REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 31 of 2010

SAMUEL MAINA

JOHN KINGORI GATARU

JAMES KARANJA (Suing as Chairman, Secretary and Treasurer respectively)

CITY PARK HAWKERS DEVELOPMENT PROJECT............PLAINTIFF/APPLICANT

-VERSUS-

THE CHAIRMAN, SECRETARY & TREASURER OF

ASIAN FOUNDATION...1ST DEFENDANT/RESPONDENT

CITY COUNCIL OF NAIROBI................................2ND DEFENDANT/RESPONDENT

RULING

The Hon. Justice Muchelule on 27th September 2010 made a ruling dismissing the plaintiff's application for injunction and also struck out the plaintiff's suit with costs to the defendants consequent to the said ruling the plaintiff filed a Notice of Motion application dated 6th December, 2010 under Order XLIV Rules 1, 2 and 3 of the Civil Procedure Rules seeking the following orders:

1. That service of this application be dispensed with due to reasons of urgency.

2. That this honourable court does review and set aside the ruling of the Hon. Mr. Justice A. O Muchelule delivered on the 27th September, 2010 and this suit and application dated 1st February 2010 be reinstated and orders sought in the said application be granted.

3. That the costs of this application be provided for.

The application is grounded on the grounds set out on the face of the application namely: -

(a)That there is a mistake or errors on the face of the record.

(b)That there exist sufficient reasons to review orders granted by the said honourable Justice Muchelule.

(c)That it is clear and obvious that the Honourable Judge completely misunderstood the aforesaid application and issues before him with the result that the orders granted will cause mayhem and confusion

in the operations of the market.

(d)That it is in the interest of justice that the orders sought be granted herein.

The application is further supported on the grounds set out in the supporting affidavit of John Kingori Gaturu sworn on the 6th December, 2010. In the supporting affidavit he faulted the finding of the judge that the plaintiff was registered as a business name contending that City Park Hawkers Development Project was indeed registered under the Societies Act and therefore would have capacity to sue and be sued. The plaintiff in the supporting affidavit sown by John Kingori Gituru in support of the application before Hon. Justice Muchelule under paragraph 2 of the affidavit annexed what he stated to be a copy of certificate of registration of the plaintiff marked JKG1; this turned out to be the Business Registration Form. The plaintiff in the instant application for review has attached a certificate of registration of the plaintiff as a society under the Societies Act dated 27th March 2002.

The plaintiff contends the Honourable Judge misconstrued the nature of the plaintiff's occupancy of the suit premises when he classified the plaintiffs as rent paying occupants whereas the plaintiffs do not pay rent but only make payments for business permits to the 2nd defendant. The plaintiff avers that this was a mistake and/or error on the part of the judge. The plaintiff further faults the judge stating that the judge failed to appreciate that what was in issue was not the ownership but rather the management of the suit property. The plaintiff in the premises avers there was an error apparent on the face of the record to entitle the court to review the said ruling.

The plaintiff has sought to rely on the cases of **Mapala vs. British Broadcasting corporation (2002) 1 EA Nyamogo & Nyamogo Advocates vs. Kogo (2001) EA 173-175 and Jane Wanjiru Gitau vs. KPLC (2006) e KLR** which cases illustrate in what instances an error can be said to be apparent on the face of the record and what constitutes an error on the face of the record.

The 1st Defendant for their part have opposed the plaintiff's application for review and filed grounds of opposition on 10th March 2011. The 1st Defendants submits that the plaintiff 's motion is bad in law, misconceived and an abuse of the process of the court. In particular the 1st defendant contends that there is no error apparent on the face of the record; that there is no new evidence that was not within the applicant's knowledge and that the applicant's alleged grievances fall within the province of an appeal and not review.

In an application for review under the previous order XLIV and the current Order 45 of the Civil Procedure Rules an applicant must show either there has been a discovery of new and important matter of evidence which was unavailable at the time the matter was heard.

A party must demonstrate that even upon exercise of due diligence such information/evidence was not within his knowledge and/or ability to produce it. A party secondly may show that there was some mistake or error apparent on the face of the record.

I have perused the application and the pleadings that were before the Honourable Judge and have read through his ruling delivered on the 27th September 2010 and I have not discerned any mistake or error on the face of the record. I do not consider that on the basis of the pleadings and documents on record that the Honourable judge misdirected himself on the facts and/or the law. The plaintiff has contended that he Honourable Judge relied on an incorrect document namely the Business Registration form in coming to the holding that the plaintiff did not have locus standi but this is the document that the plaintiff supplied or availed. The Registration Certificate under the Societies Act that the Plaintiff wishes to introduce with the application for review was issued way back on 27th March 2002 and was therefore available on 1st February 2010 when the Plaintiff filed this suit. The plaintiff certainly by exercise of due diligence would have produced and/or availed this document before the Honourable Judge. In the same vain I do not consider that the introduction of this certificate of registration under the Societies Act would constitute discovery of new and important matter or evidence as envisaged under Order 45 of the Civil Procedure since as I have observed this document was available and ought to have been produced before the court

and indeed no explanation has been given to show why it was not produced before the court at the hearing of the Plaintiff's application before Hon. Muchelule.

The complaint that the learned Judge misunderstood the application and the issues that were before him as per ground (c) in the applicant's application for review constitute an invitation to this court to sit on appeal on the decision of the learned judge as the applicant is in this regard seeking this court to interrogate the judge's exposition of the law both on the law and facts to determine whether he reached a correct or an erroneous decision. I say that would not be within the purview of a review application but would be the preserve of an appellate court. In the case of **National Bank of Kenya Ltd vs. Ndungu Njau Civil Appeal No. 211 of 1995** the Court of Appeal expressed themselves on this proposition of the law thus: -

"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 for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that he 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".

In the present case the applicant has chosen isolated abstracts of the Judge's ruling which he takes issue with and it is my view that the court cannot take a view of the matter without interrogating the judges exposition of the law and facts and that in my opinion would be tantamount to sitting on appeal in as far as the judge's decision is concerned.

There is finally one other issue which though not canvassed by either of the parties is relevant in an application for review such as the one before court. That is the requirement that in an application for review of a decree or order the decree or order sought to be reviewed ought to be exhibited and/or annexed to the application. There is ample judicial authority that an applicant in an application for review should have the decree or order sought to be reviewed to be extracted and drawn. In the case **of Ntaranguvi M'lkiara vs. The Commissioner of Lands & 2 others (HCCC No. 153 of 1995) (2010) e KLR** , Justice Mary Kasango quoting and relying on the court of Appeal for **East Africa decision in G. M. Jivanji vs. M. Jivanji & another** held that ***"the plaintiff having failed to extract the order the subject of this application leads this court to find that the application is for rejection".***

In the instant case the Plaintiff exhibited the ruling but not the decree or the order emanating from the ruling. The plain reading of Order 45 Rule 1 and 2 would require that an applicant exhibits an extracted decree or order. An application for review that omits to exhibit an extracted decree or order sought to be reviewed in my view would be incompetent.

For all the above reasons I hold that the plaintiff's application for review lacks any merit and the same is dismissed with costs to the 1st Defendant.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

………………………………………………… for the Plaintiffs

………………………………………………… for the 1st Defendant

………………………………………………… for the 2nd Defendant