REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

WINDING UP CAUSE NO.1 OF 2015

IN THE MATTER OF THE COMPANIES ACT (CAP 486) OF THE

LAWS OF KENYA

IN THE MATTER OF WINDING UP KEW GARDENS LIMITED

BETWEEN

GIOVANNI RINALDI .... PETITIONER/RESPONDENT

AND

SILVIA PALLOTTINO .... 1ST RESPONDENT/APPLICANT

SIRO MUCIARELLI .... 2ND RESPONDENT/APPLICANT

FABIO MUCIARELLI .... 3RD RESPONDENT/APPLICANT

SWARA TENTED

CAMP LIMITED ....INTERESTED PARTY/4TH APPLICANT

RULING

The Notice of Motion dated 6/7/2015 seeks a review of the court's ruling delivered on 4th June, 2015. The application is brought under Order 45 and is supported by the affidavit of Fabio Muciarelli. The respondents filed grounds of objection to the application.

Mr. Anami, counsel for the applicant submitted that the interested party, Swara Tented Camp Limited has received new investors who are ready to inject fresh capital into the company. However, due to the pending case, this cannot be done. This court observed that there was no alternative remedy to the petitioner. There is an alternative remedy available to the petitioner. The company is governed by Articles of Association which provide for procedure of sale of its shares. The petitioner is the cause of the stalemate in the company. The company has to be valued before the shares can be sold.

Mr. Anami further contends that the application that was dismissed had an alternative prayer for stay of proceedings of this petition pending the determination of case number HCCC No.23 of 2015. The petitioner is the defendant in that suit. The petitioner has not responded to that suit. The company is claiming some money from the petitioner. The applicants would like to have that suit prosecuted.

It is further submitted that the court dismissed the application with costs. The application was not frivolous and was an attempt to save judicial time. The applicants were trying to utilize the provisions of Article 159 of the Constitution. The right to seek review of the court orders is available to the applicants.

Mr. Sagana, counsel for the respondent opposed the application. Counsel maintains that the applicant has not shown that there are new facts different from the earlier positions. There is no new or important fact that have since the delivery of the ruling been discovered. There is no single mistake or error apparent on the face of the record being alleged. Counsel maintains that the only remedy for the applicants is to lodge an appeal. The current application is an appeal disguised as an application for review.

Summary of the issues being raised in the application is that there are new investors who would like to inject funds in the company, that the petitioner has an alternative remedy to sell his shares, that there is another case pending involving the same parties and that the applicant was unfairly condemned to pay costs. The application is mainly brought under Order 45 and section 80 of the Civil Procedure Act.

Order 45 rules (1) and (2) states as follows:

" 1. (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 if 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate."

Similarly, section 80 of the Civil Procedure Act states the following:

" 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."

From the above provisions, an application for review has to satisfy the following conditions:

I) The discovery of new and important matter or evidence.

ii) The discovered new and important matter must not have been in the knowledge of the applicant even after exercising due diligence before the decree was passed.

Iii) It must be shown that there is a mistake or error apparent on the face of the record.

iv) Any other sufficient reasons.

v) The application should be made within reasonable time.

One of the grounds upon which the application is made is that the court erroneously determined that there is no alternative remedy available to the petitioner yet the petitioner can follow the laid down procedure under the Articles of Association and sell his shares. The effect of that ground for review is that the court's determination on that issue of alternative remedy was erroneous. In my ruling of 4th June, 2015, I stated the following on the issue of alternative remedy.

"The last issue relates to the availability of another remedy. Mr. Anami contends that winding up a company is a serious issue. The petition seeks several prayers. These include appointment of an official receiver under section 231 of the companies Act, valuation of the assets and auditing of the company's accounts, purchase of the petitioner's shares by other shareholders as well as winding up of the company. The winding up of the company is an alternative remedy. In his paragraph 29 of the verifying affidavit, the petitioner maintains that he offered his shares to the existing shareholder under article 5 of the Articles of Association of the Company. His offer was dismissed. This therefore means that the alternative remedy of having shares bought by the other petitioners is not available as it was not acted up. The applicants have not filed any reply indicating that they are interested in purchasing the petitioner's shares. The petitioner got an outsider who was interested in buying his shares but he too was dismissed. The presence of an alternative remedy is not an automatic bar to a Winding Up Cause. The court can grant the alternative prayers with a condition that should those orders fail to be complied with then the company would be wound up. The respondents in such situations will be able to choose whether to buy off a petitioner's shares or risk the consequences of winding up."

The finding by the court on the issue of alternative remedy is clear. That was the court's view on the issue. If that view is erroneous then an application for review is not the proper route to take. In the Case of Mwihoko Housing Co. Ltd v Equity Building Society [2007] 2 KLR, the court had this to say on the issue of review.

"It is trite law, and we reiterate, 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 an elaborate argument to be established. It will not be a sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of 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 a ground for review. See Nairobi City Council v Thabiti Enterprises Ltd [1995 – 98] 2 EA 251 (CAK).

In the instant case it is plain that the matters in dispute had been fully canvassed before the learned Judge. It is plain from his ruling that he made a conscious decision on the matters in controversy and correctly 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."

In the Case of **Origo & Another v Mungala [2005] 2 KLR 307** at page 316, the Court of Appeal stated the following:

"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a 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."

I am effectively guided from the above authorities that any holding by the court viewed to be erroneous by a party cannot be a ground for review. The best cause of action is to appeal. The remedy is still available so long as the petitioner is a shareholder. The new investors can buy the petitioner's shares and the company to move on. The emergence of new investors cannot be a ground for review. The supporting affidavit did not annex any single document. There is no proof that there are investors. Even if that were to be true, then the same cannot trigger the court to review its earlier decisions. The said investments are not parties to the dispute and cannot affect the manner in which the court is to decide.

With regard to the issue of another suit namely HCCC Number 23 of 2014, it is clear from the earlier ruling that, that issue was one of the grounds for the dismissal of the application by the applicant for the dismissal of the petition. In that suit, the petitioner is the defendant. The company seems to be seeking some money from the petitioner. Should the court strike out the petition simply because the company has sued the petitioner claiming some money from him? The other suit has not been determined. It has not even been heard. There are two different causes of action. The plaintiff in that suit would have to prove its case. Likewise, the petitioner in this winding up cause will have to prove his claim. That aspect of the existence of two different cases cannot be a ground for review.

Lastly, the applicant contends that the order on costs was quite punitive. The applicant maintains that the application to strike out the petition was made in good faith and was meant to save on judicious time. It is also stated that the petitioner does not disclose any reasonable cause of action. The court declined to strike out the petition. Costs are awarded by the court whenever the court feels that such an order is necessary. Costs are discretionary. Section 27 (1) of the Civil Procedure Act states the following:

"27 (1) Where the decree is for any specific movable, or for any share in a specific movable, it may be executed by the seizure, if practicable, of the movable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in prison of the judgment-debtor, or by the attachment of his property, or by both."

All what is required is for the court to exercise its discretion prudently. The applicant wanted to have the respondent's petition struck out. That was a bold move on the part of the applicant. It is not in the interest of justice to strike out suits so that judicial time can be saved. Suits will only be struck out when the circumstances call for such bold decisions. The contention that the petition does not raise any reasonable cause of action is the applicant's stand on the whole matter. Such a position cannot be imposed on the court. I believe the petitioner's stand is that the petition has overwhelming chances of success. There is not proof that the discretion of the court to award costs was not exercised properly. I do find that there is no need to review the order on costs. The application to strike out the petition was found to lack merit and was dismissed with costs.

Ordinarily, an application for review of a court order or ruling requires the discovery of new and important matters that were not available and presented to the court among other requirements. The current application does not bring in any new issue or matter. Indeed it is correct to say that it is an extension of the earlier application seeking to strike out the petition. It is an abuse of the court process as all the issues being raised were part of the basis for the earlier application. The applicant should have preferred an appeal instead of going round and round the same issues. I do find that the application dated 6th July 2015 lacks merit and it is hereby dismissed with costs.

Dated, signed and delivered at Malindi this 9th day of November, 2015.

SAID J. CHITEMBWE

JUDGE