



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 96 OF 2015

GLOBAL RDE (K) LIMITEDPLAINTIFF

VERSUS

EWASO NGIRO NORTH RIVER DEVELOPMENT

AUTHORITYDEFENDANT

RULING OF THE COURT

1. The Notice of Motion application before the court is dated 25th November, 2015 and filed herein on 30th November, 2015 by the defendant. The application seeks the following orders;

a. That the application be certified as urgent and be heard on priority basis.

b. That the Honourable Court be pleased to grant a stay of execution of any decree issued in this suit pending the hearing and determination of this application.

c. That review and/or settling aside of the Order by Hon. Ogola J dated 12th November, 2015.

d. That costs be in the cause.

2. The application is premised on the grounds set out therein and is supported by the affidavit of **OMAR SHEIKH** sworn on 25th November, 2015, and a Supplementary Affidavit by the same person sworn on 25th January, 2016 and a Further Affidavit filed on 11th February, 2016.

3. In brief, the applicant's case is that this application has been brought without unreasonable delay after a discovery of new and important evidence which was not placed before the court and which would have occasioned different orders being issued by the learned Judge. The new and important evidence relate to the investigation report that was not ready when the impugned orders was made, and it was not possible to produce the said new evidence at the time the order was made. There are now sufficient reasons which when disclosed will warrant a review of the order by Ogola J made on 12th November, 2015. The Applicant's case is that the defendant is a registered Local Authority which heavily relies on the National Government for funding. It is unable to meet the conditions set in the impugned order as it has made several attempts to obtain the decretal amount from the Government but it has not been successful. It is now in the interests of justice that the defendant be given a fair and reasonable opportunity to present its

case to enable the court consider the same on merit and make a determination thereof. In the event the Plaintiff executes against the Defendant, this application will be rendered nugatory and the defendant will be condemned unheard.

4. The application is opposed by the Plaintiff/Respondent through Grounds of Opposition dated 11th January, 2016 and filed herein on 13th January, 2016. It is also opposed through a Replying Affidavit by **Joseph Nyamuthe** filed herein on 8th February, 2016 and another affidavit filed herein on 3rd March, 2016. The Plaintiff/Respondent's case is that the Defendant has not met the conditions for grant of a review under **Order 45 Rule 1**, and that in any event the court has already dealt with the issues raised by the so called new evidence, and the court has given the defendant conditional leave to defend the suit.

5. Parties made oral submissions on the application. I have carefully considered the application and the said oral submissions. The issue I raise for determination is whether **Order 45 Rule 1** has been satisfied.

6. The said Order allows a party to come to court for review in cases where there is new and compelling evidence which was not available, or could not have been produced at the time of the hearing of the matter. It also allows a party to request for review where there is an error on the face of the record.

7. On 12th November, 2015, this court allowed the defendant's application to set aside the ex-parte judgment entered against the defendant on 28th July, 2015, and to defend the suit on the condition that the entire decretal sum now due be deposited in an interest earning account in the Joint names of the parties' advocates within 21 days. That order was never complied with, and now the defendant has come for the review of the same. The defendant has not stated whether there is a mistake on the face of the record, so I take it that there is indeed no mistake on the face of the record to warrant a review. The defendant has, however, stated in the grounds in support of the application, and in the three (3) Supporting Affidavits that there were, before the said ruling was delivered, ongoing criminal investigations, whose reports could not be submitted, and which reports are now ready and on that ground, they believe that those reports if allowed, could substantially change the finding of this court. I have carefully read these Supporting Affidavits. It must be noted that it was indeed on the basis of the alleged fraud or corruption against the plaintiff that this court in part agreed to set aside the said judgment which was otherwise a lawfully entered judgment. It means therefore that any allegations on fraud or corruption were fully considered in the said ruling and cannot now form the basis for a review. The Defendant/Applicant then deviates from the allegations of fraud and corruption and states that the defendant cannot comply with the said ruling since the defendant is a Local Authority which relies heavily on National Government for funding. In my view, this is not a new and compelling evidence, since the defendant has always been a Local Authority dependant on the National Government for funding. In any event, the defendant does not submit about what deposit it is able to put in part compliance with the aforesaid ruling. It simply states that it has not funds. Nobody has the right to come to court and state that they have no funds to enable them to comply with court orders. If that is the case they can seek Self Liquidation so that they do not have to comply with court orders requiring them to make financial commitment. In my view, there is no valid reason why the application should be allowed. There is no compliance with **Order 45(1)**. I happen to see a Notice of Appeal filed by the defendant against the said ruling. It is dated and filed on 2nd February, 2016. Perhaps the defendant should be advised to proceed with that appeal instead of seeking orders which are not supported by law.

8. In the upshot, the defendant's Notice of Motion application herein under consideration is herewith dismissed with costs to the Plaintiff/Respondent.

Orders accordingly.

E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY, 2016

LADY JUSTICE G. NZIOKA

JUDGE

Present