REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 462 OF 2011

IN THE MATTER OF KIKAS INVESTMENTS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT CAP 486 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 165(1) (A) OF CAP 486 FOR THE APPOINTMENT OF AN INSPECTOR TO INVESTIGATE THE AFFAIRS OF KIKAS INVESTMENTS LIMITED

BETWEEN

SALAMA MAHMOUD SAAD .... PLAINTIFF/RESPONDENT

AND

KIKAS INVESTMENTS LIMITED………………..................……..1ST RESPONDENT

ABDILLAHI ABDI ……………………………………2ND RESPONDENT/APPLICANT

RULING

Defective Application

[1] The Applicant has applied by a Motion dated 23rd October, 2014 for the following orders:

a) A declaration that this cause is defective and all subsequent proceedings thereto null and void;

b) Leave be granted to M/s Rachier & Amollo Advocates to come on record in place of M/S Ibrahim, Isaack and Company Advocates;

c) A review and setting aside of the order by Hon. Mabeya J dated 20th March, 2011; and

d) Provision for costs of the application.

[2] The application is supported by an affidavit by **ABDILLAHI ABDI** and the following grounds:

a) The application has been brought without unreasonable delay;

b) The advocates on record have been negligent in prosecuting and have failed to prosecute this matter;

c) There has been a discovery of new and important evidence which was not placed before the court and which would have occasioned different orders being issued by the learned Judge. The new and important evidence relate to the firm of advocates on record for the Applicant and was not within the knowledge of the Applicant when the impugned order was made;

d) It was not possible to produce the said new evidence at the time the order was made;

e) There are sufficient reasons which when disclosed will warrant a review of the order by Mabeya J made on 2oth March, 2011;

f) The application filed by the Respondent is incompetent and fatally defective, and the respondent has acted in bad faith for failing to make full disclosure of material facts to the court.

[3] The Applicant also filed submissions which elaborated upon the grounds set out herein above.

Submissions by the Applicant

[4] He started by noting that the Respondent's replying affidavit was filed out of time. After that, the Applicant gave a brief account of the facts of this case to be: The matter was instituted as a miscellaneous cause by way of a Notice of Motion dated the 9th of May 2011for orders that an investigator be appointed to investigate the affairs of the Respondent company. The reasons advanced in support of this cause are contained in paragraphs 2 and 3 of the cause and the affidavit of Salama Mahomoud Saad sworn on the 9th of May 2013. An application by way of Notice of Motion dated the 9th of May, 2011 was also filed in court seeking for some interim orders. The Applicant is the deponent in the replying affidavit sworn on the 12th day of September, 2011 and filed through his former in the main cause. The Applicant in the said replying affidavit stated his opposition to the cause and prayed for its dismissal. His main response was that the application was incurably defective and that the respondent had not established any cause of action known in law against him. A ruling was delivered on the 20th of April, 2012 and the court made a finding that the Applicant had never denied or controverted any of the allegations made against him; which failure was taken to mean that the allegations had been admitted by him; the truth not having been challenged.

[5] According to the Applicant, failure to deny or controvert the allegations was as a result of mistake on the part of his former advocates. He relies on the case of **BAMANYA VS ZAVER (2002) 2 EA, 329 at page 333** where Mukasa – Kikonyongo, DCJ stated:

> ***"… the conduct of the former lawyers totally messed up the Applicant who was not lawyer. It has been reiterated in numerous cases including <u>Kiwanuka V Matovu 17 of 1990, Gatti V Smooth (1939) 2 All ER, 916 and Essaji V Solanki 91968) EA, 218</u> that mistakes, faults/lapses or dilatory conduct of counsel should not be visited on the***

litigant. Even if it is accepted that the Applicant was somehow at fault it was only 1% and the rest put on his former advocates… errors or faults of the counsel should not necessarily debar a litigant from enforcing his rights….

[6] The Applicant made further analysis of the legal implications given the facts of this case. He posits that it was erroneous to have filed a miscellaneous cause instead of a proper suit where a defence would be filed to expressly deny the allegations made. He termed the application to be an interlocutory application and the affidavit questioning the validity of the said application especially paragraphs 5, 6, 7, 8, 9, 10 and 11 are and should be construed as denials of the allegations contained in the application. Accordingly, the conduct of the former advocate in protecting and litigating the rights of the applicant was disappointing due to the chequered background of this case and also noting from the court record that his former advocates instead of addressing the legal issues raised in the application, engaged in a war of words with counsel for the respondent. The applicant being a frequent traveller entrusted the litigation of the matter against him to his advocates on record with the legitimate expectation that he would be informed of all rulings and orders made by the court in due course. However, this was not forthcoming as averred by him in his supporting affidavit annexed to the instant application at paragraph 4 prompting him to seek legal redress elsewhere. The Applicant cited the case of **ALIMOHAMAD HAJI SULEIMAN BODY BUILDERS LIMITED v JIVRAJ AND ANOTHER [1990] KLR 224** (Bosire, J on 10 July 1989) where the court observed that it is clear from the applicant's affidavit evidence before the court and the record that the applicant is not personally to blame for his non representation at the trial of his case. He, therefore, asks the court to exercise judicial discretion by allowing a review of the orders by MABEYA, J. based on the facts so as to avoid injustice or hardship resulting from inadvertence and complacency on the part of the applicant's former advocates. The advocate failed to bring the order dated the 20th of March, 2013 to the attention of the applicant. The order required that the applicant bear the cost of the inspectors to investigate the affairs of the company. The Applicant contends that he has been condemned to bear the costs of the investigation when the matter was never instituted by himself but by the respondent who in law must discharge her burden of prof.

[7] The Respondent bore the burden of proof to avail before the court evidentiary proof of the existence of her alleged facts, since as it is averred in her supporting affidavit dated the 9th of May, 2011 that she appointed a Mr. Zein Salimin as her alternate director who in fact happened to be her husband and who the applicant contends mismanaged the respondent company veering it to the brink of insolvency. The case in point according to the Applicant is that of **KENGELEN LENA CHURU v SAFIAN LIMITED NAIROBI HIGH COURT CIVIL CASE NUMBER 3796 OF 1994** (Aganyanya, J on 24 August, 1997) where the court held that to prove a case on a balance of probabilities the Respondent had the onus of telling the court the whole truth, and nothing but the truth. Hence the costs for appointing the investigators ought to have been either borne by her in order to discharge her burden of proof or jointly by the parties. The Applicant is not in possession of any records of the Respondent Company; all such records have been in the possession of the said Zein Salimin, who was the managing director and an ostensive agent of the company, having held himself out as authorised to act for it.

[8] The Applicant found justification for review in the fact that the applicant risks being held in contempt of the order dated 20th March, 2013. There is a discovery of new and important evidence that reveal that the application instituting this dispute was flawed and lacking in full disclosure. To redress a wrong done to or to recover money owed to a company, the action ought to prima facie be brought by the company and a suit by a shareholder should not be maintained except in cases of fraud or in cases where the action is ultra vires or in cases of individual injury. None of these have been pleaded; hence the application was flawed from the beginning. This was the ratio decidendi in **MUSA MUSANGO v ERICA MUSIGIRE AND OTHERS (1996) EA 390.**

[9] The application has been made without unreasonable delay. Order 45 Rule 1 allows an aggrieved person to apply for a review where there is discovery of new and important matter or

evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time when the order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons. There is discovery of important matters of evidence found by ourselves after having taken over this matter which information relates specifically to the conduct of the said Zein Salimin in purchasing liquefied petroleum gas on credit and burdening the Applicant in its repayment when the creditors came calling. The creditors are willing and ready to appear before court and give viva voce testimony. The Applicant has in his possession letter from various persons which were received by them purportedly from the Applicant but signed by the said Zein Salimin which was a method of soliciting business on the strength of the credibility and reputation of the Applicant. This evidence has been annexed to the supporting affidavit sworn on the 23rd of October, 2013 by the Applicant.

[10] The current Counsel for the applicant also found out during taking of instructions that the said Zein Salimin has been reported by the Applicant for stealing, which information in the counsel's opinion should be brought before the Honourable Court so that the court can properly understand the reasons that led the Applicant to shut down the operations of the company. The said Zein Salimin was running the company into debt which debt was being settled by the Applicant once the creditors called much to the surprise of the Applicant. The Applicant is, however, aware that granting out application is discretionary. He cited Duffus P in **PATEL v E.A CARGO HANDLING SERVICES LTD (1974) EA 75 at 76** where he stated that:

> **"...there are no limits or restrictions on the judge's discretion except that if he does vary the judgment (order) he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules".**

[11] The Applicant is asking for review of the order authorising that the costs of the investigators be borne by the applicant. Had the Applicant been properly represented during the hearing of the application, and the evidence shown and produced in court together with sub missions on burden of proof, the court would have perhaps made a more just and equitable order. In the above case, the Court of Appeal held on allowing review that:

> **''…. The principle obviously is that unless and until the court has pronounced judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive power….."**

Accordingly, by seeking the order for review the applicant seeks equity and fairness to avoid the injustice occasioned by the fact that he has been condemned to bear the costs of the investigators, which costs ought to have properly been borne by the Respondent Company or the Respondent herself. The Applicant prays that his application be allowed; the order be reviewed to hold the Respondent responsible and liable for the costs of the investigators. The Respondent Company is no longer a going concern. Its records are all in the possession of the said Zein Salimin and the Respondent. The replying affidavit to the instant application does not properly address the issues and concerns raised. The applicant prayers for an opportunity to be heard so that his good name, character and reputation can be addressed in court and he be discharged of the unfair and dishonest allegations against him. Full disclosure has not been made before this Honourable Court, a trial would be necessary where witnesses would establish the authenticity of the allegations contained in the application instituting this case.

The Respondent's case

[12] The Respondent SALAMA MAHMOUD SAAD filed submissions on 6th May, 2014 on the application herein. She fired the first salvo at the Applicant's submissions questioning the mode adopted to institute these proceedings. The issue was well ventilated by the Honourable Justice A. Mabeya in his ruling delivered on 20th April, 2012 wherein quoting the law (Section

165 (1) & (2) of the Companies Act and Rule 3 and 8 of the Companies [High Court] Rules) the learned judge determined that the proceedings before the court are regular in that the Notice of Motion Application dated 9th May, 2011 for the appointment of an inspector is the pleading that commenced the miscellaneous cause herein as per the law provided. The Applicant's contention that he could not properly respond to the Notice of Motion dated 9th May, 2011 is unwarranted as Order 51 rule 14(1) and (2) of the Civil Procedure Rules clearly stipulates the mode of opposing an application; either by a notice of preliminary objection; replying affidavit and or a statement of grounds of opposition. The Applicant filed a Replying Affidavit dated 21st September, 2011 and submission dated 14th November, 2011 but he did not deny any of the matters sworn by the Respondent in her Affidavit choosing to only content that the Application dated 9th May, 2011 was incurably defective and bad in law. The Honourable Court in its ruling determined that the Applicant's failure to deny or controvert the allegations meant that the allegations had been admitted by him the truth having been unchallenged.

[13] The Applicant's submissions, emphasis on justifying the prayers for review purely on the reasoning that he was misrepresented by his former Attorney, Messrs Ibrahim Issack & CO. Advocates in the proceedings. The Respondent noted that one of the prayers by the Applicant is for leave to come on record. That prayer should precede the main application for substantive orders and should be by way of chamber summons. But the Applicant leaves the issue of procedure to the court to consider based on the circumstances. Misrepresentation was never an issue during the proceedings of this matter. There is no Affidavit to that effect. It is an afterthought merely meant to delay the conclusion of these proceedings so as he enjoys the status quo of all the property of the 1st Respondent or has already benefitted from all the assets of the 1st Respondent a fact that he fears will be established upon the Auditors/Inspectors commending and concluding their work of auditing the affairs of the 1st Respondent.

[14] The Applicant rights argued his Defence vide a Replying Affidavit dated 12th September, 2011. Furthermore, he has actively participated in these proceedings to the extent of deposing affidavits, filing submissions and proposing expensive auditors he wished to audit the 1st Respondent. He is therefore estopped from going back and asking for all the proceedings herein from 2011 to be nullified on the basis of misrepresentation by his advocate. It should be noted that he acquiesced to the proceedings herein by swearing affidavits prepared on his behalf by his Advocate and had the freedom and adequate time to peruse the file of his Advocates and or the court file at any stage of the proceedings herein if he deemed that he was not being properly represented by is advocate and should have made proper arrangement for another Advocate to take over the proceedings. The Applicant claims that he is a frequent traveller. If that is so, he should have nominated a person through a Power of Attorney to follow up on his case or represent him while he was away. In the circumstances, the Court should be guided by the maxims **equity aids the vigilant and not the indolent** and also **equity follows the law**. The Respondent should not suffer due to the Applicant's lack of vigilance in following up on how his former Advocates were prosecuting his case. In any case, no evidence to prove frequent travel as alleged during the continuance of the suit.

[15] The Respondent argues that, on perusal of the Applicant's supporting affidavit dated 23rd October, 2013 and particularly paragraph 13 of the dated 26th November, 2013, she sees not misrepresentation by his former Advocates, but dissatisfaction with the order issued by this Honourable Court on 27th February, 2013 to bear the costs of the auditors. The same does not warrant the draconian orders of nullification of the proceedings. The main reason why the Applicant was ordered to bear the costs of the auditors was because he refused the Respondent's list of proposed auditors whose fees was cheaper and proposed auditors who were charging a fee which was way beyond the Respondent's means. Either way no commitment has been shown towards achieving the ends to justice by at least honouring the Court order. In fact the Applicant should bear the legal brunt of being in contempt rather than receiving audience from this honourable court. The application is misconceived and an abuse of the court process in that it is

intended to scuttle the hearing and determination of the suit. The 2nd Respondent/Applicant seems to have had issues with his former counsel Messers Ibrahim Issack & Co. Advocates which is not a ground for review or setting aside the ruling. In any case at the instance of the ruling, he had every opportunity to appeal but did not do so. The Applicant is evading justice and offending the maxim Justice delayed is Justice denied.

[16] For an order for review to issue under Order 45 of the Civil Procedure Rules, 2010 **"...there should be discovery of new and important matters or evidence, mistake or error apparent on the face of the record."** Clearly, the supporting affidavit does not disclose any new information. Letter from Zein Salimin requesting the Oil Libya Terminal to correct the registration numbers of the tanker bears no relevance, nor any effect on the proceedings or ruling herein. Annexures at pages 2-5 are orders of liquefied petroleum gas. As was disclosed in the Respondent's application dated 9th May, 2011, the 1st Respondent did enter into a liquefied petroleum distribution agreement with Oil Libya Kenya Limited on 1st January, 2008. It therefore suffices to say that the orders therein emanated from the same. This agreement can thus not be termed as new evidence or information. Annexures at Pages 6-9 and precisely paragraph 6 clearly explained how one director could unilaterally access bank accounts; authorization was either the Respondent or the Applicant could access the company's account without the others. In Annexures at pages 10-12, the 1st Respondent is marketing its products to various companies for the distribution of liquefied petroleum gas. Annexures at pages 14-16 are quite interesting. First and foremost the alleged report was made on 16th July, 2011 vide OB No.45/16/17/11 and there is an unstamped letter addressed to the Police Commissioner Mathew Iteere whose authenticity cannot be determined. Be as it may, the author of the letter is the Applicant himself and the same cannot be new evidence/information. The grounds being relied upon are frivolous, vexatious, misconceived and an abuse of the court process in that they are an afterthought purely intended to scuttle the hearing and determination of the suit. The Applicant seems to have had issues with his former Counsels Messrs Ibrahim Issack & Co. Advocates and is also pointing an accusing finger at Zein Salimin, a person not party to this suit. The actions of the said Zein have not been pleaded as grounds for review or setting aside the ruling.

[17] The application dated 9th May, 2011 was well ventilated in the Honourable Justice A. Mabeya's ruling which was based on the law in ordering that auditors/inspectors be appointed to investigate the 1st Respondent's affairs, specifically Section 165 and 166 of the Companies Act which give the court jurisdiction and discretion to appoint an inspector and the sections also spell out the circumstances under which an inspector may be appointed to investigate the affairs of a company. The court also quoted Rule 8 of the Companies (high Court Rules) and Sections 165 and 166 of the Companies Act which allowed filing a cause by way of Notice of Motion. The Honourable judge further rules that rule 3 of the Companies (High Court) Rules provide that any proceedings brought under the said rules shall be deemed to be a suit within the meaning of the Civil Procedure Act and rules made thereunder. The Applicant was granted a fair hearing as he was represented in the proceedings. The Applicant merely wants to derail justice by not responding to the issues at hand which is contrary to the spirit of the Constitution at Section 159(1) that justice must be seen to be done. The audit report would bring an independent outlook of the issues and allegations herein and it should not be subject to such preliminary blockades. If that is allowed, in all fairness justice will not be achieved. See for instance the case of **MOHAMED ALI MURSAL v SAADIA MHAMMED & 2 OTHERS (2013) E KLR** S.N Mutuku, J, and **NUH NASSIR ABDI v ALI WARIO & 2 OTHERS (2013) E KLR EP NO. 6 OF 2013,** G.V Odunga J., observed:-

> ***"A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose…."***

In the case before court, review will not serve any useful purpose. Order 45 of the Civil Procedure Rules 2010 also requires application for review should be brought without any unreasonable

delay. The ruling was delivered on 20th April, 2012. Subsequent orders granted on 20th March, 2013. It was not until 25th October, when the Respondent/Applicant filed for review. This is clearly inordinate delay and should not be entertained. In the premises the orders sought are unwarranted, uncalled for, meant to delay justice and an attempt to obstruct fairness and transparency in knowing the affairs of the 1st respondent Company. Therefore, the Respondent submitted that the application should be dismissed and with costs to the Respondent as orders of the court are not made in vain.

COURT'S RENDITION

A little error in application

[18] The application dated 23rd October, 2013 seeks a review and setting aside of a purported order issued on 2oth March, 20111 by Mabeya J. I have meticulously perused the record and I am not able to see such order issued of 20th March, 2011. In fact, these proceedings were commenced on 10th of May 2011. However, in the intrinsic diligence of courts of law, I was able to discern from the supporting affidavit that order sought to be reviewed was issued by Mabeya J on 20th March, 2013. I will proceed on that basis.

Several prayers

[19] The application herein carries four prayers; three are substantive and relate to alleged defective application, review or setting aside of court order issued on 20th March, 2013 and leave for Rachier & Amollo Advocates to come on record for a party. The other one is a corollary prayer and is for costs of the application. I agree with the Respondent but to the extent that leave for the advocates to come on record should come first. Except I do not think the law prohibits such application for leave to come on record from being combined with other prayers. I will, therefore, determine the application for leave first.

Leave to come on record

[20] From the submissions, the Respondent is not opposed or averse to leave being granted to M/S Rachier & Amollo Advocates to come on record for the Applicant. I order the said firm to be and is the advocates for the Applicant. I move on to the other issues.

Arguments on Defective proceeding

[21] This court has a terse rendition on the claim that the proceeding herein is fatally defective for having been commenced by way of a Notice of Motion. Rule 8 (c) of the Companies (High Court) Rules provides that... **application for appointment of inspectors under section 165 and 166 of the Companies Act, shall be made by notice of motion.** The prescribed procedure is the correct procedure for initiating proceedings under sections 165 and 166 of the Companies Act and any proceeding so commenced is not defective in any way. See a work of the court in **SADIA KARIMBUX v SAAIDA KARIMBUX [2014] eKLR** is that:

> **''...I find comfort in the fact that the proceedings before me have been commenced by way of an Originating Notice of Motion which is permitted way of commencing substantive proceedings''.**

The issue was even succinctly dealt with by Mabeya J in his ruling delivered on 20th April, 2012 and I wish counsels for the Applicant had taken care to peruse the record. Perhaps they would not have applied on the basis of that argument. I reject Prayer 1 of the application in toto.

On Review, or setting aside of orders

[22] The applicable law here is Order 45 of the Civil Procedure Rules 2010 which provides as follows:

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, and who from the discovery of new and important matter of 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 or der 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 review of judgment to the court which passed the decree or made the order without unreasonable delay."**

[23] The jurisdiction of the court under the Order 45 of the CPR is restricted to the grounds set out in the said order which are; 1) there has been a the discovery of new and important matter of 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 2) on account of some mistake or error apparent on the face of the record; or 3) for any other sufficient reason. The question of alleged ill-representation by counsel is not per se a ground for review of court orders unless a causal effect between the ill-representation and adverse outcome or order is established. A direct attrition of the adverse order to the ill-representation must be established for it to be a basis of review. But mere allegations against counsel should not, therefore, suffice as a basis for review under order 45 of the CPR lest courts should open a new ground for review based on dissatisfaction of clients with their legal counsels. The ground is a tricky one which would need to be shown that counsel acted in a manner prejudicial to the right to legal representation of the Applicant. Consider what *Mukasa – Kikonyongo,* DCJ stated in **BAMANYA VS ZAVER (2002) 2 EA, 329 at page 333** that:

> **"…the conduct of the former lawyers <u>totally messed up the Applicant</u> who was not lawyer. It has been reiterated in numerous cases including Kiwanuka V Matovu 17 of 1990, Gatti V Smooth (1939) 2 All ER, 916 and Essaji V Solanki 91968) EA, 218 that mistakes, faults/lapses or dilatory conduct of counsel should not be visited on the litigant. [Emphasis added].**

In any event, the advocate filed the affidavit sworn on 21st September, 2011 by the Applicant in this proceeding and it was placed before, and the judge was referred to it by the advocate. The Applicant has not denied the contents of the said affidavit. The advocate also filed submissions and made oral submissions which the judge considered. Therefore, the allegation of ill-representation by counsel is not properly grounded and may not even warrant a review of an order of the court on the basis of ''any sufficient reason''. In my opinion, sufficient reason can only be deduced from the facts and circumstances of a particular case before the court. See the case of **NGORORO v NDUTHA & ANOTHER [1994] KLR 402.** The Applicant has not established any sufficient reason to review the impugned order herein. The ground fails.

[24] The Applicant has also based his application for review on discovery of new and important evidence. The construction and application of that ground has been discussed in many previous decisions of the Court of Appeal but I am content to cite a work by ***Mulla*** on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726, thus:

> **"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence**

was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important *evidence* that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

[25] The reason for the caution sounded in the above commentary is evident from the decision of the Court of Appeal in **D.J. LOWE & COMPANY LTD v BANQUE INDOSUEZ CIVIL APPL. NAI. 217/98 (UR)** where the court stated as follows: -

"Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of 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 no remissness on his part in adducing all possible evidence at the hearing."

[26] The Applicant has not shown that the new and important matter of evidence, 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. The information which the Applicant says is new and important evidence was all along within the reach of the Applicant or could easily have been obtained by him from the alternate director. In those circumstances, under Order 45 of the CPR, the question of 'discovery' of new evidence does not, therefore, arise. Looking at the averments by the Applicant and the circumstances of the case, this application may as well be a temptation to procure and lay evidence which will strengthen the weak part of his case and put a different complexion to it. The person the Applicant claims committed the alleged fraud is not a party in these proceedings. But that hurdle is resolved because the investigation herein is into the affairs of the company in totality and is not limited to the allegations proffered by the Respondent; it will also cover the alleged fraud which was done within the company's affairs by Zein Salimin. The order of Mabeya J on 20.4.2012 required parties to give the inspector all necessary cooperation. The inspection report should adequately cover all these concerns. There is, therefore, another avenue through which the alleged fraud will be brought to the fore. The threshold of order 45 of the CPR has not been met.

[27] The Applicant is also seeking for the setting aside of the order made on 20.3.2013 that... **the costs of the inspector shall be borne by the Defendant...**But all the arguments in support of that request are attacking the merit of the order. Award of costs is a discretionary relief and is granted by the judge depending on the circumstances of the case. There is nothing which is irregular or so pernicious as to invite setting aside of the order *ex debito justitiae*. There is also really no error or mistake on the face of the record, that is, one which is easily and readily discernible from the record to justify a review of the order herein. In light thereof, such order is incapable of interference by a judge of concurrent jurisdiction in an application for review or setting aside an order, unless such judge will be pretending to sit on appeal against the order of the peer judge. That would be loathe and an erroneous exercise of judicial authority. My own view is that those arguments will befit an appeal in the Court of Appeal.

[28] The application was also filed about over seven months from the date the order was issued and the delay is inordinate. The upshot is that the application dated 23rd October, 2013 is dismissed with costs to the Respondent.

Dated, signed and delivered in open court at Nairobi this 10th day of July, 2014

F. GIKONYO

JUDGE