REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.COMM CASE NO. 75 OF 2015

MUNAVER N. ALIBHAI.....PLAINTIFF

VERSUS

SOUTH COAST HOLDINGS LTD.....DEFENDANT

RULING

1. Before the court for consideration is the Notice of Motion by the defendant dated 4.2.2016 and seeking orders that:

(i) That this application be certified as urgent and heard ex-parte in the first instance.

(ii) That the court be pleased to stay, discharge, set aside, vacate and review the order and ruling issued by this honourable court by Honourable Justice P. Otieno on the 18th day of December 2015 granting inter alia an order of mandatory injunction directed at the Defendant, compelling it to forthwith and unconditionally open the suit premises and to grant to the Plaintiff, unhindered and unfettered access thereto.

(iii) That the court be pleased to stay, discharge, set aside, vacate and review the order and ruling issued by this honourable court by Honourable Justice P. Otieno on the 18th day of December 2015 granting *inter alia* an order of temporary injunction directed at the Defendant, its agents, employees, or persons acting under its directions, from unlawfully seeking to levy distress on account of service charge, pending the hearing and determination of this suit.

(iv) That the cost be borne by the Plaintiff/Respondent.

2. By the time the matter came up for hearing on the 18/3/2016 only prayers 2 ,3 & 4 were due for consideration. The substantive prayers 2 & 3 are essentially the same in that prayer 2 seeks to set aside/review the mandatory temporary injunction while prayer 3 seeks the setting aside review and or discharge of the prohibitory injunctive orders granted by the court and restraining the defendant from unlawfully seeking to levy distress on account of service charge pending the outcome of the suit. When all is considered, the application simply seeks an order that the plaintiffs application allowed by this court's ruling of 18th December 2015 be dismissed

3. The application is expressed to be grounded upon the provisions of order 40 Rule 2 & 5, order 45 as well as order 51 Rule 1 & 3 together with sections 1A, 1B,3,3A and 63 of the Act. From the onset I am

minded to comment and hold that the provisions of Order 40 Rules 2 & 4 cannot be invoked to found an application like the one before the court. Rule 2 is only available to an applicant seeking to be granted a temporary injunction while Rule 4 relates to where the court could grant interim temporary orders. To that extent it was totally worthless to invoke those provisions. That alone however cannot be the basis of refusing the application since the court is bound to consider the same on the merits and without the technicalities even if that is concerned with citation of the wrong provision of the law.

4. Special and inherent jurisdiction under sections 3 & 3A together with section 63 C & e of the Act are equally invoked besides the overriding objectives of the court to do justice. I am aware that before the court sets to make a determination it must always and at all times appreciate its duty to do justice to all before it and guard against the prospects of its processes being abused. It is therefore, to this court never mandatory for a litigant to cite those special provisions for before the court can apply the same. To this court these are the very foundation upon which orders of the court are made and grounded even where there exists no specific provision to cater for a peculiar case. Consequently it is clear to me that the matter before me plainly without the way words used in the application, seeks to have the orders granted on the 18/12/2016 upset by way of Review under order 45 of the Rules.

5. Order 45 finds its statutory underpinning at section 80 of the Act which is worded as follows:

> **Section 80**
>
> ***"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 the judgment to the court which passed the decree or made the order and the court may make such orders thereon as it may think fit."***

6. The Rules made pursuant to the foregoing provision are however clear on the parameters to be met by a person seeking review and provide that such application is only available on account of:-

- **the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by him at the trial.**
- **Some mistake or error apparent on the face of the record.**
- **Any other sufficient reason.**

7. The decision now sought to be upset by the defendant having been made pursuant to the provisions of order 40, was a decision to which an appeal is clearly allowed and the Defendant could have opted to appeal but has opted not to within its legal rights. I am therefore not in doubt at all that there being no appeal from the decision, the applicant has met the first threshold of set under the law from applying for review.

8. What then would concern the court is whether the parameters for grant of review orders have been met. The question that this court must therefore pose for itself and answer is if all the prerequisites under the Act and the Rules have been made. I proceed from the premise that not all decisions are reviewable as some decisions are only amenable to appeal and not review.

9. In the decision of **NDUNGU NJAU -VS-NATIONAL BANK [} eKLR** , the Court of Appeal had this to say on the position of application for review.

> **"In the instant case the matter in dispute had been fully canvassed, before the learned judge.**

He made in conscious decision of 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."

10. The applicant before the court in the current matter seeks review of the subject orders on grounds which include the fact that the ruling was delivered on a date not set and without notice to it, that the court has misapprehended the legal definition of the term rent reserved and whether or not there exist a tenancy between the parties with the consequence that the orders granted by the court are in vain operate in a vacuum and therefore leading to an illegal/irregular creation of a tenancy without jurisdiction.

11. My reading of the grounds of the application do not persuade me that the applicant is alleging an error apparent on the face record or the discovery of new and important matter of evidence. That leaves the third limb, of "any other sufficient reason".

I hold the view that the expression sufficient reason for purposes of review must be construed to be reasons analogous and consistent with the existence of new and important matter of evidence and an error apparent on the face of the record. It cannot be any reason picked from anywhere and leading on anything. That would take the decision to the realm of whim and caprice.

My finding on this aspect is guided by the decision of the court of appeal in **OFFICIAL RECEIVER AND LIQUIDATOR -VS- FREIGHT FORWARDERS KENYA LTD[1997] eKLR** where the court said;

"These words only mean that the reason must be one that is sufficient to the court to which an application for review is made and they cannot without at times running counter to the interests of justice be limited to the discovery of new and important matters or evidence or occurring of a mistake or error apparent on the face of the Record"

In consistency with that position, the court of appeal in ***tokesi Mambili vs Simon Litsanga Sabwa (CACA NO.9 0F 2001-KSM*** said:

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

12. I understand the above excerpts to mean that there is an unfettered discretion under the law to allow a party to appeal to the sense of justice in the mind of the court so as to achieve the core purpose of the court. Order 45 Rule 3(1), leave no doubt as to the extent of discretion and reinstates the points that where it appears to the court that there are no sufficient grounds to order review the application shall be dismissed.

13. In the instant case I am persuaded that this court is being faulted for its appreciation of the law applicable and what it considers to constitute a controlled tenancy and whether or not it was right to have granted the orders it did on the 18/12/2016. That to me falls within the realms of an appeal otherwise I would be sitting on appeal from own decision.

14. I am equally convinced that, this application, albeit expeditiously brought, does not serve the ultimate interest of the justice between the parties which is to have the dispute finally determined on the merits. I say it does not serve that interest taking into account that had the defendant opted to heed the direction given in the ruling of 18/12/2015, this matter would be having a date for hearing to allow it reach its logical conclusion. As a result of the application some five (5) months have been squandered to the

detriment of all concerned in that the final determination has now been delayed by those 5 months. This must be discouraged if the provisions of section 1A (3) Civil Procedure Act is of any relevance.

15. I should not conclude this determination without commenting on the assertion by the defendant/applicant that the ruling was delivered on a date not fixed nor communicated to the parties. The answer to that accusation on the court has been provided by the Respondent/plaintiff who depones at paragraph 1(a) of the Replying Affidavit of MUNAVAER N. ALIBHAI that there was indeed a notice dated the 16/12/2015 posted at the court Notice board and indicating that the ruling in this file among other seven (7) other matter was slated for the 18/12/2016. When it was indeed delivered.

16. It is indeed a grave matter for a determination of the court to be delivered behind a party for it is likely to infringe on that party's right to approach the court even by way of an appeal. In this case however a notice was given. As much as the Defendant/applicant faults the court for failure to give notice, it does not say when it came to learn about the ruling and totally fails to counter the averments by the plaintiff/respondent in the Replying Affidavit that that the extracted order was indeed served upon the caretaker of the premises on the 21.12.2015 some three days after the ruling was delivered. The question one would have to ponder over is whether the failure to attend court for the delivery of the ruling has visited upon the Respondent any prejudice intended to be avoided by the requirement for notice. In my assessment no such prejudice has been demonstrated and therefore even had that alleged failure been proved to have been true, it would not be a sufficient reason for review.

17. The upshot is that this application fails for the reasons aforesaid and is thus dismissed with costs.

18. I reiterate that the parties take the steps directed by the ruling of 18th December, 2016 to have this matter heard on the merits.

Dated, signed and delivered at Mombasa this 13th day of May 2016.

In the presence of:

Mrs Mulraj for the Plaintiff/respondent.

Mr Mwawasa for the Defendant/applicant.

P.J.O.OTIENO

JUDGE