REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 461 OF 2014

REPUBLIC……...…….APPLICANT

VERSUS

NAIROBI CITY COUNTY……..……...…RESPONDENT

EX-PARTE

SENCO LIMITED & W.H.E. EDEGELY'S TRUST TRUSTEES REGITERED

RULING

1. Through the Notice of Motion application dated 5th February, 2016brought under the inherent jurisdiction of the Court, the two applicants, Senco Limited and W. H. E. Edgely's Trust Trustees Registered have urged this Court to review its judgment of 5th November, 2015 and grant them the orders they had sought in their Notice of Motion application dated 5th November, 2014.

2. Their application is supported by the grounds on its face and the affidavit of the Antony Pedder Davies, the Director of the 1st Applicant sworn on 5th February, 2016.

3. The Respondent, Nairobi City County opposed the application through a replying affidavit sworn on 5th February, 2016 by its Acting Assistant Chief Accountant, Bernard Njau Njehia.

4. The applicants' case is very brief. They aver that in the judgment delivered on 5th November, 2015, this Court found and held that there was a valid consent entered between the 1st Applicant and the Respondent's predecessor exempting payment of rates in respect to the 1st Applicant's property, LR. No. 209/3324.

5. It is the applicants' case that having so found the Court ought to have gone ahead and quashed the Respondent's letter of 18th September, 2014 which had demanded rates in regard to the 1st Applicant's property in question.

6. The applicants contend that the Court's decision to dismiss its application instead of issuing the necessary orders was therefore a clear error on the face of the record necessitating the review of the Court's judgment.

7. It is the applicant' view therefore that there are good and sufficient reasons for the Court to review its judgment and allow its Notice of Motion dated 18thDecember, 2014.

8. In opposition to the application, the Respondent contends that the case does not meet the conditions for grant of review as set out in Rule 1(b) of Order 45 of the Civil Procedure Rules, 2010.

9. The Respondent asserts that there is no discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicants at the time when the judgment of this Court was being delivered. Further, that there is no error whatsoever apparent on the face of the record. According to the Respondent, there is also no sufficient cause to warrant the engagement of the review jurisdiction of this Court.

10. The Respondent asserts that once this Court concluded that the matter was *res judicata*, it had no other business apart from dismissing the applicants' motion.

11. It is the Respondent's position that this application is an attempt by the applicants to obtain orders of judicial review in respect of an application that had been dismissed by the Court. The Respondent's case is that the applicants ought to have appealed against the decision of this Court instead of seeking a review of the judgment. The Respondent asserts that this Court is *functus officio* and it cannot now allow the applicants' Notice of Motion dated 18th December, 2014.

12. The advocates for the parties made submissions and supported those submissions by citing authorities.

13. I have considered those submissions. The only question to be decided in these proceedings is whether the applicants have met the conditions for the review of this Court's decision. The applicants are specific that they seek review on the ground of an apparent error on the face of the record.

14. Order 45 Rule 1(b) of the Civil Procedure Rules, 2010 provides that:

> **"1(1) Any person considering himself aggrieved-**
>
> **(a) by a decree or order from which an appeal is allowed, but from which 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."**

There are therefore three grounds upon which a court can review its decree. The applicants rely on one of those grounds.

15. In **Muyodi v Industrial & Commercial Development Corporation & another E.A.L.R. [2006]1 EA243**, the Court of Appeal gave the meaning of a mistake or error apparent on the face of the record as follows:

> **"In Nyamogo and Nyamogo V Kogo [2001] EA 174 this Court said that 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 real distinction between a mere erroneous decision and an error apparent on the face of 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 even though another view was also possible. Mere error, or wrong view is certainly no ground for review although it may be for an appeal."

16. From the above statement it is clear that for the Court to review its judgment there is need to show that there is a clear mistake which does not require much explanation. Controversial statements and findings of a court are not meant for review but ought to be subjected to appeal.

17. As was observed by Odunga, J in **Benson Bernard Mbuchu Gichuki v Kenneth Kagiri Mwangi & another [2012] eKLR" [a] review, it has been stated time without a number, is not and should not be a substitute for an appeal since grounds for an appeal are not necessarily the same as grounds for review."**

18. A decision of the Court once delivered should be protected from unnecessary attacks in the name of review. I therefore agree with G.V. Ogunda, J's holding in **Benson Bernard Mbuchu Guchuki** (supra) that **"[a] review is not an avenue by parties to fill in the blanks that were left during the hearing, but which were, due to negligence, inadvertence or even accident, omitted. To do so would defeat the well-known legal maxim that litigation must come to an end**."

19. For the record, it must be stated that what the applicants' seek is review of the Court's judgment under Order 45 of the Civil Procedure Rules, 2010. This is different from the circumstances under which the ruling dated 20th June, 2014 was made by the Court of Appeal in **Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited[2014] eKLR**.

20. In said case the Court of Appeal was addressing the question as to whether it had jurisdiction to review its own judgment. This fact was clearly brought out at paragraphs 27 and 28 of its ruling when it stated as follows:

"27. In the High Court, both the Civil Procedure Act in section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review. There is no similar statute law in this Court.

28. In this Court, save for the *slip rule* embedded in rule 35 of the Court of Appeal Rules which enables the Court to effect its manifest intention in a judgment or order, there is no apparent jurisdiction to review orders or judgments. And even in exercise of its inherent jurisdiction in the application of the *slip rule*, it seems that the Court could not travel beyond correcting errors in the judgments…."

21. The Respondent heavily relied on the said decision and the authorities cited therein to stress the principle that there is need for litigation to come to an end. I agree with that argument but it is important to remember that the applicants' current application is premised on the law. The same has been brought without delay. The Court is therefore expected to look at it and make a determination based on the principles governing the review of a decision of this Court.

22. In**Republic v Cabinet Secretary for Transport and Infrastructure & 6 others [2015] eKLR**, Odunga, J held that this Court has residual power to correct its own mistakes. The parties herein do not disagree with this obvious statement of the law.

23. What therefore remains for me to consider is whether the applicants have demonstrated that there is a mistake or error on the face of the record to warrant a review of the Court's judgment.

24. In the Notice of Motion application dated 18th December, 2014 the applicants herein who are the *ex-parte* applicants in the substantive judicial review proceedings sought orders as follows:

> **"1. An Order of Certiorari to remove into the High Court for purposes of it being quashed the decision made by the Nairobi County dated 18th September, 2014 to charge the Applicants' land L.R. 209/3323 with land rates.**
>
> **2. An Order of Mandamus to compel the Respondent to issue a rates clearance certificate.**
>
> **3. An order of Prohibition to prohibit the Respondent – the Nairobi City County, from raising, demanding, charging or levying land rates on L.R. No. 209/3324.**
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> **4. THAT all necessary and consequential orders or directions be given.**
>
> **5. THAT the costs of this application be provided."**

25. The applicants' line of argument was that the charging and demanding of rates on the property by the Respondent was in breach of Section 27(1)(d) of the Valuation for Rating Act, Cap 266, in disobedience of a court order and contrary to the applicants' legitimate expectation.

26. On its part the Respondent argued that the applicants' case was targeted at the merits of its decision and judicial review was thus not available. The Respondent also contended that the applicants' case was *res judicata* as the same was the subject of litigation in **Nairobi Magistrates' Civil Case No. 834 of 1984, City Council of Nairobi vSenco Ltd** and **Nairobi Magistrates' Court Civil Case No. 1046 of 1991, City Council of Nairobi v Senco Limited.**

27. Another ground upon which the Respondent opposed the applicants' case was that even though Section 27(1)(d) of the Valuation for Rating Act, Cap 266 exempted certain entities from paying rates, the exemption did not extend to the 1stApplicant's property by virtue of the proviso which excluded profit-making entities from the exemption.

28. I started by considering the question as to whether the matter was *res judicata* and at paragraph 20 to 23 of my judgment delivered on 5th November, 2015 I held as follows:

> **"20. In the case before me, the parties are agreed that they had previously litigated before the Magistrate's Court on the question as to whether the 1st Applicant's property was exempted from payment of rates. That litigation resulted in the recording of a consent which remains unvaried and binding on the parties to date. The parties do not dispute the fact that the said consent order was reached before a court of competent jurisdiction. Therefore, by virtue of the consent dated 8th April, 1994 the Respondent herein is to date barred from collecting rates in respect to the 1st Applicant's property.**
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> **21. From what I have stated above, it is clear that the Respondent's plea that this matter is *res judicata* is valid. I therefore find that the matter is indeed *res judicata.* Having reached this conclusion, I do not need to address the core issue namely whether the 1st Applicant's property is by virtue of Section 27(1)(d) of the Act exempted from payment of rates.**
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> **22. Fortunately for the parties, they chose to answer the question for themselves through their consent dated 8th April, 1994. Although the legal notices referred to in the consent have since been revoked, Section 27(1) of the Act remains unchanged thus making the consent legal to date. The Respondent cannot run away from that consent.**
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> **23. The end result is that the Applicant's case is dismissed. However, this litigation would not have been necessary had the Respondent complied with the consent dated 8th April, 1994 and**

issued a Rates Clearance Certificate in respect of the 1st Applicant's parcel of land. For this reason, the Respondent is condemned to pay the applicants costs in respect of these proceedings."

29. It is important at this stage to look at the contents of the letter that had propelled the applicants to this Court. The letter dated 18th September, 2014 which was addressed to the applicants' advocates states as follows:

"RE: RATES ON LR 209/3324

The above property belonging to your client was Exempted from payment of Rates after a Consent Order was entered into, between yourselves and the then City Council of Nairobi, based on Legal Notices Nos. 389 and 390 of 1990.

However the above Legal Notices were revoked on 1st July, 1997 through a Gazette Notice by the then Minister for Local Government and consequently the Exemption was invalidated.

The Rates Section has been advised by our Director of Legal Affairs that following the revocation of the Legal Notices, your client is liable to pay Land Rates due and after the life of the Legal Notices.

Therefore we have charged Rates with effect from 1998 and the balance due upto 30th September, 2014 stands at Kshs. 379,385,218/-.

Attached is an invoice for the balance outstanding for your necessary action."

30. The applicants' were seeking an order of certiorari in respect of the said letter and an order of mandamus to compel the Respondent to issue to them a rates clearance certificate in respect of the property in question. Although the court did indeed agree with the parties that the matter was *res judicata* it did not go ahead to make a determination as to the import of that finding on the letter dated 18th September, 2014 thus allowing the Respondent to continue holding the position that the consent order had been terminated bythe revocation of Legal Notices No. 389 of 1990 and 390 of 1990. The Respondent continuesto hold this position despite the court's finding that the consent order subsists and is valid to date.

31. This state of affairs has left the applicants' in a quandary. This is the same situation the Court of Appeal was confronted with when it stated in **Nakumatt Holdings Limited v Commissioner of Value added Tax[2011] eKLR** that:

"**Mr. Ontweka, for the Respondents in his submissions to us, seemed to suggest that where a law is silent on whether review is permissible, then courts must decline jurisdiction where review is sought. While we agree with him that judicial review is a special jurisdiction, we do not agree that in clear cases, courts should nonetheless fold their arms and decline jurisdiction. The process of review is intended to obviate hardship and injustice to a party who is, otherwise, not to blame for the circumstances he finds himself in. This Court in the case we earlier cited of Aga Khan Education Services Kenya v R. (supra) expressed the view, that review jurisdiction in cases as the present one, should be exercised sparingly and in very clear-cut cases.**

In the matter before us it was the superior court which put the appellant in the predicament it finds itself in. It was mistaken on the applicable law. The appellant acted promptly and sought an order reviewing the erroneous order. The court declined jurisdiction with the result that the limitation period expired. If that decision is not reviewed it would not have any remedy. It is hardship of that nature which the review jurisdiction should be exercised to obviate, more so if it is shown that the applicant did not contribute to the state of affairs.

The decision of this Court in the case of Judicial Commission of Inquiry into the Goldenberg Affair & 3 others v Kilach [2003] KLR, 243, which Mr. Ontweka cited, does not, with due respect to learned counsel, hold that review is not available under order 53 of the Civil Procedure Rules. It would be oppressive and an affront to common sense in a case like the one before us where the court precipitated a situation for the same court to turn around and say it lacks jurisdiction to correct what is, obviously a wrong decision, more so where, as here, the court was to addressed on the merits or otherwise on the application for leave. The court, *suomoto*, raised the jurisdictional issue without making the applicant's counsel to address it on the matter."

32. I have intentionally cited the decision of the Court of Appeal at length in order to demonstrate that where the court has made a mistake it must exercise its inherent power to correct that mistake. The court cannot leave a party to his own devices.

33. In the case before me, it is clear that the court did not answer the question as to the effect of the consent order of 8th April, 1994 on the Respondent's letter of 18th September, 2014. In my view that is an error on the face of the record which would entitle this court to review its decision in order for the parties to have a clear outcome of the matter. I will therefore proceed to review my decision in this matter.

34. The question that needs to be answered is whether the applicants were deserving of the orders sought. Judicial review orders are available against illegality, irrationality or procedural impropriety by public bodies. The applicants herein are confronted by a public body that is demanding rates despite the existence of a consent order to the contrary.

35. Any person who acts in clear contravention of a court order is acting illegally. Such a person can also be said to be irrational for a reasonable person is not expected to act against an order to which it has wilfully consented to.

36. The Respondent herein is frustrating the applicants for no good reason and its actions should not be condoned. The Respondent's argument that judicial review is not available to the applicants on the ground that they are attacking the merits of its decision and not the process leading to the making of the decision is unsustainable. The Respondent's letter is a clear illegality and is also irrational. In such a case, the same is capable of attracting judicial review orders.

37. The Respondent strongly urged the argument that the matter was *res judicata* having been settled by consent before the Magistrate's court. It cannot therefore be allowed to turn around and thrash that consent which clearly held that the 1st Applicant was not liable to pay rates on its property.

38. I think I have said enough to lead me to the logical conclusion that this court made a mistake in dismissing the applicants' Notice of Motion dated 18th December, 2014. The applicants' application for review is thus allowed and this court's judgment of 5th November, 2015 is reviewed so that the order dismissing the applicants' Notice of Motion dated 18th December, 2014 is set aside and replaced by an order allowing the said Notice of Motion.

39. An order of certiorari will thus issue calling into this court and quashing the decision of the Respondent conveyed through its letter dated 18th September, 2014. An order of mandamus will also issue compelling the Respondent to issue a rates clearance certificate to the applicants in respect of the 1stApplicant's L.R. No. 209/3324.

40. Having issued an order of mandamus, an order prohibiting the Respondent from raising, demanding, charging or levying land rates on L.R. No. 209/3324 is no longer necessary. The application for an order of prohibition is thus declined.

41. The costs for the substantive Notice of Motion will be paid by the Respondent as earlier directed. The

Respondent will also meet the applicants' costs for this application for review.

Dated, signed and delivered in Nairobi this 1st day of July, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT