REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO. 244 OF 2014

GLOBAL INVESTMENTS DEVELOPMENT LIMITED……..APPLICANT

VERUS

TRICLOVER INDUSTRIES (K) LIMITED…….……..RESPONDENT

RULING

1. Before me is a Notice of Motion dated 13th October, 2014. It is expressed to be brought under Section 3A, 80 of the Civil Procedure Act, Order 45 Rules 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules. The Applicant seek that this court be pleased to review, vary and/or set aside the ruling of Honourable Justice H. Waweru delivered on 3rd October, 2014 together with all the consequential orders therein with the result that the prayers sought in the Applicant's Notice of Motion dated 3rd March, 2014 be granted.

2. The application is premised on the grounds on the body of the application and the supporting affidavit of Nitin Shah sworn on 13th October, 2014. She stated that by the time the application was heard an appeal had been filed within time which fact was deponed under paragraph 11 of her supplementary affidavit dated 15th April, 2014. She stated that an amended appeal was also filed on 17th April, 2014. That the Applicant renewed the registration of its trademark No. 15600 on 13th December, 2013 for a period of 10 years from 25th April, 2014. The renewal certificate exhibited in that application was inadvertently exhibited instead of that of 24th April, 2014. Her gravamen is that unless the ruling and order are set aside, injustice shall be occasioned to the Applicant as the Respondent will go ahead and register its trade mark rendering the appeal nugatory.

3. The application is opposed vide a replying affidavit and further affidavit of Vikul Shah sworn on 17th October, 2014 and 29th October, 2013 respectively. He contended that there was no appeal on record to demonstrate whether or not the appeal was filed within time; that even if it was there, the court was not expected to determine an application based on an appeal in a different case; that the appeal was filed a month after the ruling i.e. there was no appeal at the time of filing of the dismissed application; that there was delay in bringing the existence of the appeal to court's attention; that in any case, the Respondent has registered its trademark therefore this application has been overtaken by events; that no substantial loss has will be suffered to warrant the grant of the orders sought; that the court can cancel the Respondent's registration and that the Respondent has financial means to refund the Applicant in the event the appeal succeeds.

4. In the further affidavit, Mr. Vikul annexed a certificate for use in legal proceedings issued by the Assistant Registrar of trade marks to establish that the Respondent's trade mark had been registered.

5. It is the Applicant's submission that the issues for determination are whether there is a mistake or error

apparent on the face of record and whether there is any other sufficient reason to warrant an order for review. On whether there is a mistake or an error apparent on the face of record, the Applicant submitted that the legal position provided for under Order 45 of the Civil Procedure Rules flows from Section 80 of the Civil Procedure Act which gives a court power to review its own orders where an appeal has not been preferred against its order for sufficient cause and the Applicant cited the case of **Commercial Bank of Africa Ltd v. David Njau Nduati [2013]eKLR.** It was submitted that the court erred in finding that the Applicant had not filed an appeal when indeed it was filed on 3rd March, 2014. That finding that there was no appeal yet there was one on record was an error apparent on the record. The Applicant on this point relied on **Moses Wachira v. Niels Bruel and 2 Others (2013) eKLR** in which Judge Havelock cited **Nyamogo Nyamogo Advocates v. Kogo [2001] EA 170** with approval and held that failure to canvass pertinent issues at trial amounted to a denial of the right of hearing hence a breach of natural justice. The Applicant further cited **Lucy Bosire v. Kehancha Div Land Dispute Tribunal & 2 Others (2013) eKLR** in which it was held that the administration of justice should normally require that the substance of all disputes should be investigated and decided on merits.

6. On whether sufficient reason to warrant an order of review was given, the Applicant cited the case of **Mburu Muthoka v. Chairman Kinangop Land Contro Board, Secretary Central Land Control Board, Attorney General, Njunge Njenga [2004] eKLR** in which the scope of the phrase "any other sufficient reason" was discussed. The Applicant urged that it deserves the orders sought for the reasons that there is injustice and hardship to be suffered by the Applicant if the orders sought are not granted and that the inadvertent mistake of the advocate is excusable. The Applicant cited **Paul Asin t/a Asin Supermarket v. Peter Mukembi (2013) eKLR** where it was found that an inadvertent mistake by an advocate was excusable and **Phillip Chemwolo & Another v. Augustine Kubende (1982-88) KAR 103** where it was held that it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. Other cases cited which held the same position were **Esther Wamaitha Njihia & 2 Others v. Safaricom Limited (2014) e KLR**, **Shah v. Mbogo and Another (1967) EA 116 at 123 BC** and **Delkan Enterprises Ltd v. Masaku County Council HCCC No. 73 of 2014., Machakos.**

7. The principles guiding courts review and setting aside of orders have been discussed in a number of cases. In **National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported)** it was held:

"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. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More 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."

"... the learned Judge. He 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."

in **Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557** it was held:-

"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal"

Chittaley & Rao in the Code of Civil Procedure (4thEdn) Vol.3, pg 3227 also explained the distinction between a review and an appeal have this to say:

"A point which may be a good ground of appeal may not be a ground for an application for review.

Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal."

30. I have carefully perused the application and it is clear that the Applicant annexed a draft memorandum of appeal to the dismissed application. This in my view was an error apparent on record and calls for review of the orders. However, the Respondent has evidenced that it has registered its trademark thereby this application has been overtaken by events considering that its essential prayer was that seeking to halt the Respondent's move to so register. It is also clear that the Applicant is in a position to recover costs in the event the appeal succeeds. In the circumstances, the application fails and is dismissed. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 6th day of February, 2015.

J. K. SERGON

JUDGE

In the presence of:

Mukami Mwangi h/b Mumbi for the Applicant

Sang for the Respondent