REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 51 OF 2012

IMPERIAL BANK OF KENYA…….....PLAINTIFF

- VERSUS -

KARIUKI CONSTRUCTION COMPANY LIMITED.....1ST DEFENDANT

JULIUS KARIUKI MWAURA…….....2ND DEFENDANT

JOYCE WANJIRU KARIUKI……...……3RD DEFENDANT

RULING

1. The application before me is for the review of the Judgment and Decree of 13th February 2014. The said application is premised upon the plaintiff's contention that there was an error apparent on the face of the judgment.
2. The judgment in issue was delivered by Havelock J. Subsequently, the Learned Judge retired from the Bench.
3. Ordinarily, if the Learned Judge was still in service, and if he was not based far away from the Milimani Law Courts, where this case was filed, the application would have been determined by him.
4. The task of determining the application has been thrust upon my shoulders, following the retirement of Havelock J.
5. In urging the application Ms. Stella Muraguri submitted that the finding by the learned Judge, which is now the subject matter of the current application;

"….was arrived at without due consideration of Section 3.1 of the Hire Purchase Act…"

6. The plaintiff pointed out that whereas the court had come to the conclusion that;

"*The lack of registration of that Agreement under the Provisions of the Hire Purchase Act nullified the plaintiff's right to pursue the first Defendant for monies owed under the same. Indeed, I have already found that the plaintiff, in view of the invalidity of the Hire Purchase Agreement, had no right of repossession and sale of the motor vehicle financed thereunder, being Mitsubishi KAZ 917 L"*, the said court could not have so concluded if it had taken into account the provisions of Section 3.1 of the Hire Purchase Act.

7. Havelock J. had applied the provisions of Section 5 (4) of the Act, which stipulated, *inter alia,* that unless a Hire Purchase Agreement was registered, no person would be entitled to enforce the

Agreement against the hirer or to enforce any contract of guarantee relating to the Agreement. Indeed, when an Agreement was not registered, the owner of the goods would not be entitled to enforce any right to recover the goods from the hirer.

8. It was on the basis of that statutory provision that the Learned Judge held that Imperial Bank of Kenya Limited had no right to repossess the motor vehicle which it had financed under the Hire Purchase Agreement.
9. The plaintiff has told me that because the Hire purchase Act did not apply to Hire Purchase Agreements in which the hirer was a body corporate, such as Imperial Bank of Kenya Limited, the learned trial Judge erred by not taking into account Section 3.1 of the Hire Purchase Act.
10. In the considered view of the plaintiff, the error made by the trial court was *"plain and apparent"*.
11. Being so convinced, the plaintiff further added that this court had an unfettered jurisdiction to review any judgment regardless of whether or not the error was one of law or one of fact.
12. Nonetheless, the plaintiff appreciated the following position;

"…that the position of precedent is that where the court looks at the law applicable and proceeds on an incorrect exposition of the law it has considered, then that cannot be a ground for review".

13. In this case, the trial court is said to have failed to consider the law which is applicable; that law is Section 3.1 of the Hire Purchase Act.
14. If the court had given due consideration to that section, the plaintiff believes that the court would have come to the conclusion that there could reasonably be no two opinions on the interpretation of Section 3.1. The plaintiff asserted that;

"The provision is clear and unambiguous in expressly stating that the Act does not apply to body corporates (sic!), and consequently provisions on registration of hire purchase agreements are equally not applicable".

15. I was therefore asked to take action by reviewing the judgment, so as to correct the evident error, and that it was immaterial how the errors occurred. Provided that the judgment had an error on its face, this court was obliged to correct it.
16. If I should be persuaded to review the judgment, I would then set aside the dismissal of the plaintiff's claim against the 1st Defendant, **KARIUKI CONSTRUCTION COMPANY LIMITED,** and substitute it with an Order granting judgment against the said defendant, in the sum of Kshs. 2,417,993/- plus interest at 40% per annum: that is what the plaintiff told me.
17. In answer to the plaintiff's application, the defendants have submitted that there was no error apparent on the face of the judgment.
18. As far as the defendants were concerned, the plaintiff is well aware that the alleged error was actually an erroneous conclusion of law. If the plaintiff was so convinced that the learned trial Judge had erred, then, according to the defendants, the only remedy available to the plaintiff was an appeal.
19. The plaintiff was also faulted for failing to bring the application timeiously. They came to court after the lapse of more than 3 months, from the date when the judgment in issue was delivered.
20. On the basis of that alleged unreasonable and un-explained delay, the defendants urged me to dismiss the application.
21. This is one matter in which the parties all agree on the law that is applicable; and they are right in that respect.
22. A party seeking the review of a decree or an order should bring his application without unreasonable delay. He then needs to demonstrate one or more of the following factors;

1. "*That he has discovered new and important matters or evidence which was not within his knowledge or which he could not produce at the time when the decree or order was passed, even though at that time he had exercised due diligence; or*
2. *There was an error apparent on the face of the record; or*
3. *There was any other sufficient reason to warrant the grant of the order for review"*.

23. Those factors are spelt out in Order 45 Rule 1 of the Civil Procedure Rules.

24. In this instance, the plaintiff asserted that there was an error apparent on the face of the record. Again, the parties are in agreement about what constitutes an error apparent on the face of the record.
25. The plaintiff quoted from **ANTHONY GACHARA AYUB VS FRANCIS MAHINDA THINWA, CIVIL APPEAL NO. 92 OF 2008** (at Nyeri), in which the Court of Appeal said;

"*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 a mere erroneous decision and an error apparent on the face of the record.

Where an error on a substantial point of law stares one 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".

26. On the other hand, the defendants relied upon the Court of Appeal's decision in **FRANCIS ORIGO & ANOTHER VS JACOB KUMALI MNGALA, CIVIL APPEAL NO. 149 OF 2001** (at Eldoret), in which the Court said;

"*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. They have now come to a dead end".*

27. In my considered view the issue as to whether or not the High Court's discretion is fettered, is a red – herring when an applicant for review of a judgment, order or decree has chosen to rely on the grounds that he had discovered new and important matter or evidence; or that there was an error apparent on the face of the record.
28. In **NAIROBI CITY COUNCIL VS THABITI ENTERPRISES LIMITED, CIVIL APPEAL NO. 264 OF 1996** the Court of Appeal dealt with a situation in which a review had been sought on the grounds of *"any other sufficient reason".* The said Court noted that the decision of Chanah Singh J. which held that the phrase "any *other sufficient reason"* means sufficient reason analogous to those in the Civil Procedure Rules, was too restrictive.
29. The Learned Judges of Appeal made it clear that;

"….the court has unfettered discretion to review its own decrees or orders for any sufficient reason".

30. In this case, the plaintiff is placing reliance upon the assertion that there was an error apparent on the record. If it is to persuade the court that it is entitled to the orders for review, the plaintiff will therefore have to prove that there was an error apparent on the record. It cannot obtain an order for review by seeking to prove that there was *"any other sufficient reason,"* whereas that is not the foundation for its application.
31. In the case of **TAAWAWA SUPERMARKET LIMITED VS FINA BANK LIMITED, CIVIL APPEAL NO. 118 OF 2002,** the Court of Appeal expressly held that the Hire Purchase Act was inapplicable to Hire Purchase Agreements in which the hirer was either a co-operative society or a registered company.
32. But the said court also made the following statements, in relation to Section 3 (1) of the Hire Purchase Act;

"That section is not, with respect, happily worded. In our view it is capable of two constructions, namely: that the Act does not apply at all where the hirer is a corporation, which is the construction adopted by Mr. Mbigi: or that the monetary threshold applies only to individual hirers but not corporate hirers who will be covered by the Act regardless of the monetary consideration in the transaction, which is the construction adopted by Mr. Ombwayo".

33. Thereafter, the Court went ahead to hold that the Hire Purchase Act was not applicable to Hire Purchase Agreements in which the hirer was either a co-operative society or a registered company.
34. To my mind, the acknowledgement by the Court of Appeal, that Section 3 (1) was capable of two constructions, means that the issue is not as obvious as the plaintiff herein asserted.
35. It is true that the Court of Appeal has now made a pronouncement on the issue. However, it is possible that the learned trial Judge was unaware of the said decision.
36. But it is clear, from the judgment, that none of the parties drew the trial court's attention to Section 3 (1) of the Hire Purchase Act.
37. It does appear that the Judge was therefore never called upon to make a determination on the applicability or otherwise of the Hire Purchase Act to corporate organizations.
38. At any rate, the plaintiff has not complained about the trial court ignoring submissions pertaining to the meaning and effect of the provisions of that section.
39. In **COMMERCIAL BANK OF AFRICA LIMITED VS DAVID NJAU NDUATI, HCCC NO. 231 OF 2012,** Havelock J. quoted from *"Mula's Code of Civil Procedure Vol. III, 15th Edition", at paragraph 10, on page 2724;*

> *"Mistake or error apparent on the face of the record - A review may be granted, whether on any ground urged or at the original hearing of the suit or not, whenever the court considers that it is necessary to correct an evident error or omission, and it is immaterial how the error or omission occurred. Thus, a review was granted where an error on a point of law was apparent on the face of the judgment e.g. failure to apply the law of limitation to the facts found by the court or failure to consider a particular section of an Act or part thereof".*

40. Although the learned Judge made reference to that quotation, the court nonetheless rejected the application for review.
41. To my mind, there now arises the question whether or not any decision which fails to take into account a particular provision of the law would be amenable to review. That question is important because there are many circumstances or reasons which may lead the court to fail to take into account a particular provision of the law.
42. First, the court may simply be unaware of its existence. Such a court would not take that provision into consideration because the court did not know about it.
43. Secondly, the court may have been generally aware of the legal provisions, but the parties did not make reference to the said legal provision. In that scenario, one court may take into account that section of the law, whilst another court may choose not to delve into it. Just because a court did not delve into the section may or may not be justifiable. I say so because a court may well reason that it was wrong to arrive at a determination after giving consideration to something which the parties did not canvass.
44. Another court may reason that because people are presumed to know the law, it would be wrong for the court to overlook a section of the law just because the parties before it did not canvass that said section.
45. Another scenario could be one in which the section of the law is brought to the attention of the court, but the court says nothing about it in the Decision.
46. To my mind, if the section of law that was brought to the attention of the court was so plain and obvious an answer to the issue for determination, then the decision in issue would be amenable to review.
47. That is, in my humble view, different from the first scenario, in which the court either did not know about the section of law, or the attention of the said provision was not drawn to the attention of the court.
48. In this case, none of the parties drew the attention of the Judge to the provisions of Section 3 (1) of the Hire Purchase Act. Therefore, it cannot be said that the court failed to take into consideration a section of the Act, which had been canvassed.
49. If the court had given consideration to that section, and then proceeded to arrive at a wrong decision, that decision could not be amenable to review. As the Court of Appeal said in **FRANCIS ORIGO & ANOTHER VS JACOB KUMALI MUNGALA CIVIL APPEAL NO. 149 OF 2001** (at Eldoret);

"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but it may be a good ground for appeal".

50. But then again considering that the hirer is a body corporate, I hold the view that if attention of the trial court was drawn to the provisions of Section 3 (1) of the Hire Purchase Act, it is unlikely that the court could have reached the conclusion that the non-registration of the Hire Purchase Agreement rendered it un-enforceable.
51. The point I am making is that if that section of the law is brought to the fore, it makes the decision of the learned Judge appear wrong on its face. That conclusion does not require convoluted submissions or intricate reasoning, for it to be reached.
52. I find that there is an error on the face of the judgment, and proceed to it aside. For the avoidance of doubt, the only portion of the judgment which has been set aside is that which dismissed the plaintiff's claim against the 1st Defendant.
53. Ordinarily, after the setting aside of the judgment, the court would proceed to immediately enter judgment for the applicant, in the terms prayed for.
54. However, as none of the parties herein had had occasion to address the trial court on the effect of the provisions of Section 3 (1) of the Hire Purchase Act, I now give to the 1st Defendant and the Plaintiff an opportunity to address this court on that issue, before the final adjudication.
55. Meanwhile, the costs of the application dated 21st May 2014 are awarded to the plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **12th day** of **November** 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

…….for the 1st Plaintiff

……for the 1st Defendant

……for the 2nd Defendant

…….……for the 3rd Defendant.