REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 326 OF 2014

MIANGENI INTERNATIONAL LIMITED.....PLAINTIFF

-VERSUS-

LISBORNE PROPERTIES LIMITED.....DEFENDANTS

RULING

[1] Before the Court for determination is the Notice of Motion dated **9 December 2016.** It was filed herein by the Plaintiff/Applicant on **13 December 2016** pursuant to **Sections 3A and 80** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, **Order 22 Rule 52**, **Order 45 Rules 1 and 2** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** for orders that the Court be pleased to review, vary and/or set aside the interlocutory judgment entered herein on **27 October 2014** in default of defence together with all consequential orders; and that the costs of the application be provided for.

[2] The application was premised on the grounds that the Court lacked the jurisdiction to enter judgment in favour of the Respondent, the said jurisdiction having been ousted by the arbitration clause in the parties' agreement; and therefore that there is an error apparent on the face of the record, or sufficient reason to warrant the setting aside of the said judgment. It was further contended that the Respondent's failure to draw the attention of the Court to the existence of the arbitration clause amounts to material non-disclosure and a travesty of justice; and therefore that the Court lacks the basis to proceed with the formal proof. Hence, the only viable option, it was averred, is to have the default judgment set aside to pave way for a referral of the matter to arbitration.

[3] The application was supported by the affidavit of the Managing Director of the Plaintiff/Applicant, **Mr. Jonathan Muema Ndungi**, sworn on **9 December 2016**, in which it was deponed that the Applicant herein filed this suit on **28 July 2014** simultaneously with a Chamber Summons application seeking interim measures of protection and an order to have the matter referred to arbitration. That upon being served, the Respondent filed a Defence and Counterclaim as well as a response to the Chamber Summons application. It was further averred that the subject matter of the suit and the application was premised on a construction agreement which provided for an arbitration clause that bound the parties to settle any disputes arising through arbitration. It was thus the contention of the Applicant that the Court lacked the jurisdiction to do more than issue interim measures of protection pending arbitration, and to refer the dispute to an Arbitrator.

[4] It was further averred by the Applicant that when the initial application came up for hearing on **28 July 2014**, the Court declined to grant interim measures of protection because the construction had already been completed. Moreover, the parties pointed out that they were engaged in negotiations with a view of settlement. The suit was consequently stood over generally pending settlement. It was thus the contention of the Applicant that it was mischievous for the Respondent to proceed to obtain interlocutory judgment on their counterclaim notwithstanding that the suit and the application were limited to interim measures of protection and referral to arbitration. In the premises, the Applicant urged for the setting aside of the interlocutory judgment in the interests of justice.

[5] The Defendant/Respondent filed a response to the application vide the Replying Affidavit sworn by **Hesbon Odhiambo Nyaori**, in which it was deponed that since the jurisdiction of this Court is derived from the Constitution, it cannot be ousted by an agreement between the parties; and that in any case, it was the Applicant who invoked the jurisdiction of this Court in the first place, by filing its Plaint dated **28 July 2014** in which it sought, inter alia, the following substantive prayers:

[a] An Order compelling the Defendant to refund a sum of Kshs. 5,150,000/=;

[b] An Order compelling the Defendant to pay the Plaintiff the sum of Kshs. 19,823,000/=; and

[c] Damages for breach of contract.

[6] According to the Respondent, the fact that the Applicant sought substantive prayers in the Plaint, taken together with the averment in paragraph 8 of the Plaint, is an acknowledgement that the Court does have jurisdiction to hear and determine this matter. It was therefore the contention of the Respondent that the Applicant should not be allowed to approbate and reprobate at the same time; adding that it is therefore untrue for the Applicant to state that the Plaint only sought interim measures of protection with a view of arbitration.

[7] It was further the contention of the Respondent that at no point during the pendency of this suit did the Applicant seek a stay of the proceedings pending arbitration, as no such arbitration was or has been extant; and that in any case, the Applicant had not demonstrated that it stands to suffer substantial loss or furnished security as a basis for the grant of stay of proceedings. Accordingly, the Respondent's averment was that the instant application dated **9 December 2016** is nothing but an abuse of the process of the Court, granted that the Court has already pronounced itself on the merits or otherwise of a previous application for setting aside of the Interlocutory Judgment.

[8] A perusal of the record shows that the Applicant approached the Court by way of a Plaint dated **28 July 2014,** in connection with an agreement that had been entered into between the parties for the construction of some 8 apartments on **LR No. Kisumu/Kasule/4923**. It was the contention of the Applicant that despite undertaking the works, the Respondent had refused, neglected and/or failed to pay for the services in the manner agreed; and that the Respondent had unlawfully and in breach of the agreement, terminated the agreement. Accordingly the Applicant moved to Court for redress vide its Plaint dated **28 July 2014**, praying for the following reliefs:

[a] An Order permanently restraining the Defendant whether by itself, its agents, servant, contractors, employees or any other person whomsoever from carrying on with the construction of the 8 apartments known as **Sparrow Gardens** on **LR No. Kisumu/Kasule/4923** until a valuation of the work done by the Plaintiff and the amount payable to the Defendant was established either by the Court or an Arbitrator;

[b] An Order compelling the Defendant, whether by itself or its agents, servants or any other person whomsoever to return to the Plaintiff or allow the Plaintiff to collect its machinery, tools, equipment and other implements of work lying at the site;

[c] An Order directing that the dispute herein ought to be referred to arbitration;

[d] In the alternative to Prayer (c) above, an Order compelling the Defendant to refund the Plaintiff the sum of **Kshs. 5,150,000/=;**

[e] An Order compelling the Defendant to pay the Plaintiff the sum of **Kshs. 19,823,000/=** or in the alternative, an independent valuation be conducted of the work done by the Plaintiff to establish the contract amount payable to the Plaintiff;

[f] Damages for breach of contract;

[g] Cost of the suit

[h] Interest on (a) and (b) above;

[i] Any other relief that the Court may deem just to grant.

[9] Along with the Plaint, the Applicant filed a Notice of Motion of even date, seeking Temporary Injunction to restrain the Defendant from undertaking any further development, completion or construction of the suit property in any manner whatsoever or from interfering with the material, equipment, machinery, tools or any other items left on site by the Applicant pending the referral of the matter to arbitration and pending the outcome of the arbitration. The applicant also prayed for an Order directing the parties to submit the dispute to arbitration.

[10] Two days after the filing of the suit and the application aforementioned, the Applicant filed another application pursuant to **Section 7(1) of the Arbitration Act**, and **Rules 2 and 8** of the **Arbitration Rules, 1997,** seeking Orders to restrain the Respondent from, inter alia, appointing, engaging or handing over the site and construction of **Sparrow Gardens** on **LR No. Kisumu/Kasule/4923** to any other contractor or any other person for completion pending the hearing and determination of the application *inter partes* and pending the hearing and determination of the dispute between the parties by way of arbitration. Accordingly, interim orders were made on **31 July 2014** for a joint audit with a view of establishing the final account to determine the amount payable to the Applicant, if any, pending the hearing and determination of the two applications.

[11] Further Orders were granted on **12 August 2014** to restrain the Respondent as prayed in Prayer 2 of the initial application dated **28 July 2014** for 36 days pending the joint inspection and audit exercise. As the parties had expressed the willingness to engage in out of court negotiations with a view of an amicable settlement, the Court further granted them the liberty to negotiate the matter out of court with a view of recording a consent. However, by **7 October 2014**, no settlement had been reached.

[12] In the meantime, the Respondent had entered appearance and filed a Statement of Defence and Counterclaim dated **25 August 2014,** contending that the Applicant did not complete the construction within the agreed timelines despite two contract extensions. The Respondent further contended that the Applicant was overpaid for the shoddy work it had done on the project. Accordingly, the Respondent counterclaimed for:

[a] Kshs. 1,532,475.58 being overpayment for works done;

[b] Kshs. 4,150,000/= being 15% of the value of the project;

[c] Kshs. 2,200,000/= being damages for delay in completion of the construction;

[d] Kshs. 420,000/= being costs for delay in the completion of the construction;

[e] Kshs. 2,200,000/= being loss of rental income;

[f] General Damages;

[g] Interest and Costs.

[13] The record shows that the Defence and Counterclaim was duly served on the Applicant and therefore when no Defence was filed thereto within the prescribed period, a Request for Judgment was filed on **9 October 2014**, which was acted upon by the Deputy Registrar **on 27 October 2014** pursuant to **Order 10 Rules 4 and 6** of the **Civil Procedure Rules**. It is therefore incorrect for the Applicant to contend that the said Judgment was entered by me, noting that, in any case, I had not, by then, been appointed as a Judge of this Court. What came up before me for determination was the Applicant's Notice of Motion dated **15 July 2015**, which was an application for the setting aside of the default judgment, which was dismissed on **18 November 2016.**

[14] In view of the foregoing background, the main issue for consideration is whether a case for review has been made herein as envisaged by **Section 80** of the **Civil Procedure Act** as read with **Order 45 Rule 1** of the **Civil Procedure Rules**. **Section 80** of the **Civil Procedure Act**, provides that:

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.

[15] Order 45 Rule 1 of the **Civil Procedure Rules**, on the other hand provides that:

(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.

[16] Needless to say therefore that a party seeking review is under obligation 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] that there was any other sufficient reason; and

[d] that the application had been brought without unreasonable delay.

[17] The main ground relied on in support of the application is the contention that **"...the Court lacked the jurisdiction to hear the dispute and/or render the judgment it did, as the Court's jurisdiction was ousted by the Arbitration Clause in the parties' Agreement..."** and that the absence of jurisdiction amounts to an error apparent on the face of the record or a sufficient reason to warrant the review or setting aside of the interlocutory judgment. It was therefore not the contention of the Applicant that 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 the time that the interlocutory judgment was entered.

[18] As to what amounts to an error apparent on the face of the record, the Court of Appeal, in the case of **Nyamogo & Nyamogo Advocates vs. Kago (2001) 1 EA 173**, had this to say:

"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 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, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal..."

[19] With the foregoing in mind, I have looked at the interlocutory judgment that was recorded herein on **27 October 2014**. It was entered on the Counterclaim pursuant to the clear provisions of **Order 10 Rule 6** of the **Civil Procedure Rules** on the motion of the Respondent. The Request for Judgment dated **8 October 2014** was filed on **9 October 2014.** It was further premised on an Affidavit of Service sworn by **Michael K. Rotich** on **8 October 2014**, by which the Deputy Registrar was satisfied that service had been effected on the Plaintiff, and that service was effected on **25 August 2014**. Attached to that Affidavit of Service was a copy of the Defence and Counterclaim bearing the stamp impression of **M/s Omari Muumbi & Kiragu Advocates**, confirming that the Defence and Counterclaim was served on the said firm, (which was then on record for the Applicant) on **25 August 2014**, having filed this suit on its behalf. Accordingly, the Applicant had the prescribed 15 days from the date of service to file a Reply to the Defence and Defence to Counterclaim. This is the prescription in **Order 7 Rule 11** of the **Civil Procedure Rules**, which states thus:

"Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the court, deliver a reply within 15 days after service upon him of the counterclaim and shall serve a copy thereof on all the parties to the suit."

[20] There is no gainsaying that the Applicant did not take action as required by the provision aforementioned; and it was on account of that default, which persisted up to **27 October 2014**, that a default judgment was applied for and obtained by the Respondent. There is therefore no error apparent on the face of the record in connection with the entry of the said default judgment. Indeed it was recorded in accordance with the provisions of the law, notably **Order 7 Rule 11** and **Order 10 Rule 6 of the Civil Procedure Rules**. Hence there was no hearing or determination properly so called from which it can be inferred that an error was committed by the Court.

[21] Thus, the only option open to the Applicant in the circumstances was to seek the setting aside of the default judgment, which is what it did by its Notice of Motion dated **15 July 2015**. That application was heard on the merits and determined on **18 November 2016.** The Court was satisfied that the entry of the default judgment was regular and that there was no justification or plausible explanation as to why the Applicant did not file a Defence to the Counterclaim within the prescribed time. That decision having not been appealed or reviewed; the argument that there is an error on the face of the record is untenable. Indeed, in **National Bank of Kenya Limited vs. Ndungu Njau [1997] eKLR**, 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-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review..."

[22] As to whether the Court had jurisdiction to entertain this suit, there is no dispute that by virtue of **Clause 45.1** of the parties' construction agreement dated **13 March 2013**, they were in accord that:

"In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing to concur in the appointment of an arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya on the request of the applying party."

[23] There is similarly no controversy that a dispute did arise between the parties as envisaged by **Clause 45.1** of the Agreement; for this is why this suit was filed in the first place. Both in the Plaint and the accompanying Chamber Summons, as well as the subsequent application dated **30 July 2014,** the Applicant made it clear that it was desirous of having the dispute referred to arbitration and that it would be seeking interim measures of protection pursuant to **Section 7** of the **Arbitration Act, No. 4 of 1995** pending such arbitration. It is also evident that the Applicant abandoned this line in favour of out of court negotiations, which initiative was apparently not pursued to conclusion, and which had not been finalized by the time the interlocutory judgment of **27 October 2014** was recorded. In the premises, it is plain that that argument that the Court lacked jurisdiction to record the default judgment cannot avail the Applicant, for the simple reason that this suit was instituted by the Applicant and at paragraph 8 of its Plaint the applicant was in no doubt that **"This Honourable Court has jurisdiction to hear this matter."** Besides evincing an intention to go for arbitration, the Applicant pleaded in the alternative for judgment in its favour against the Respondent for specific sums of money as well as for General Damages for breach of Contract. Accordingly, unless resolute steps were taken to that end, the Court's residual inherent jurisdiction would remain unassailed notwithstanding the agreement of the parties. This, to my mind, is the purport of **Section 6** of the Arbitration Act.

[24] Additionally, **Order 46 Rule 1** of the Civil Procedure Rules is explicit that:

"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."

[25] Clearly therefore, whereas there ought to be deference in favour of arbitration, it was never intended that the opportunity for arbitration be open-ended. Thus, the parties must be prepared to comply with the structured procedure and timelines set in that regard for arbitration in all matters where the Court is approached by way of a Plaint, and more so in a matter such as this where alternative prayers were sought,

which prayers may not patently be arbitrable. Failure to so act would mean that the window for arbitration was waived by the parties; and in this respect it is instructive to restate the observation of the Court **(Kamau, J.)** dated **7 October 2014** evidencing the lackadaisical attitude displayed herein by the Applicant. The Court noted that:

> **"This matter came under Certificate of Urgency during the High Court Vacation in August 2014. It has emerged from past court attendances that there was really no urgency in this matter as was portrayed by the Plaintiff as construction had been concluded before it even came to court. I wholly concur with counsel Ian Maina that the Court and the Respondent cannot be held at ransom by the Applicant's indecisiveness on how to proceed with the matter. In the circumstances foregoing, I hereby decline to grant any further mention in the matter. Parties are at liberty to file a consent once a settlement is arrived at and thereafter to fix a mention date when the court will endorse and adopt the said consent order as an order of this court..."**

[26] In the premises, I find no merit in the argument that the Court lacked the jurisdiction to record the default judgment of **27 October 2014;** or the contention that there is an error apparent on the face of the record to warrant a review. I would therefore dismiss the Applicants' Notice of Motion dated **9 December 2016** with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2018

OLGA SEWE

JUDGE