, under Section 107 of the Evidence Act (Cap 80) Laws of Kenya states, "he who alleges must prove". The respondent relied on the case of; *Bwire vs Andrew Nginda Civil Appeal No. 103 of 2000, Kisumu (200) LLR 8340*.

23. It was submitted that in the present application, there are two main grounds relied on by the applicants that is; discovery of new and important evidence and a mistake or an error apparent on the face of record. Firstly, the adduced accounts by the applicants annexed as "LG22" in the affidavit of; Lucy Githinji is no new and important evidence that could not be produced by the applicants at the time when the ruling was made. The applicants were subjected to oral examination on the 7th June 2018, the examination was not by ambush as the applicants were rightly aware of the respondent's application dated 17th March 2017 and its contents.

24. The applicants dutifully and as per the law placed their replying affidavit dated 6th April 2017, sworn by Lucy Githinji, the 2nd applicant herein opposing the said application. Since then the applicants had more than one (1) year before the oral examination on the 7th June 2018, to approach the Honourable court and tender in the accounts as requested. Moreover, after the oral examination, the court placed no bar to the applicants to tender in the said accounts.

25. The respondent relied on the Court of Appeal decision in the case of; *Evan Bwire vs Andrew Nginda (supra)* cited by the High court in *Stephen Gathus Kimani vs Nancy Wanjira Waruingi t/a Providence Auctioneers (2016) eKLR,* where the court held that; "an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh".

26. Further, the applicants' claim that the accounts were not presented because they were in the possession of their Advocate at the time of examination and the court proceeded to hear the matter without allowing the Advocate to bring the documents, does not qualify as an omission apparent to the face of the court amounting to the review of the ruling. The court held in the case of; *High court Civil Case No. 788 of 1995, John Musili Mwandia vs Mohamed Sharif Chaundhry*, absence of counsel and an error of counsel are neither something new nor an error/omission apparent on the face of the record.

27. Similarly, in the case of; *Nyamogo & Nyamogo vs Kogo (2001) EA 170*, the court defined the scope of what would amount to an error or omission of the court as follows: -

> *"an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un-definitiveness 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."*

28. Additionally, the *Court of Appeal in Civil Appeal NO. 2111 of 1996, National Bank of Kenya vs Ndung'u Njau* held that an error or omission should be identified;

> *"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 proceeded on an incorrect expansion of the law."*

29. In the present matter, the Applicants have not shown why the statements of accounts could only be delivered to the court by the Advocate in person and why they were not filed formally in court and served upon the decree holder/Respondent.

30. Moreover, the applicants have not tendered an explanation for the delay in filing the application and why the accounts have not been produced since 13th September 2016. Therefore, the applicants have not demonstrated how the failure to admit the said books of account was an error or omission apparent on the face of the record.

31. Alternatively, the applicants have not demonstrated how if the books of accounts are admitted would alter the ruling of 31st October 2018. A bird's eye view of the books of accounts particularly the income statement, indicate that company's income statement has drastically been cascading towards losses from 2015; at Kshs. 1,308,694 to Kshs. 6,684,688. Thus it will be a long-drawn process of reasoning to hardly come to any conclusion as to the mistake, error or omission which the applicants may draw to point out the basis of the review.

32. I have considered the subject application herein and find that to place this matter in perspective, it is important to highlight the factual background of this matter, (at the risk of repeating what is already stated). In that regard, it suffices to note that, this case was filed in this

court as; a miscellaneous cause, following the award rendered by Hon. Justice Aaron Ringera (Rtd), on 25th July 2014.

33. The award was adopted as an order of the court on 30th April 2015 and the decree extracted on 13th September 2016. The judgment debtor was served with notice to show cause why warrants of attachment could not be issued and its assets sold in satisfaction of the decree.

34. The Judgment debtor then applied for an order to stay the execution of the decree and be allowed to liquidate the decretal sum in installments. The application was heard and orders made that, the Judgment debtor furnish its statement of accounts to assist the court determine the prayer for payment in installments and the reasonable installments payable. The Judgment debtor and its directors, who are the applicants in this application, did not comply with that court order. The application was subsequently dismissed fully on 18th November 2016. The decree holder commenced execution, but was not able to find any attachable assets hence the application dated 17th March 2017 seeking for examination of the Judgment debtor's directors. Upon filing and service of the same, the court ordered that, it be served for directions on 28th March 2017.

35. On that date, the applicants sought for fourteen (14) days to respond thereto. They were granted the fourteen (14) days and the court directed the parties to file submissions and stood over the matter to 18th May 2017. However, the court was not sitting on that date. The matter was rescheduled to 12th June 2018.

36. Apparently, the date of 12th June 2018, was taken ex parte. Consequently, due to failure to serve the Respondent, the matter did not proceed and was stood over to 23rd June 2017. The court was then informed the parties had filed submissions and granted the 11th July 2017, for highlighting the same. The parties consented to the examination of the Judgment debtor's directors and the date of 24th July 2017 set for the examination of directors, was taken by the consent of the parties.

37. The matter did not proceed and on 14th November 2017 the parties took the date of 9th February 2018 by consent. Apparently the directors to be cross examined were not in court.

On the 9th February 2018, the trial court was not sitting and the matter was stood over to 7th June 2018. On that date, the matter was called out at 9.00am. The learned counsel Ms. Tebino was holding brief for Mr. Muthama for the judgment debtor and the applicants and sought for the court's indulgence for the file to be placed aside as counsel was still held up. The court agreed and set the file aside at 9.00am. At 10.15am, the matter was called out again. The counsel was not in court and there was no counsel holding brief for him. The matter proceeded to hearing whereby the directors were cross examined and the matter set down for ruling on 17th July 2018.

38. It is noteworthy that the Judgment debtor's counsel did not move the court immediately after the matter was set down for ruling. Infact on the 30th July 2018, the learned counsel Mr. Njagi held brief for the learned counsel Mr. Muthama with instructions to take the ruling which unfortunately was not ready due to the indisposition of the court. Again, the judgment debtor and/or the directors did not seek to be given an opportunity to be heard before the ruling. The ruling was eventually delivered on 31st October 2018 in the presence of the Judgment debtors counsel. Again, there was no action taken, until the filing of the application herein on 6th December 2018.

39. It is therefore clear from the foregoing that, this matter which came to this court, post, the arbitral proceedings in the year 2015, has pending for the last four (4) years. It has acquired its own space and continues to flourish as the parties file one application after the other. The applicants are faulting the court in the affidavit sworn in support of the application, and avers that the order dated 31st October 2018, is "unnecessarily harsh and punitive".

40. However, with utmost respect, to the Judgment debtor and/ or its directors, how can they allege that the orders given are harsh, and punitive, when the court gave them an opportunity to be heard and did not utilize the same. In fact, it suffices to note that, there is no reason advanced why the applicants' lawyer was not in court. The absence of the explanation simply means that, the applicants have no good reason why their counsel was not in court.

41. Be that as it were, the provisions for review of a court order are well guided by the provisions of; Section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules. The absence of a counsel is not one of the grounds for review. The applicants have not proved any of the grounds stipulated under the subject provisions.

42. I therefore find the application has no merit and I accordingly dismiss it with costs to the Respondent.

42. Those are the orders of the court.

Dated, delivered and signed in an open court this 19th day of November 2019.

G.L. NZIOKA

JUDGE

In the presence of;

Mr Gachuhi for Mr Muthama, the decree holder/Respondent

No appearance for the Defendants/Judgment debtors

No appearance for the directors/Applicants

Dennis ----------Court Assistant