



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 624 OF 2015**

**SAMUEL GUTU MACHARIA & 4 OTHERS.....PLAINTIFF**

**VERSUS**

**PATRICK G. MWANGI & 6 OTHERS.....DEFENDANT**

**RULING**

[1] The Defendants brought the Notice of Motion dated **18 January 2017** under **Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 45 of the Civil Procedure Rules, 2010**. The orders sought are basically that the Court be pleased to review, set aside and/or vary its *status quo* orders made herein on the **9 January 2017**; and that the costs of the application be provided for. The application is predicated on the affidavit of **Patrick Githinji Mwangi** that was annexed thereto.

[2] The court record shows that this is a file that has been placed before various Judges in the Division for orders under Certificates of Urgency. It was however ultimately taken over by my brother, the **Hon. Mr. Justice Tuiyott**, who made his last orders herein on **20 December, 2016**. The matter is listed for the hearing of the Notice of Motion dated **9 December 2016** on **14 March 2017**. The matter was thus placed before me on **5 January 2017** as the Duty Judge, for interim orders under a Certificate of Urgency pending the hearing of the Notice of Motion aforesaid. The said Notice of Motion sought orders that the Interested Parties' application dated **9 December 2016** be heard *ex parte* during the vacation. The Interested Parties were apprehensive that certain monies that form the subject matter of the application were on the verge of being paid out to the Defendants before they could have their application heard and determined.

[3] After hearing the protagonists herein, the Court directed thus:

**"This being a matter that the Hon. Mr. Justice Tuiyott is already seized of and a date taken, it is hereby directed that the application be served on the Defendants for hearing on 14 March 2017 before Hon. Mr. Justice Tuiyott.**

**It is further directed that the status quo now prevailing be maintained till then as no prejudice will befall any of the parties in the interim..."**

[4] It is the aforesaid order that prompted the filing of the instant Notice of Motion dated **18 January**

2017. The Defendants have come under **Order 45 of the Civil Procedure Rules** for review on the ground that the orders were issued in error granted that the Defendants are presently and legally in office as the directors of **Kirima Bus Service Ltd** (hereinafter, **the Company**), and are in need of funds to carry out the day to day activities of the company. They further averred that the order had the effect of finally disposing of the two applications that have been set for hearing on **14 March 2017** and should therefore not be left to subsist.

[5] The application was resisted by both the Plaintiffs and the Interested Parties who filed their affidavits on **26 January 2017** and **30 January 2017**, respectively. They denied allegations that the Defendants have been unable to run the Company, contending that it had contracted an estate management company known as **Masterways Properties Ltd** to take care of the day to day operations of the Company. The Interested Parties conceded that there had been wrangling amongst the shareholders and that meetings that had been called for the purpose of discussing and transacting company business had all ended up in chaos; and that on account of their mutual suspicions, the Plaintiffs and the Defendants are currently facing criminal charges with regard to allegations of fraud against the Company. The Interested parties further proposed that, should the Court be inclined to lift the *status quo* order, then an order should be made in place thereof for the funds in issue to be paid to a joint account, to be held in the joint names of the three law firms on record herein, pending the hearing and determination of the pending applications.

[6] The Plaintiffs on their part contended that they were and had been the *bona fide* Directors of the 6<sup>th</sup> Plaintiff Company, before the Defendants unlawfully installed themselves as the Directors; and that over the years, there had been wrangles over the management of the 6<sup>th</sup> Plaintiff, including an attempt by the 5<sup>th</sup> Defendant to have the company wound up. It was thus in those circumstances that **Masterways Properties Limited** was appointed to collect rental income to avoid pilferage and wasted of company funds. According to the Plaintiffs, the latter company had been faithfully and diligently collecting rents to date. They urged for the *status quo* order to be kept in place pending the hearing of the pending applications, positing that the management and operations of the Company was not in jeopardy in any way as the same was being undertaken by an estate management company.

[7] The application was argued *inter partes* on **31 January 2017** and the key issue for consideration that emerges from the foregoing is whether the Defendants have made out a good case for review. In **National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR** the Court of Appeal had the following to say on the subject:

**"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 ground for review."**

[8] The Defendants contended, not that there is new or important matter or evidence that has come to the fore, but that the Court ought not to have made the *status quo* order, for the reason that the **Hon. Mr. Justice Tuiyott** had earlier declined to grant any interim orders on **20 December 2016**. The truth of the matter is that the Court did not, on **9 January 2017**, grant any of the orders sought by the Interested Parties in their application dated **9 December 2016** nor did it give any orders sought in the subsequent application dated **5 January 2017**. It is for this reason that I find the instant application misconceived.

[9] Secondly, it is trite that a point which may be a good ground of appeal may not necessarily be a good ground for review; and it has been held that an erroneous view of the evidence or the applicable law, which is what has been raised herein, are not good grounds for review, though they may be good grounds for an appeal. The rationale for this is plain, it would put the Judge in an awkward position of having to sit on appeal on his/her own decision. In **the National Bank of Kenya Case** (supra) for instance, the Court made the following observation:

"...the learned Judge ... 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 law, it could be a good ground for appeal but not for review. Otherwise we agree that the Learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it."

[10] Thirdly, a *status quo* order is simply intended to keep things as they exist at the time when the order is made, pending further orders of the Court. I would therefore entirely agree with the view-point taken by Odunga, J in the case of **Republic vs National Environment Tribunal, ex parte Palm Homes Limited & Another [2013] eKLR** when he stated that:

"When a court of law orders or a statute ordains that the *status quo* be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining *status quo* is meant to preserve existing state of affairs...*Status quo* must therefore be interpreted with respect to existing factual scenario..."

[11] I therefore have no hesitation in holding, for the reasons aforestated, that the application falls short of demonstrating that this is a proper and fit case for review. Accordingly, I would dismiss the Notice of Motion dated **18 January 2017** with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MARCH, 2017**

**OLGA SEWE**

**JUDGE**