REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 625 OF 2002

SKOOL ENTERPRISES LIMITED.....….....PLAINTIFF

-VERSUS-

HOUSING FINANCE COMPANY

OF KENYA LIMITED.....1ST DEFENDANT

FRANK IRERI.....2ND DEFENDANT

JOSEPH KANIA.....3RD DEFENDANT

JULIUS M. MUIA.....4TH DEFENDANT

RULING

[1] The Notice of Motion dated **28 June 2016**, which is the application that is the subject of this Ruling, was filed herein on even date by the Plaintiff, **Skool Enterprises Ltd**, for the following orders:

> [a] That the Court be pleased to grant the Plaintiff a review of the Ruling of the **Hon. Mr. Justice Njagi** delivered on **3 June 2010** and grant the orders as prayed for in the application dated **3 June 2009**;
>
> [b] That the costs of the application be provided for.

[2] The application was presented pursuant to **Sections 3, 3A, 80 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, and **Order 45 of the Civil Procedure Rules**, **2010,** together with all other enabling provisions of the law. The application is supported by the affidavit of **Isaac G. Munyiri**, the Plaintiff's General Manager, who also prosecuted the application on behalf of the Plaintiff. His detailed affidavit, together with the annexures thereto is, in effect, an explication of the 7 grounds which the application is premised; which can safely be summarized as hereunder:

> [a] That the Learned Judge erred in not addressing himself to the application that was placed before him for determination;and that out of the four grounds raised in support of the application, the

Learned Judge considered only one, namely the one for stay; and that even then, the Learned Judge failed to evaluate the threshold required by the Civil Procedure Rules for stay before making his Ruling;

[b] That the Learned Judge erred in his Ruling in not considering that leave to commence contempt of court proceedings had already been granted by another Judge; and that his Ruling amounted to sitting on Appeal/Review of the orders of a fellow High Court Judge;

[c] That the Learned Judge erred in his Ruling in not considering that there was a permanent injunction order in existence by the time he Plaintiff's property was sold; which order had not been vacated;

[d] That the Learned Judge did not consider the violation of the *sub-judice* rule by the Defendants/Respondent; and that the Plaintiff's property was sold when there were matters pending in the High Court and the Court of Appeal.

[3] In opposition to the application, the Defendants, who are herein represented by the firm of **Issa & Company Advocates**, relied on the Grounds of Opposition filed on **25 July 2016**, namely:

[a] That the application is incompetent and defective as the Plaintiff had not extracted and attached the order that it seeks to have reviewed as required under **Section 80 of the Civil Procedure Act** and **Order 45 Rule 1 of the Civil Procedure Rules;**

[b] That the application is an abuse of the court process as it seeks to challenge the merits of the ruling delivered by **Njagi J** on **3 June 2010** which can only be done by way of appeal and not under the guise of a review application;

[c] That the application is incompetent and does not meet the threshold for review under **Order 45 Rule 1 of the Civil Procedure Rules**;

[d] That there has been inordinate delay in filing the application for review, contrary to **Order 45 Rule 1,** which provides that an application for review should be made without unreasonable delay.

[4] I have carefully considered the application, the grounds and averments in support thereof, including the documents annexed to the Supporting Affidavit, as well as the grounds raised in opposition thereto. I have also endeavoured to peruse and gain an appreciation of the pleadings filed herein and proceedings held to date. That this is a fairly old matter is not in doubt. It is a matter that was filed on **22 May 2002** for a permanent Injunction. The Plaintiff also simultaneously prayed for interlocutory injunctive orders, which were granted by **Mwera, J** on the same date of **22 May 2002**; with an order that the application be fixed for hearing *inter partes* within 14 days.

[5] In his Supporting Affidavit the Plaintiff contended that the Order of **22 May 2002** was a Permanent Injunction; and that although an attempt was made to dismiss the suit for want of prosecution on **14 July 2005**, there was an order of stay that was granted by **Kasango, J** pending appeal, which order, along with the injunctive order, was in force when the Defendants disposed of the suit property on **28 November 2006**. It was thus the contention of the Plaintiff that the sale was not only illegal but also amounted to contempt of court. Hence, the Plaintiff promptly filed an application for leave to commence contempt proceedings against the 1st Defendant. The application for leave to commence contempt proceedings was later amended, with leave of the Court, to include the 2nd, 3rd and 4th Defendants; whereupon leave was granted by **Khaminwa, J** on **21 May 2009**. That order paved way for the filing of the Notice of Motion dated **3 June 2009** for orders that the Defendants be punished for contempt of Court; which application found itself before **Njagi, J** for hearing and determination.

[6] It was the contention of the Plaintiff that instead of hearing and determining the Notice of Motion that was before him for contempt of court, being the Notice of Motion dated **3 June 2009**, the Learned Judge digressed and delivered a ruling on a non-existent stay application, being the ruling dated **3 June**

2010 and marked **Annexure 1** to the Plaintiff's Supporting Affidavit. According to the Plaintiff, the Learned Judge fell into error in concluding firstly that there was no valid order of stay and secondly that the Plaintiff had no case when courts of coordinate jurisdiction had ruled otherwise and granted leave to the Plaintiff to commence contempt proceedings in respect of the injunctive orders issued by **Mwera, J** on **22 May 2002**.

[7] The foregoing being the summary of the facts relied on by the Plaintiff as set out in its Supporting Affidavit, and bearing in mind the Grounds of Opposition filed herein on behalf of the Defendants, including the List and Bundle of Authorities filed in support of those grounds, the issues for determination, in my view are only two, namely:

[a] Whether or not the application is incompetent for the reason that the Plaintiff did not extract or attach the order sought to be reviewed as required by **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1 of the Civil Procedure Rules;** if not;

[b] Whether a good case for review has been made out by the Plaintiff to warrant the issuance of the orders sought in the Notice of Motion dated **28 June 2016.**

[8] Section 80 of the **Civil Procedure Act**,on which the Plaintiff heavily relied, 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."

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, 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.”

[9] Thus it is settled law that a party coming under the aforesaid provisions for review is obliged 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.

[10] There is a long line of authorities to support the argument that it is an additional requirement to the four points aforestated, that the decree or order sought to be reviewed must be attached to the application. This is the argument that was posited by the Defence Counsel, on the authority of the case of **Titus MulandiKitonga vs B O (a minor suing through his mother and next of friend S N O [2016] eKLR**, in which **Njuguna J** was of the view that:

> **"...it is now well settled law that a party seeking to review an order has to annex a copy of the order which he seeks to review. The Respondent herein failed to comply with this legal requirement and the omission in my view is fatal. On this issue, the learned magistrate noted that a copy of the proceedings and judgment were exhibited by the Respondent and to him, that is adequate. To me, this is not the current position in law...It is the duty of the party who wishes to appeal against, or apply for a review of a decree or order to move the court to draw up and issue a formal decree or order...In view of the above, the failure by the Respondent to extract a formal decree was fatal to the Application and the same ought to have failed on that account..."**

[11] It is not in dispute that the Plaintiff relied, not on a formal order extracted for that purpose, but on the Ruling of **Njagi J** delivered herein on **3 June 2010** (marked **Annexure 1)**. My position however has been to in favour of the approach that where the applicant attaches the Judgment or Ruling sought to be reviewed, then the failure to annex an order or decree thereof need not be fatal. This is the approach I took in the case of **Skair Associates Architects vs The Evangelical Lutheran Church of Kenya & 4 Others Nairobi HCCC No. 342 of 2014** (Commercial and Tax Division) wherein I stated as follows in a similar application:

> **"I would be more inclined to the view that failure to annex the Decree sought to be reviewed is not necessarily fatal to the application, more so in this case where reliance was placed on Article 159(2)(d) of the Constitution as well as Sections 1 and 1A of the Civil Procedure Act. Besides, the Decree is on the file... the constitutional imperative to administer justice without undue regard to procedural technicalities as set out in Article 159(2)(d) of the Constitution would dictate that the Plaintiff's failure to exhibit the decree as an annexure to the supporting affidavit be subordinated in the larger interests of substantive justice. Consequently, I take the view that this omission is not fatal to the application..."**

[12] I find succour in this view point in the case of **Stephen Boro Gitiha vs Family Finance Building Society & 3 Others [2008] eKLR** in which the Court held that:

> **"The overriding objective overshadows all technicalities,precedents, rules and actions which are in conflict with... and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time...In this case, the plaintiff's counsel did annex a copy of the judgment which is sought to be reviewed. The extraction of a decree or order sought to be reviewed no doubt stems from the judgment and is purely a procedural omission which should not be used to impede access to justice..."**

[13] Accordingly, it is my finding that the application is competently before the Court. As to whether the application was filed without undue delay, there is no denying that there was delay; indeed the Plaintiff did concede, in its oral submissions herein that there was inordinate delay in bringing the instant application. It however contended that that delay was not due to its fault. The reason given was that the Plaintiff applied for certified copies of proceedings which were not given in time. The Plaintiff thereafter obtained a Certificate of Delay to support its posturing, which was exhibited herein as **Annexure IGM-3** to the Supporting Affidavit. I have looked at that Certificate of Delay and it does confirm that the Plaintiff applied for proceedings and a certified copy of the subject Ruling on **8 June 2010**; and that the proceedings were only ready for collection on **20 April 2016**, in spite of reminders. The Deputy Registrar further certified that it took the period between **8 June 2010** to **20 April 2016** for the proceedings to be typed. In the premises, I would agree that the Plaintiff is not to blame for the delay.

[14] As to the merits of the application, the Plaintiff was explicit enough in its oral submissions to say that the ground relied on is that there is an error apparent on the face of the Ruling of **Njagi J** dated **3 June 2010.** Counsel for the Defendants on the other hand posited that the application is evidently more of an appeal against the Ruling than an application for review. Thus, it is pertinent to pose the question: what is an error on the face of the record? This question was answered in the case of **Nyamogo & Nyamogo Advocates Vs Kago (2001) 1 EA 173** in which the Court of Appeal had the following 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..."**

[15] According to the Plaintiff, **Njagi J** erred in not addressing himself to the application that was placed before him for determination; and that out of the four grounds raised in support of the application dated **3 June 2009,** the Learned Judge considered only one ground; and that in considering that ground the Judge failed to evaluate the threshold require in the Civil Procedure Rules for an order of stay pending appeal. First and foremost, a perusal of the Ruling complained of does show that the Judge addressed his mind to the issues before him. He started off with a consideration of the background of the case. At paragraph 2 on page 3 of the Ruling the Judge observed that:

> **"Against that background, the Applicant filed the application which is the subject of this ruling. The application was made by a notice of motion dated 3rd June 2009 seeking orders that the 1st Defendant/Respondent be fined for being in contempt of Court and being guilty of the *sub judice* rule as the Court deems fit; and that the 2nd, 3rd and 4th Defendants/Respondents be punished for contempt of Court by being imprisoned for a period not exceeding 6 months together with such fine as the Court deems fit. The application is based on the grounds that the 1st Defendant failed to comply with permanent court orders dated 22nd May 2002 and the interim stay orders dated 14th July 2005 by selling the Plaintiff's/Applicant's property, and that the 2nd, 3rd and 4th Defendants are senior officers of the 1st Defendant/Respondent company who participated in making the illegal sale decision on behalf of the 1st Defendant/Respondent."**

[16] In the premises, the averments of the Plaintiff as per the first and second grounds of complaint cannot be true in the face of the contents of the Ruling dated **3 June 2010.** In any event, since it is the Plaintiff's contention that the Learned Judge misapprehended the factual and legal landscape pertaining to the application, it is plain that his remedy lay on appeal and not on review on this particular point. The rest of the grounds set out in the Plaintiff's Notice of Motion are but an amplification of the first two grounds; they contend that the Learned Judge erred in not considering that leave and stay had been granted by other Judges before him; and that there was a permanent injunction order in force. It is instructive that the suit was indeed dismissed for want of prosecution on **14 July 2005** by **Kasango J,** and in the impugned ruling, the Court observed thus in connection therewith:

> **"After hearing Mr. Munyiri for the Applicant and Mr. Issa for the Respondents, I note that this application is riddled with procedural irregularities which cannot allow it to stand. it is noteworthy that the application is made in HCCC No. 625 of 2002. That suit was dismissed on 14th July, 2005. On the same day, the Applicant was granted a stay for 7 days pending the filing of a formal application for stay orders. Although the application was duly filed on 19th**

July, 2005, no stay orders were made thereon, and it was finally withdrawn on 2nd March 2007, with costs to the Defendant."

[17] A perusal of the Court record confirms the foregoing observations by the Judge. Accordingly, it cannot be said that there is an error on the face of the record for the purposes of **Section 80 of the Civil Procedure Act** or **Rule 1 of Order 45, Civil Procedure Rules**. Indeed, in the case of **National Bank of Kenya Ltd vs Njau [1995-98] 2 EA 231 (CAK)** the Court of Appeal had the following to say in respect of applications for review:

"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 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 exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. In the instant case, the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of the law, it could be a good ground for appeal but not review. An issue hotly contested cannot be reviewed by the same court which had adjudicated upon it."

[18] The foregoing being my view of the matter, I would dismiss the Notice of Motion dated **28 June 2016** with costs.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH 2017

OLGA SEWE

JUDGE