REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 559 OF 1995

RYCE MOTORS LTD……..……...……PLAINTIFF

Versus

JONATHAN KIPRONO RUTO…..…...…….……..1ST DEFENDANT

MIDWAY ASSURANCE INTERNATIONAL LTD…....…..2ND DEFENDANT

RULING

Review of order

[1] I have before me the Plaintiff's application dated 5th December 2014. The application is seeking inter alia;

> **1. THAT the order made by this Honourable Court on 21st November 2014 be reviewed or reversed or set aside; and**
>
> **2. THAT the costs of this application be provided for.**

[2] The application is expressed to be brought pursuant to the provisions of Order 45 Rule 1 and Orders 50 Rule 1 of the Civil Procedure Rules. The application was predicated upon the grounds that there were obvious glaring errors apparent on the face of the record with regard to the decision of this Court made on 21st November 2014, in that it had no jurisdiction or powers in law to exercise appellate jurisdiction over the ruling and determination of Lesiit, J. The decision by Lesiit J could only have been reversed or set aside by the Court of Appeal which has appellate jurisdiction over the High Court. Further, the Applicant stated that the Defendant deceived and/or misled the Court to believe that the intended appeal related to the decision of Lessit, J. The deceit was an abuse of the process of the court and thereby a miscarriage of justice against the Plaintiff.

[3] The application was further supported by the affidavit of Desterio Oyatsi sworn on 5th December 2014. Mr. Oyatsi in his said affidavit averred that the ruling that the Plaintiff intended to appeal and has appealed from is not the judgment and decree of Osiemo, J dated 29th May 2002, but the ruling and decree by Warsame, J (as he then was) made on 31st October 2007. See paragraph (a) of the grounds and paragraph 15 of the affidavit in support. Further it was contended that the stay granted by Lesiit, J was

conditional, and that the Plaintiff had satisfied and complied with the conditions imposed by the said ruling, and therefore the orders issued therefrom remain valid, effective and operative up to and until the hearing and determination of Civil Appeal No 271 of 2009. On that basis, Mr. Oyatsi argued that this court did not have the jurisdiction to reverse or set aside the orders of Lesiit, J. Therefore, the orders made therefrom were made without jurisdiction, and thus, null and void.

[4] In the submissions dated and filed on 10th February 2015, the Plaintiff submitted that the purpose of the ruling by Lesiit, J dated 22nd May 2009 was to allow the Plaintiff reprieve and file an appeal to the ruling and orders issued by Osiemo, J delivered on 31st October 2007 (see para. 6, 14, 17 and 40 of the submissions). It was submitted that they complied with the orders by Lesiit J and so the said stay orders were to remain in force, pending the hearing and determination of the appeal, and therefore no Judge of the High Court had the jurisdiction to interfere with the said order or to give it a different interpretation, as the decision by this Court of 21st November 2014 did.

The submissions by the Respondent

[5] The 1st Defendant filed his submissions dated 26th February 2015 on 3rd March 2015, in which they submitted that orders of the nature sought by the Plaintiff in its application had to strictly adhere with the conditions under Order 45 Rule 1(1) of the Civil Procedure Rules. See the case of**National Bank of Kenya Ltd v Ndung'u Njau Civil Appeal No 211 of 1996**. It was further submitted that the court had the requisite jurisdiction to issue the orders it did following Order (5) of Lesiit, J's ruling and as per the provisions of Article 165(3)(a) of the Constitution. The 1st Defendant submitted that an appeal would not operate as an automatic stay and that the contention by the Plaintiff that the orders for stay issued were in force was against the provisions of the Civil Procedure Rules, more particularly Order 42 Rule 6(1) of the said rules. See **George Kimani Mbugua & 2 Others v Ministry of Roads & Another (2015) eKLR**.According to the Defendant, the Plaintiff was at liberty to apply for extension of the orders in accordance with Order (5) of the ruling by Lesiit J, but they failed to do, thus, the orders lapsed automatically after a period of six (6) months. The Plaintiff has not acted mala fides or with intentions of misleading the Court. This application simply does not meet the threshold for review of, as the order made on 21st November 2014 was not ultra vires. The ruling and decree issued by Lesiit, J was not to operate as a stay until the intended appeal of the ruling and orders of Warsame, J (as he then was) delivered on 31st October 2007.

DETERMINATION

[6] I have considered the application by the Plaintiff, the affidavit in support thereof and the submissions filed by the parties. I am guided by section 80 and Order 45 Rule 1(1) of the Civil Procedure Act and the Civil Procedure Rules, respectively as read together with Article 165(3)(a) of the Constitution and Sections 1A and 1B of the Civil Procedure Act. Under Order 45 rule 1(1) of the Civil Procedure Rules:-

> **(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.**

[7] From the aforementioned provisions, the Court will review its order only:-

a) Where there is 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

b) On account of some mistake or error apparent on the face of the record; or

c) For any other sufficient reason,

[8] The single ground for applying in this case is on account of an error apparent on the face of the record. According to the Applicant, the error consists in the fact that this Court did not have the jurisdiction to make the order it made on 21st November 2014. Help comes from the definition of ‘’apparent error’’ in **Black's Law Dictionary**, Ninth Edition at pg. 662, that;

"An error that is so apparent and prejudicial that an appellant court should address it despite the parties' failure to raise a proper objection at trial. A plain error is often said to be so obvious and substantial that failure to correct it would infringe a party's due process rights and damage the integrity of the judicial process."

[9] But as we consider what ‘’apparent error’’ entails in an application for review, one should not forget what the Court said in the case of**National Bank of Kenya Ltd v Ndung'u Njau** (supra), that, it is not sufficient to state that the Court proceeded on a different view of the matter. See what the court exactly stated*inter alia*that;

"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 elaborate argument to be established. It will not be sufficient ground for review that the court preceded on a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of the law cannot be a ground for review."

[10] There are two questions to ask. The first question is whether there is an error on the face of the record in the sense of Order 45 of the CPR? The second one is whether the alleged error is apparent on the face of the record as not to require copious explanation to establish? The court simply gave effect to the clear order No 4 which was issued by Lesiit, J. The order stated that:-

4. It is ordered that six (6) months from the date hereof the stay granted in this application will automatically lapse.

The judge again made order No 5 in these terms:-

5. Either party has leave to apply.

The Court simply reaffirmed what the judge had ordered and therefore, the question of whether the Court had jurisdiction or not does not arise. No party had applied for extension of stay of execution. No such application for extension of stay was made even at the time the application for release of funds. In short there is no stay at all in this case given the orders of the Lesiit J. A diligent litigant was, therefore, expected to have applied under order No 5 of Lesiit J, even if belatedly, for stay. It bears repeating that none has been applied for here. The arguments being put forward now that I made the order without jurisdiction are misplaced. If indeed I find that the court had no jurisdiction, I wouldnot hesitate to set aside my orders*ex debito justitiae*. But that is not the case. A careful reading of my ruling of 21st November 2014 will readily reveal that the Court was categorical as it was aware that it was not sitting on appeal over the decision by Lesiit J and that realization of law never left the dominant left side of court's mind.It is, thence, erroneous for the Applicant to state that the stay was to subsist until the appeal in the Court of Appeal was heard and determined. Needless to say, that, in law an appeal by itself does not operate as a stay.

[11] I take review to be a serious matter as was stated in the case of **P. N. Eswara Iyer v The Registrar 1980 AIR 808; 1980 SCR (2) 889**,that;

> **"A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility."**

See also the case of **Francis Origo & Another v Jacob Kumali Munagala [2005] eKLR**, where it was held *inter alia*;

> **"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction."**

[12] Nothing has stopped the Applicant from applying for stay of execution rather than a review of my order. Even review of my order will not translate into a stay herein. Accordingly, I do not find any error apparent on the face of the record which warrants a review of my order dated 21st November 2014. Perhaps the arguments by the Applicant will suffice in an appeal. The upshot therefore, is that I dismiss the application dated 5th December 2014with costs to the Respondent.

Dated, signed and delivered in court at Nairobi this 8th day of June 2015.

F. GIKONYO

JUDGE