



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Case 909 of 2009

DAMCO LOGISTICS KENYA LTD. :..... PLAINTIFF/RESPONDENT

- VERSUS -

NEW OCEAN TRANSPORT LTD. :..... 1ST DEFENDANT/RESPONDENT

LESK INVESTMENTS LTD. :..... 2ND DEFENDANT/APPLICANT

RULING

By a Notice of Motion dated 22nd November 2010 the 2nd Defendant/Applicant seeks to have this court review its order given on April 23, 2010. The application is supported by affidavit of LYN HENDERSON dated 22nd November 2010 and grounded on the allegation that there is an error apparent on the face of the record in respect of the Ruling and Order delivered on April 23, 2010. In the Ruling, delivered by Honuorable Justice Luka Kimaru, the 2nd Defendant was ordered, *inter-a-alia* to deposit a sum of Kshs.1,766,967.00 in a joint interest earning account in the names of the counsels for the parties as security for the Plaintiff's suit. The said Ruling was premised on the finding by the learned Judge that the Plaintiff had incurred a penalty as a result of the 1st Defendant's act of diverting goods meant for the Ugandan market into the Kenyan market.

The application is opposed through a Notice of Preliminary Objection filed in court on 16th January 2012 and grounds of opposition also filed in court on 16th January 2012.

The brief history of the application is that the Plaintiff instituted this suit against the 1st Defendant on 17th December 2009. Together with the suit the Plaintiff field an interlocutory chamber summons application dated December 16, 2009 in which it sought *inter-a-alia* orders for injunction and attachment of motor vehicle registration number KAW 718 W Trailer No. ZC3599 before judgement against the 1st Defendant. An interim *ex-parte* order was granted on 18th December 2009.

The said motor vehicle KAW 718W Trailer No. ZC3599 belonged to the Applicant, who, being informed of the attachment immediately filed an application seeking to be enjoined in the suit as interested party. The Applicant did this by filing a Chamber Summons application dated 28th January 2010, and on 29th January 2010 the Applicant was enjoined as the 2nd Defendant to the suit. The Applicant on February 2nd 2010 filed a Chamber summons application seeking to set aside the interim orders issued on

18th December 2009 in respect of the attachment of the said motor vehicle reference Number KAW 718W Trailer No. ZC3599. This application was heard together with the Plaintiff's application dated 16th December 2010 and a Ruling delivered on 23rd April 2010 which confirmed the earlier oral direction of the court that the Defendants do deposit in a joint interest earning account Kshs.1,766,967/= upon which deposit the aforesaid motor vehicle be released to the 2nd Defendant.

The Applicant now contends that there is an error on the face of the said Ruling, arguing that at the *inter partes* hearing of the Plaintiff's application for attachment before judgement dated 16th December 2010, the same had not been amended to include the 2nd Defendant. It is submitted that the prayers in the said application were made against the 1st Defendant only. The Plaintiff did not amend its Chamber Summons dated December 16th 2010 to include prayers against the Applicant. The Applicant submits that the court erroneously considered the Applicant's supporting affidavit for the application dated 1st February 2010 as an affidavit in opposition to the Plaintiff's application dated 16th December 2010.

I have considered the application and the opposing submissions. I have also looked at the Ruling of the court dated 23rd April 2010. The said Ruling does not indicate that the learned Judge was in doubt of what he was delivering. At the beginning of page 2 of the said Ruling, the learned judge stated:-

“At the hearing of the application, I heard oral submissions made by Mr. Saende for the Plaintiff, Mr. Inyangy for the 1st Defendant and Mr. Gichomo for the 2nd Defendant.”

The above being correct, it cannot be said that there is an error on the face of the Ruling. Any argument or problem the Applicant may have with the said Ruling cannot be a subject of review. It may be an issue for appeal.

At page 4 of the Ruling the learned Judge stated:-

“To protect the interest of the Plaintiff in the claim, and also to enable the 2nd Defendant secure the release of his motor vehicle, this court ordered the Defendants, jointly and severally, to deposit the said sum of Kshs.1,766,967/= in a joint interest earning account . . .”

Clearly, the learned Judge was clear in his mind that he was entering orders against the 1st and 2nd Defendants. Even if the 2nd Defendant had not been joined to these proceedings as alleged, the record show that Mr. Gichomo submitted orally for 2nd Defendant. The action of the learned Judge, whether correct or faulty, cannot be a subject of review. Record show the learned Judge was very clear in his Ruling. There is no mistakes on the face of the record to be remedied by a review. If the Applicant is dissatisfied with the learned Judge's Ruling the only option is to appeal against the same.

I am unable to find that there is a mistake or an error on the face of the said Ruling which may merit a review.

In the case of **JAMES KINGARU & 17 OTHERS – VS – J. M. KNGARI**, the court in rejecting an application for review stated:-

“. . . applications on this grounds must be treated with great caution. Review cannot be sought to supplement the evidence or to introduce new evidence.”

In opposing the application the Respondent had also submitted that the Applicant having chosen to appeal against the aforesaid Ruling, had lost the right to have this matter be reviewed by the court. However, the court record does not show that there is a Notice of Appeal and so I will not consider this objection any further.

For the foregoing reasons I dismiss the Notice of Motion application dated 22nd November 2010 with

costs to the Plaintiff/Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 4TH DAY OF JUNE 2012.

E. K. O. OGOLA

JUDGE

PRESENT:

Minishi for the Plaintiff

Inyangu for 1st Defendant/Respondent

Inyangu H/B for Gachomo for 2nd Defendant/Applicant

Teresia – Court clerk