REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 398 OF 2012

SHOP ONE HUNDRED LIMITED.....APPELLANT/RESPONDENT

VERSUS

KULLSAM KASSAM.....1ST RESPONDENT

JASON ONDABU T/A

ONDABU & COMPANY ADVOCATES.....2ND RESPONDENT/APPLICANT

ZACHARIA BARAZA t/a SIUMA TRADERS.....3RD RESPONDENT

R U L I N G

By a Notice of Motion dated the 5th February, 2013, the 2nd Respondent seeks the following orders: -

1. ***Spent.***

2. ***That there be a stay of execution of the Orders of 20th December, 2012 pending the hearing and determination of this application.***

3. ***That this Honourable court be pleased to issue an order compelling the 1st Respondent to allow the Applicant back into the suit premises.***

4. ***That this Honourable court be pleased to review, set aside and/or vary the orders of the court made on 20th December, 2012.***

5. ***That the costs of this application be in the cause.***

The application is brought under order 51 Rule 1, Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A and 63 of the Civil Procedure Act and all the other enabling provisions of the law. It is supported by the Affidavit of Jason Ondabu the 2nd Respondent herein which was sworn on the 5th February, 2013. The grounds for the application are enumerated on the face of the application as well as in the affidavit in support.

In the said affidavit, the 2nd Respondent avers that there is an error apparent on the face of the record which error this Honourable Court is empowered to rectify. That when the Judge made her ruling dated

the 20th December, 2012 she failed to consider his response to the allegations of extracting the court order from the lower court as averred in his affidavit sworn on the 25th September, 2012 and filed in court on the 26th September, 2012.

The 2nd Respondent avers that he did not extract the lower court order on 8th August, 2012 which is the substratum of the Honourable court's ruling of 20th December, 2012, the same was done by the 1st Respondent himself and handed over to the 3rd Respondent for execution without his knowledge.

That he wrote a letter to the Executive Officer Milimani Commercial Court on the 23rd January, 2013 requesting for a copy of the letter requesting for the lower court order and he was furnished with a copy of a letter written by the 1st Respondent requesting for the order. The 1st Respondent also paid for the order and a receipt was issued to him personally. He further averred that between 8th August, 2012 and the 13th August, 2013, he was in Nairobi Hospital attending to a patient and would have in no way been simultaneously extracting a court order and instructing the 3rd Defendant to execute the same.

According to him, the period between 8th August, 2012 when the order was extracted and 10th August, 2012 when it was executed was insufficient to execute an eviction order in that the requisite charges and arrangements had to be made for smooth execution of the order. He avers that for the reason that he never extracted the order and that he did not instruct the 3rd Respondent it's only fair that the orders sought in the application are granted.

The application is opposed vide a replying affidavit by Mohammed Devji sworn on 27th March, 2013. The deponent is the General Manager of shop One Hundred Limited. He avers that he has read the ruling and he believes that the Honourable Judge took into account all the documents together with the application and the affidavits filed in support and in opposition and that there is no apparent error on the face of the record.

He avers that as explained to him by his advocate, the normal procedure for extraction of court orders is that advocates extract orders on behalf of their clients after which they order execution of the same upon receiving instructions from their clients to have the orders executed. That in the replying affidavit of the 3rd Defendant, it is clear that he was instructed by the 2nd Respondent to carry out execution of the order. He further depones that annexture "JO4" which is the letter dated 24th July, 2012 by the 1st Respondent to the Chief Magistrate, Milimani Commercial Court applying for a certified copy of the order issued in CMCC No. 3019/2012 and the receipt for payment of the order marked "JO5" were never produced during the hearing of the contempt of court proceedings yet they were available to the 2nd Respondent. The inclusion of those documents at this stage, according to him, amounts to introduction of new evidence which is not permissible without the leave of the court which leave has not been sought or obtained by the 2nd Respondent.

He depones that although the 2nd Respondent has annexed a discharge summary to show that someone was in Nairobi Hospital during the material time, the 2nd Respondent did not have to be present when the order was being extracted and executed. According to him the Honourable Judge found beyond reasonable doubt that in law and in fact there was contempt of court order and he prays that this court do uphold the same.

Parties agreed to canvass the application by way of written submissions. I have perused through the submissions by the respective parties and they largely mirror the contents of the affidavit in support and the replying affidavit and it would not be prudent for this court to reproduce the submissions save to add that, on matters of law, the Applicant has relied on the case of **Julius Njoroge & 104 Others Vs Savings & Loan Kenya Limited & Another** wherein the learned Judge B. K. Tanui while acknowledging an error apparent on the face of the record in the case in which the record reflected 300 Plaintiffs yet they had been reduced to 104 stated: -

"… this in my view is an error apparent on the face of the record, it cannot be disputed that the court had reduced the number of the Plaintiffs' to 104 from 309. It is obvious and self evident and I think the court has the necessary jurisdiction and duty to correct this error on a review."

The applicant has also relied on Mombasa HCCC No. 170 of 2007 **ADM Limited Vs Msumarini Limited & Others** where the learned Judge J. K. Sergon stated: -

"I notice there are many issues which were raised in the motion and the affidavits filed for and against the motion. However, the most serious issue which was raised and which I think I should determine first is whether there is an error apparent on the face of the record and whether there is a discovery of a new and important matter to warrant a review of the ruling of 20th December, 2007. After a careful consideration of the arguments and the material placed before me I am convinced that there are errors which are glaring on the face of the record and that new matters which were not brought to the attention of the court have emerged."

The Applicant submits that in the replying affidavit sworn on 27th March, 2013 by Mohammed Devji, he states that the issue of who exactly extracted the court order is beyond his knowledge and yet he is the same person who cited the 2nd Respondent for contempt of court on the ground that he (the 2nd Respondent) extracted the court order and gave instructions to the 3rd Defendant to execute the order.

On its part, the Respondent/Applicant submitted that the learned Judge considered the entire record before making her ruling and therefore, there is no ground for review in that, there is no new and important evidence which was not within the knowledge of the 2nd Respondent. The Respondent/Appellant has relied on the case of **Antony Gachara Ayub Vs Francis Mahinda Thinwa (2014) eKLR** quoted with approval in its earlier decision of **Muyodi Vs Industrial and Commercial Development Corporation & Another (2006) IEA 243** where the court stated: -

"For an application for review under Order XLV, Rule 1 (Now Order 45), the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at the time….."

Reliance was also made on the case of **Rose Kaiza Vs Angelo Mpanju Kaiza (ZW 9) eKLR** where the Court of Appeal citing its earlier decision in **D J Lowe & Co. Ltd Vs Bangue Indosuez (Civil Appeal Nai. 217/09) (UR)** stated: -

"where such a review application is based on the fact of the discovery of fresh evidence the court must exercise greatest of the care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was remissness on his part in adducing all possible evidence at the hearing."

Still on whether there was an error apparent on the face of the record, the Respondent made reliance on the ***Antony Gachora Case (supra)*** which quoted with approval the decision of **Draft and Develop Engineers Ltd Vs National Water Conservation and Pipeline Corporation,** Civil Case No.11 of 2011 where it was held: -

"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 mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares on 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 here 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 grounds for review although it may be for appeal."

The Respondent has submitted that the view adopted by the Honourable Judge was a possible one based on the material placed before her and that the error that the 2nd Respondent is claiming about, requires some serious reasoning and contemplation by this Honourable Court. That the claim by the 2nd Respondent cannot be termed as an error apparent on the face of the record for the reason that the letter dated 24th July, 2012 has no acknowledgment stamp by the lower court.

In his further submissions, counsel for the Appellant/Respondent has submitted that the letter dated 24th July, 2012 was allegedly written on the same day that the ruling was delivered by Hon. R A Oganyo (Mrs.) SPM and the 2nd Respondent has casually failed to explain to the court whether the 1st Respondent was present in court when the ruling was delivered. That the 2nd Respondent feigns ignorance as to how the 1st Respondent (his then client) managed to write the letter to the Executive Officer yet the court record shows that an advocate (Miss Baya) was present on his behalf on the 24th July, 2012 which said advocate would be aware if the 1st Respondent was present in court. According to the counsel for the Respondent, the letter dated 24th July, 2012 has been fabricated and only appeared after the ruling of Hon. Justice Ang'awa as a last ditch attempt to save the 2nd Respondent from his contemptuous conduct. He further alleged that the signature on the letter dated 24th July, 2012 does not match that of the 1st Respondent in the supporting affidavit dated the 29th May, 2012.

It is also submitted that the receipt for payment of the court order was issued on the 24th November, 2012 as opposed to 24th July, 2012 which is almost four (4) months after the alleged request was made for the court order to be extracted. That this receipt only appeared after the Applicant was found to be in contempt of the court.

On the issue of the reinstatement of the 1st Respondent, it is submitted that the remedy in the form of mandatory injunction can only be issued in the clearest of the circumstances and given the inordinate delay in prosecuting the application herein, re-instatement of the applicant into the premises is practically impossible for the simple reason that there is another tenant in the premises.

The court has carefully considered the material before it both in support of and in opposition to the application dated 5th February, 2013. The main orders sought for in the application are for reinstatement of the Applicant i.e. Shop One Hundred Limited to the premises. The other prayer is for review, setting aside and/or varying of the orders of the court made on the 20th December, 2012. Review is provided for under order 45 Rule 1 of the Civil Procedure Rules which provides: -

"45. (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 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."

The foregoing provisions are based on Section 80 of the Civil Procedure Act which provides: -

"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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

An applicant seeking an order for review needs to satisfy the court the following: -

a. There is a 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 or order was made.

b. There is some mistake or error apparent on the face of the record.

c. Or for any other sufficient reason.

The Applicant herein the 2nd Respondent seeks to review the orders made by Justice Ang'awa on 20th December, 2012 on the ground that there is an error apparent on the face of the record in that the 2nd Respondent never extracted the lower court Order made on the 18th August, 2012 and that the Judge by error failed to consider the 2nd Respondent's averments contained in the affidavit sworn on the 25th September, 2012. The court has taken the liberty of perusing the affidavit sworn on the 25th September, 2012, the deponent who is the 2nd Respondent depones that he never instructed the 3rd Respondent to execute the court order. In the same affidavit, it is admitted that he is an agent of the 1st Defendant and in paragraph 21, he avers that there is nothing illegal about extracting a court order since it is a reflection of what is on record. It is noted that nowhere in that affidavit has he deponed that he never extracted the court order made on the 8th August, 2012. It is also noted that, nowhere in that affidavit has he deponed that it is his client who applied for the said order. These matters not having been deponed to in the said affidavit, the applicant could not have expected the Hon. Judge to consider them and/or take them into account.

The letter by the 2nd Respondent requesting to be furnished with a copy of the letter requesting for the lower court order to be extracted was done on 23rd January, 2013. This was after the order of 20th December, 2012 had been made. Of importance to note, is that the letter applying for the order dated 24th July, 2012 is not stamped with the Court Stamp and that the receipt for payment of the same is dated 24th November, 2012 which was four months latter and no explanation has been offered for this discrepancy in the dates.

A perusal of the court record will show and confirm that the application for leave to file the contempt of court proceedings was granted on the 3rd day of August, 2012 pursuant to which the substantive Notice of Motion was filed on the 3rd September, 2012. It first came up in court for inter partes hearing on the 13th September, 2012 when it was adjourned to permit parties to file further response to the application. This, therefore, means that by the time the 2nd Respondent was served with the said application the letter dated 24th July, 2012 had already been written and it was in the lower court's file. In that case, the 2nd Respondent could have obtained a copy had he applied for the same which he did not. The record also shows that the application for contempt of court was heard on 11th December, 2012 after it had been adjourned severally by which time the court receipt dated 24th November, 2012 had been issued and the original was available and lying in the court file.

The 2nd Respondent in his affidavit sworn on 25th September, 2012 paragraph 11 depones that he was an

agent of the 1st Respondent which then means that he was expected to apply for and give instructions on the execution of the order and if the process was done in any other way or by any other person, the burden was on him to prove that he was not involved. The letters annexed to his affidavit in support of the application herein were not exhibited to the court when the Hon. Judge heard the application for the contempt of court and no explanation has been given why they could not be produced at that material time.

In the supplementary affidavit the Respondent avers that the 1st Respondent complained to the Law Society of Kenya that he did not have instructions to appear for her in the High Court and for that reason, he avers that the 1st Respondent extracted the Order in the lower court and instructed the 3rd Defendant to execute the same.

In his reply dated 14th March, 2012, he confirms that he was on record and he indeed acted in the matter and in any event, he did not apply to withdraw from acting in the matter.

As to whether he instructed the 3rd Defendant to execute the order, the 3rd Respondent depones that he was instructed by the 2nd Respondent and not by the 1st Respondent as alleged.

In my view, it has not been shown that the Hon. Judge made some mistake or there was an error apparent on the face of the record and no sufficient reason has been given for review of the orders made on 20th December, 2012.

The 2nd Respondent/Applicant has also sought for an order for reinstatement of the Appellant/Respondent (Shop One Hundred Limited), which is a mandatory injunction. As regards granting of a mandatory injunction, the courts have stated time without number that at the interlocutory stage such injunction will only be granted in clear cases or where special circumstances exist. In the **Kenya Breweries Limited Vs Ekeyo (2002) E.A.** 109 the Court of Appeal stated as follows: -

> ***"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the plaintiff."***

Meggary J, gave the rationale of this approach as follows: -

In Shepherd Homes Limited Vs Shandahu (1971) ICH 34:

> ***"It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect that a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation."***

It is noted that the Appellant herein was evicted on 10th August, 2012 and there is a pending appeal. It is also noted that in the 1st Respondent's replying affidavit dated 11th September, 2013 and her further affidavit dated 3rd October, 2012, it has been deponed that the premises have another tenant by name John Kuria Maina and Alim Karmali who trade under the name of Midway mall. The Applicant was evicted three (3) years ago and immediately thereafter a new tenant was put into the premises.

The Appellant is not keen on being reinstated and in its submissions, it avers that reinstatement can no longer fully compensate it for the trouble it went through after the unlawful eviction and in particular that reinstatement would only cause harm to a party that is not even a party to this matter. The 2nd Respondent

herein is seeking orders on behalf of the Appellant who has indicated to court through its submissions that it is not interested in the said reinstatement.

Having considered the aforegoing, I am satisfied that the Notice of Motion dated 5th February, 2012 has no merits and it is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 15th day of September, 2016

…….

L. NJUGUNA

JUDGE

In the presence

……..…… for the Appellant

…….…… for the 1st Respondent

……. For the 2nd Respondent/Applicant

…….. for the 3rd Respondent