



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 2031 of 1979

SATWANT KAUR SANDHU

RAJINDER KAUR SANDHU.....APPLICANTS/DEFENDANTS

VERSUS

KULTAR HANSPAL.....PLAINTIFF/RESPONDENT

RULING NO. 1

The background information is that the proceedings herein have been protracted. The plaint is dated 25th day of June 1979 and filed the same date. The court has also traced a judgement on record by Chesoni J as he then was dated and delivered on the 22nd day of June 1982. The final condition reads:-

“The plaintiff succeeds and there shall be judgement for the plaintiff for specific performance of the agreement dated 11th March 1977 entered into by the plaintiff and the defendants for the sale of plot LR No. 3734/118 Nairobi to the plaintiff by the defendants. The defendants shall do all consequential things, execute all documents or documents necessary to effect the full fulfillment of the said agreement. The defendants shall pay to the plaintiff the costs of this suit. Order accordingly dated and delivered at Nairobi this 22nd day of June 1982”

There is an order dated 29th day of June 1979 issued on 8th day of July 1979. It reads:- *“ That the time for removal by the Register of Titles of the caveat lodged by the plaintiff/caveator and registered in the Registry of Titles at Nairobi as I.R No. 12262/4 against the defendants/caveatees property known as LR No 3734/118 be and is hereby extended by order of this court, until further order of this court.*

(2) That liberty be and is hereby given to the defendants/caveatees to apply at any time to set a side this consent order.

(3) That the costs of this application be costs in the cause.”

It is noted that a defence had been filed, dated 17th day of August 1979 and filed on 20th August 1979. There is also filed on the record an application by way of chamber summons under order 9(9) rule 10 and 9 (b) rule 8 of the CPR dated 30th day of July 1982 seeking orders that *“ the judgement passed herein exparte or otherwise be set aside and the suit restored to hearing on merit, and, that the costs of this application be provided for.”* This application was apparently dismissed, necessitating another chamber summons filed on 17th December, 1985 to reinstate the same. This was followed by an application dated 7th day of March 1966 and filed on 10th March 1986 seeking stay of execution of the decree passed herein. There is also traced on record an application dated 30th day of September 2005, and filed on 25th

day of October 2005. It sought the following orders:

“ (1) That the applicant herein Alka Roshanlala Hanspal be enjoined in these proceedings as the 2nd Plaintiff.

(2) The Registrar of the High court, does execute necessary transfer forms in favour of the applicant herein as the lawful wife of the decree holder on such terms and conditions as may be determined.

(3) costs of this motion be in the cause.”

The reason for so applying is because the plaintiff was alleged to have suffered a stroke since the decree was issued, and was incapable of handling any affairs on his own behalf. It is not clear from the proceedings whether these orders were granted or not.

There is also traced on the record an application dated 12th day of July 2006 and filed the same date. It is by way of notice of motion under section 98 and 3 of the Civil Procedure Rules, order L rule 1 order XX rule 16 of the Civil Procedure Rules. It sought 2 orders namely:-

“(1) That the Registrar of this Honourable court do execute the necessary transfer forms for the property known and registered as LR Number 122262 infavor of the plaintiff/applicant

(2) that this court do give such other orders as it may deem fit in the interest of justice.

(3) That costs of this application be provided for”.

It is noted on the record that the same was withdrawn by consent. But its prayers were replicated and presented in an application dated 6th day of October 2006 and filed the same date. It is noted on the record that on 25/10/2006 counsel for the plaintiff applicant appeared before Aluoch J as she then was formally JA (now her Highness with the ICC) and being satisfied that the defence had notice of the hearing date, and had not responded to the said application granted orders as prayed and an order in respect of the same was duly sealed and extracted on the 31st day of October 2006.

It is against the afore set out background information that the defendants applicants have presented to this court, an application by way of chamber summons dated 14th day of July 2008. The reading indicates that it is brought by the defendants who are the applicants. Brought under section 3A, 63(e) and 80 of the CPA chapter 21 laws of Kenya, order 39 rule 1 (2) order XLIV rules 1 and 4(1) of the Civil Procedure Rules and all enabling provisions of the law. Six prayers are sought, namely:

(1) spent.

(2) That leave be and is hereby granted to the applicants to enjoin Sana investment limited as respondents to this application.

(3) That pending the hearing and determination of this application, the suit and/or until further order of this honourable court, a temporary injunction do issue restraining Sana Investments limited by itself, its agents, servants, employees and or any other person whosoever acting on its behalf from transferring, discharging, developing, or dealing howsoever with land Reference Number 3734/118 (LR Number 12262) Lavington.

(4) That the ex-parte orders of this honourable court, granted on 25/10/2006 by Lady Justice Aluoch (as she then was) directing the Registrar of this court, to execute the necessary transfer forms for the suit property infavour of the respondent/plaintiff be and are hereby reviewed and the same be set aside in their entirety together with all consequential orders.

(5) That the transfer of the suit property by the Respondents to Sana Investments Limited registered

on 26/09/2007 at the lands registry in Nairobi be and is hereby set aside.

(6) That costs of this application be provided for.”

The application is grounded on the grounds in the body of the application, grounds in the supporting affidavit, annexures, written skeleton arguments in court.

A perusal of all these papers reveal that the complaint is solely limited to the orders made by this court on 25/10/2006 infavour of the plaintiff regarding the plaintiffs application presented to this court ,on 6th day of October 2006. The major complaint is that the said application was neither served on to the applicants themselves or their counsels.

- That by reason of that non service, exparte orders were entered infavour of the respondent/plaintiffs to the detriment of the defendants applicants.
- By reason of the grant of the said exparte orders, the plaintiff/respondents caused the transfer of the suit property to a 3rd party.
- That the said 3rd party has been joined to this application.
- That by reason of that joining, an injuction should issue against this 3rd party to prevent them from transferring the suit property to other 3rd parties.
- Further that by reason of the matters afore said sufficient reason has been shown to warrant the granting of the reliefs sought herein.
- That the orders granted herein exparte are tainted because of non service of the application which led to the issuance of the said orders.

In their written skeleton arguments, counsel for the applicants stressed the following;

- the record bears witness that when the respondents notice of motion came up for hearing before Aluoch J as she then was, it was only the advocate of the next friend of Mr. Ogesa who was present. There is nothing on the record to show that the judge then seized of the matter had sufficiently been informed and satisfied that the respondents to that application had due notice.
- It is on record that the counsel then on record for the applicant, informed the court that Rustam Hira had been served on behalf of the respondent applicant. The correct position was however that Rustam Hira was not then on record for the respondent applicants. The counsel then on record for them was Mr. Satish Gautama advocate who had replaced Rustam Hira way back in the early 80s. By reason of this, they contend that there was no proper service of the said application. For this reason they contend that the orders of this court, made on 25/10/2006 were irregular and they should be set aside *exdebito justitiae* and as a matter of right.
- The replying affidavit apart from addressing issues not relevant herein has confirmed that indeed it is the firm of Rustam Hira which had been served with the application whose orders are sought to be upset by the applicants current application.
- The deponement of the replying affidavit has not demonstrated that she was enjoined to these proceedings as a next friend in terms of orders XXXI rule 1 (2) of the CPR as read with rule 15 as there is no written authority filed by the said deponent filed in court, and then served on to the applicants counsel.
- It is their stand that, the deponent has not been properly joined to these proceedings is confirmed by the fact that the application dated 25/10/2005 which had sought to enjoin the deponent into these proceedings were abandoned.

- The current counsel on the record is not properly on the record as there are two notices of appointment on the record.
- There are two transfer documents on the file, the one dated 19/04/2006 thus predating the orders authorizing the transfer of 25/10/2006 and another one dated 31/20/2006 which effected the transfer of the title property. They contend the presence of two transfer documents on the record is highly irregular.
- They concede that indeed there is a decree on record but they sought to have it set aside in an application dated 30/07/1982 which has never been heard. It is therefore not true as contended by the respondent that there are no contesting proceedings on the record.
- This court, should not close its eyes to the fact that the balance of the purchase price was never paid and as such the Respondent should not be allowed to pocket the 17,000,000.00 which they have received from the purchase.
- They intend to contend that the decree ordered to be executed by the orders of 25/10/2006 had become extinct by reason of the provisions of section 4 of the limitation of action Act as by the time the same was ordered to be executed, twelve (12) years had lapsed.
- It is their stand that they have brought themselves within the ambit of the law entitling one to earn the relief of setting aside because of the following factors:-

(i) One Alka was aware that the dispute herein has not been finally determined and yet she has gone ahead and disposed off the suit properties subject of the proceedings. She did so without obtaining leave of the court, and without giving sufficient security as will sufficiently protect the property from waste and ensure its proper protection.

(ii) The said Alka disposed off the property to Sana Investments Ltd as soon as the ex parte orders were obtained without moving the court, for the requisite leave.

(iii) Have demonstrated that there has been a fraudulent transfer of the said suit property to 3rd party. First to Sana Investments Limited which has failed to reveal its identity by giving a false address or contact address, which Sana Investments Ltd has disposed off the same property to Knight Investments which transfers as per annexure 4 and 5 which go to show that the transfer of the said properties was effected after the defendant applicant had presented to this court, the application subject of this ruling, and to them this is evidence of fraud and in this regard, this court, has jurisdiction which it is being asked to exercise to direct the Registrar of Title, to correct the memorandum to the certificate of title and cancelled the transfer to Knight Investment. This is so because once the said orders are set aside, no instrument endorsed by the Registrar in pursuance of the said orders should remain subsisting thereof.

On case law, the learned counsel referred the court, to the case of **CHARLES MWALIA VERSUS THE KENYA BUREAU OF STANDARDS, NAIROBI MILIMANI COMMERCIAL COURTS HCC NO. 1058 OF 2000** decided by A.G.N Ringera J as he then was on the 16th day of May 2001. The decision deals with an application vide order IXA rules 10 and 11 of the CPR, seeking the setting aside of the ex parte judgment and that they be given unconditional leave to defend. Discussion on the principles of law on setting aside begun at page 8 of the said ruling and for purposes of the record the extracted principles are as follows:

(i) *It is undisputed that the discretion of the court to set aside is unfettered except that if the judgement is set aside, it must be on terms that are just.*

(ii) *At page 9 of the said ruling the learned judge quoted with approval Duffus E.A Cargo Handling (1974) E.A 75 thus:-*

“ 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 to it by the rules. I agree that where it is regular judgement as is

the case, here, the court, will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view a defence that must succeed it means as Sheridan J put it “ a triable issue” that is an issue which raises a prima-facie defence and which should go to trial for adjudication”.

(3) On the same page 9, the learned judge quoted with approval a passage by Sheridan J in **SEBEL DISTRICT ADMINISTRATION VERSUS GASYALI (1960) E.A 300 PARLIAMENT.**

“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly should be considered, and finally I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court.”

(4) A distinction has to be drawn between a regular and irregular ex parte judgement. That where the judgement sought to be set aside is a regular one, then all the above considerations as to the exercise of discretion will be borne in mind in deciding the matter. Where as on the other hand, where the judgement to be set aside is an irregular one..... the same ought to be set aside ex debito iudiciae for a court should never countenance an irregular judgement on its record,”

The Respondent has moved to oppose the application on the basis of the grounds set out in a replying affidavit, oral highlights and written skeleton arguments. The salient features of the same are:-

- she is the next friend to the plaintiff who is her lawful husband as per exhibited marriage certificate.
- She had been appointed a next friend of the said husband vide a court order issued on 4/12/2002.
- The suit was determined on the 22nd day of June 1982, leading to the issuance of a decree which required that the defendant do specifically perform the agreement of sale and transfer the suit land to the plaintiff/respondent.
- The court, is urged not to set aside the orders made by this court, on 25th October 2006 because the application for setting aside is frivolous, the plaintiff will suffer irreparable loss in view of the fact that the decree herein was for the transfer of the property, which decree will still be executed since there is a decree in force.
- That the said property has always been vacant and was in the process of being alienated when she sought transfer in her name.
- That the whereabouts of the defendants are not known and the undertaking as to damages has been given by a person not party to the proceedings. Further that the said security is inadequate as to secure the value of the property subject of these proceedings.
- It is their stand that the firm of Rustam Hira have always been on record for the defendants as late as 2006 and have all along been being served for purposes herein.
- Deny demonstration of a prima facie case with a probability of success, neither is there any likelihood of suffering irreparable loss which cannot be compensated for by way of damages.
- Maintain that the injustice that will be suffered by the plaintiffs outweigh the injustices that will be suffered by the defendants if the injunction is denied.
- Lastly that the application is incompetent as the application for review is required to be brought by way of notice of motion and not by way of chamber summons in the manner presented.
- Also maintain that a mandatory injunction can only issue upon presentation of a notice of motion application and not otherwise.

- The applicant is further disentitled to the relief of review because there has been undue delay on their part in presenting this application.

In their written skeleton arguments, they have stressed the following:

- Since the application has been presented 20 years since after the issuance of the decree, and 2 years after the issuance of the orders sought to be set aside, the same has been presented after undue delay and no explanation has been given for the delay.
- Since they allege non service, the applicants should have presented an application for setting aside and not an application for review.
- Even if an application for review were to lie, the ingredients laid down by the relevant provisions of the law are absent.
- Turning to the issuance of an injunction, the court, is urged to hold that the ingredients for granting the same are absent.
- Still maintain that a proper procedure has not been followed in seeking the mandatory injunction.
- Since the subject matter of these proceedings is title to land registered under the Registration of Titles Act vide Section 23 thereof, the title once registered can only be altered in accordance with the procedure specified therein.

On case law, the respondents referred the court, to the case of ROBERT NJUE WANGAI VERSUS FRANCIS MUTHIKE decided by the Court of Appeal on the 18th day of November 2005. At page 4 of the judgement line 3 from the top the learned law lords of the Court, of Appeal made the following observation:-

“ The basis for the application for review is that the appellant was not served with the application seeking the entry of judgement. Thus the essence of his complaint is that the application was heard and allowed exparte when he had not been served with the application or with a hearing notice. That being the precise nature of his complaint, the appellant should have filed an application to set aside the exparte order and not an application for review under order XLW CPR”.

Indeed the application for review did not satisfy the conditions prescribed in order XLIV CPR. *“The application for review did not lie and was misconceived. More over, the application for review was not brought without unreasonable delay.”*

The case of BONIFACE NJENGA KURIA VERSUS JULIUS KERU NJOROGE AND 5 OTHERS NAIROBI HCCC NO 112 OF 2008 decided by this court, on the 4th day of November 2008. At page 25 of the said ruling, this court, set out the content of section 23 of the RTA whose central theme is that a certificate of title is sufficient evidence of ownership. At page 35 case law on the granting of a mandatory injunction are set out. The principles extracted run from page 35 – 36 and these are:-

- *a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances it will not be normally granted.*
- *In order for an applicant to earn this relief, it must be shown that there are special circumstances of the case.*
- *The litigant must go further and show that the special circumstances are not only special but are also clear and plain which ought to be decided at once.*
- *The act done must be a simple and summary one which can be easily remedied.*

- *There is a demonstration that the defendant attempted to steal a match on the plaintiff.*
- *There is no uniform standards set for establishing or determining the special circumstance, each case depends on its own facts and circumstances.*
- *The determination of what amounts to special and clear circumstances and what does not amount to such circumstances depends on the good sense of the trial judge.*
- *That the determination of the special and clear circumstances is question of facts and circumstances of each case.*
- *Each case must be considered at each time on its own facts.*

At page 38 of the said own ruling, there is cited the case of FILM ROVER INTERNATIONAL AND OTHERS VERSUS COMMON FILM SALES LTD (1965) AER 722 whose gist of the ruling is that:-

“ in determining whether to grant an interlocutory injunction or not, the question for the court was whether the injustice that would be caused to the defendant if the plaintiff was granted an injunction, and later failed at the trial, out weighed the injustice that would be caused to the plaintiff if an injunction was refused and he succeeded at the trial”.

On the courts assessment of the facts herein, it is clear that the rival arguments have presented two fronts for determination, namely the technical aspect and the merit aspect on the prayers sought. The technical questions that have arisen are as follows:

- (1) In respect to prayer 2 whether leave was procedurally granted to enjoin Sana Investments Limited to this application in the manner enjoined?
- (2) Whether the injunctive relief sought in prayer 2 of the said application is properly anchored on the circumstances of the brief history of the facts set out herein.
- (3) Whether the proper action to be taken by the applicant to upset this courts orders of 25/20/2006 should have been an application for setting aside of the exparte orders, or an application for review in the manner presented and sought herein?
- (4) Whether this is a proper case where a mandatory injunction can issue to se aside the transfer to Sana Investments Limited registered on 26/09/2007 and have the transfer to Sana Ltd Investments Ltd reversed?
- (5) Whether the undertaking as to damages is sound?
- (6) Whether the supporting affidavit to the application having been sworn by counsel is competent?

In respect to prayer 2, it is on record that, the respondent has not raised any objections to the said enjoining, but that notwithstanding this court, of the opinion that section 3A of the CPA which enshrines this court’s, inherent power donates power to rectify any errors noted whether moved orally or formally by any of the litigants, or the court to move on its own motion to rectify the error noted for the ends of justice to be met to both parties and to prevent abuse of the due process of the court. It is noted from the court, record, that the order to enjoin was made by Osiemo J on 23/7/2008. Indeed there is no prayer from the respondent seeking interference with that order, but that notwithstanding as mentioned above, this court, is not precluded from interrogating that issue in view of the fact that orders are being sought against this party. It is therefore imperative on the court, to determine whether the party is properly enjoined to the proceedings or not. Prayer 2 of the application under consideration reads:

“ 2 Leave be and is hereby granted to the applicants to enjoin Sana Investments as a Respondent to this

application". The question for determination is whether that order is valid and the same was given within the law. This court, has scoured through the Civil Procedure Act, and has failed to trace a section whereby a party can be added onto an application. I have also scoured through the Rules and come across order 1 rule 10 CPR. The marginal note reads "substitution and addition of parties". It reads:-

"Order 1 rule 10 (1) where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court, may at any stage of the suit if satisfied that the suit has been instituted through a bonafide mistake and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as a plaintiff upon such terms as the court thinks fit.

(2) The court, may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the court, to be just, order that the name of any party improperly joined, whether as a plaintiff or defendant be struck out and that the name of any person who ought to have been joined, whether as a plaintiff or defendant or whose presence before the court, may be necessary in order to enable the court, effectually and completely to adjudicate upon and settle all question involved in the suit be added."

This court's, construction of this provision is that, there is power donated to the court, to add or remove parties to a suit either as plaintiff or as a defendant. If the same power were to operate for an application as well, I am sure the rules committee would have added the words "*where in a suit or an application*" in the said rules.

Even if this court, were to hold that, since there is no such provision applicable to an application, then section 3A of the CPA is called into play to remedy the defect, this court, cannot ignore the fact that an application is usually anchored on the parent pleadings namely a plaint, defence or defence and counterclaim. It therefore follows that the party being introduced should not be alien to the parent pleadings.

The parent pleadings herein as mentioned, are a plaint and a defence. In the plaint dated 25th June 1979 and filed the same date, parties on board are one KULTAR HANSPAL as plaintiff and SATWANT KAUR SANDHU as first defendant, and RAJINDER KAURSANDHU as the second defendant. The plaintiffs complaint against the defendant is set out in paragraph 4 (a) and it reads that:-

" 4(s) By an agreement in writing dated 11th March 1977 and made between the plaintiff and the defendants, the plaintiff offered to buy and the defendants agreed to sell the said property at a price of Kenya Shillings 80,000.00" Paragraph 4 (b) avers that a total of Kshs 39,500.00 was paid. Paragraph 5 reads; "In breach of the aforesaid agreement and despite demand having been made on behalf of the plaintiff, the defendants have wrongfully failed and refused and continue wrongfully to fail and refuse to complete the said sale or take any steps towards such completion". In the premises the plaintiff has suffered loss and damage. The reliefs sought are:

- (a) Specific performance of the said agreement against the said defendants.*
- (b) All necessary and consequential accounts, direction and inquiries.*
- (c) Damages for breach of contract in lieu of or in addition to specific performance.*
- (d) Costs of this suit*
- (e) Any further or other relief that this honourable court may claim for."*

The defence traced on this record is one dated 17th day of August 1979 and filed on the 20th day of August 1979. Vide paragraph 2. There of the defendants denied the content of paragraph 4 (a) of the plaint. Vide paragraph 3 thereof, the 1st defendant denied signing the said agreement and in the

alternative, that one Baldev Singh purported to sign the agreement on her behalf, was never her constituted agent or at all. In the alternative that if the agreement was indeed signed, which was denied, then the same was on condition that it was to be completed by 31st March of 1977 and as such time was of the essence. On this ground and others the defendants prayed for the suit to be dismissed.

It is common ground that judgement has been given herein by Chesoni J as he then was on the 22nd day of June 1982. Pursuant to that judgement a decree was issued on the 3rd day of January 1985, which judgement and decree have not been upset, although there is a pending application on record for the setting aside of the said judgement and decree. This being the case, it is this courts' view that since the issues in the plaint herein were settled by judgment and decree herein, no new party can legally be introduced into these proceeding at this late stage. It is my respectful view and I stand to be corrected by the court of appeal, that my learned senior bother was in error when he allowed prayer 2. It is my humble opinion that since the said application was presented by a defendant whose invitation in the proceedings was for purposes of defending, the law as this court knows, it, allowed the defendants to seek reliefs against the plaintiff only and themselves. It therefore follows that in order for any relief to be sought from any other party not party to the proceeding, it could only be possible if the matter is reopened and the party procedurally introduced into the proceedings before any relief can be sought from such a party.

Turning to prayer 3 of the said application, it is clear that it seeks an injunctive relief against Sana Investments Ltd, by itself, its agents, servants, employees and/or any other persons whomsoever acting on its behalf from transferring, alienating, discharging, developing or dealing howsoever with land reference number 3734/118/I.R number 12262) Lavington. The provision governing the granting of this relief is none other than order 39 CPR. It reads

“Order 39 rule 1(1) where in any suit it is proved by affidavit or otherwise.” This court's, construction of this provision is that in order for one to earn this relief, one has to anchor it on a suit. By a suit, it means that a suit that the claimant is party to. This being the case it means that, the applicant here stand disentitled of this relief since it has not been anchored on the suit herein. Sana investments ltd herein is not a party to the suit herein. The defendants in this suit do not have a substantive pleading on the basis of which they have anchored the relief sought from the said Sana International Ltd. The defendants rights herein are limited to either seeking reliefs against themselves or the plaintiff and no other party. The claim against Sana Investment Internal Ltd could be channeled through two avenues. The first and longest avenue is through these proceedings by causing the judgement to be se aside, matter reopened, and then an application made to add the said Sana Ltd to the proceedings as a plaintiff, followed by the defendants amending their defence to include a counterclaim, to counter claim the said reliefs as substantive reliefs against Sana Ltd. It is only after such amendment, and introduction of the counter claim that the defendants' application can legally be permitted to anchor such an interim application and relief. The second and simpler avenue should be by way of a fresh suit against Sana Investments Ltd with the applicants as plaintiffs and Sana Investments Ltd as defendants with or without the current plaintiffs. If the current plaintiffs are left out, then it would have been the duty of Sana Investment Ltd to bring them in either as co-defendants or as 3rd parties.

Turning to prayer 4, it is clear that the relief is being sought for under order XLIV rule 4 (1) namely review and setting aside. It has been argued by the plaintiff respondent that the same is mis placed and the provision quoted should have been that applicable to setting aside of exparte orders. Case law has been cited to this court and which is already reflected on the record. The question for determination now is whether the applicant should have come by way of review or setting aside.

Starting with review, all that the applicants need to do is to demonstrate that they are within the ambit of the applicable ingredients which are set out in order XLIV rules. Order XLIV rule 1 (1) reads in part:-

“ O.XLIVR 1(1) Any person considering himself agreed by a decree or order.....and who from the discovery of new and important matter or evidence, which after 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 judgement to the court

which passed the decree or made the order without unreasonable delay.

4(1) 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 the court at the time the application comes for hearing.”

Due consideration has been made by this court, of the afore set out provisions and considered them in the light of the rival arguments on record as regards prayer 4 and the court, makes the following findings:

By reason of rule 4 (1) this court, is properly seized of the matter. The judge who made the judgement herein and who made the *exparte* orders are no longer within this jurisdiction.

As for the ingredients for review the ingredients are as follows:

(i) *Discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him when the order was made or decree passed.*

(ii) *The second ingredient is demonstration of existence of some mistake or error apparent on the face of the record.*

(iii) *Or for any other sufficient reason.*

These ingredients have been applied to the proceedings herein, and the court, makes a finding that these are not being relied upon by the applicant, because they are not being agitated by the said applicant. What has been agitated before this court, is the lack of service and lack of locus standi of the plaintiffs' next friend leading to the *exparte* orders being made.

In this courts', opinion, this is a matter which would fall squarely under order IXA rule 10 CPR. The marginal note reads "*setting aside of the exparte orders.*" While the main order reads:-

"Order IXA rule 10, where judgement has been entered under this order, the court may set side or vary such judgement and any consequential decree or order upon such terms as are just.) 11.Application under this order shall be by way of a chamber summons".

This court, has given due consideration of the facts presented on this aspect, by the rival arguments and the court, is satisfied that order IXA rule 10 and II procedure was the most appropriate procedure to be invoked by the applicant to access the relief of setting aside and not the application for review.

It is apparent from the reading of the application that this provisions was not invoked and the question is whether by reason of that omission, the applicant is disentitled of this relief, or the court, can intervene in some other way through the inherent power of the court. Indeed section 3A, of the CPA which enshrines the inherent powers of the court, has been invoked. This court, has judicial notice of the fact that this inherent power of the court, can only be called into play where there is no provision of law catering for that situation. Herein we have order IXA rule 10 and 11 which were not cited but there is a clear indication in prayer 4 that all that the applicant wanted was to set aside the *exparte* orders of 25/10/2006.

Order 50 rule 12 CPR governing presentation of applications provides "*every order, rule or other statutory provisions under or by virtue of which any application is made, must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this value.*" This is a safety valve through which the applicant can get justice, in that despite failure to cite this provision, the relief of setting aside can be accessed through the phrase, "*and all other enabling law*". Secondly ends of justice would require that a pronouncement on the merits be made on prayer 4 in view of the age of the litigation as opposed to striking out the prayer on a point of technicality. For this reason, the court, will proceed to consider the issue of setting aside on merit.

The guiding principles that this court, has to bear in mind when making the assessment are as follows;

(1) There are two sets of orders capable of being set aside namely the regular ones and the irregular ones. The irregular orders, are those obtained without jurisdiction. Where as the Regular ones are those obtained within the law but on account of default by a participating party.

(2) The irregular orders are set aside as a matter of course, *ex debito justitiae* where as the regular ones are set aside following the exercise of the courts discretion.

(3) The principles on the exercise of the court's discretion have now crystallized as generated by juris prudence emanating both from the Court of Appeal, and the superior courts. Setting out a few such cases will do no harm to the ruling. There is the case of SHAH VERSUS MBOGO AND ANOTHER (1967) EA 116 where it was held inter alia that:-

(4) " the court's discretion to set aside an *ex parte* judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person, who has deliberately sought (whether by evasion or otherwise) to obstruct or delay, the cause of justice".

The case of ELITE EARTH MOVERS LTD VERSUS KRISHNA BEHAL AND SONS (2005) KCR 379 in which Emukule J ruled that "*the discretion of the court to set aside an *ex parte* judgement is wide and flexible and it is exercised upon terms that are just.*"

There is also the Court of Appeal decision in the case of CMC HOLDINGS LTD VERSUS NZIOKI (2004) 1 KLR 173 in which the following principles were set out by the Court of Appeal:-

(a) *The court's discretion must be exercised upon reason and judiciously.*

(b) *It should not be exercised wrongly in principle, neither should the court act perversely on the facts.*

(c) *It should be exercised to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error.*

(d) *It would not be proper use of such discretion if the court, turns its back to a litigant who clearly demonstrates such an excusable mistake, in advertence accident or error. Such an exercise of discretion would be wrong in principle.*

(e) *The court, must consider not only the reason why the defence was not filed or why the appellant applicant did not turn up for hearing but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or a draft defence is annexed raises triable issues."*

In this court's opinion, what those principles enjoins this court, to do is that:-

- That the jurisdiction to exercise the courts judicial discretion exists.
- The power to do so is donated by provisions of law.
- Where as the yardstick for the mode of executing the exercise is provided by case law.
- The characteristics to be borne in mind when exercising the same are that

(i) The exercise of the discretion is unlimited or unfettered.

(ii) The only fetter attached to it is that it has to be exercised judiciously and with reasons.

These principles have to be applied to the rival arguments as regards the setting aside or not to set aside this court's orders of 25/10/2006:

The main grounds put forward are that:

- The same was served on Rustam Hira advocate who was then not on the record, as the counsel then on the record was Satish Gautama. Indeed the plaintiff respondents' counsel has conceded vide paragraph 18 of the replying affidavit that the firm of Rustam Hira who were on record for the defendants then were served. A perusal of the record, reveals that indeed it is the firm of Rustam Hira and Company advocates who entered appearance, for defendants dated 3rd day of July 1979 and filed on the same date. The same firm dated and filed a defence on 2nd August 1979. There is no notice of change of Advocates traced on the record changing representation from the firm of Rustam Hira to the firm of Satish Gautama. But this court, has traced a list of authorities filed by the firm of Satish Gautama and company advocates. There has been no copy of the said notice of change of advocates, annexed either to the supporting affidavit or further affidavit to show exactly when the firm of Satish Gautama advocates took over the conduct of this matter. In the absence of such exhibition, it is difficult for this court, to penalize the plaintiff/respondents or fault them for serving the firm of Rustam Hira as advocates for the defendant. Secondly until that notice of change of advocate is exhibited, the transaction on this record by the said firm of Satish Gautama are without basis. More so when the deponent of the supporting affidavit to the application in paragraph 6 thereof did not disclose when their firm came on to the record. Order III rule 7, and 12 stipulate that where notice of change has not been properly effected, the former advocate is deemed to be still on record.

Turning to the issues raised of wanting to raise issues of lack of locus standi, of the beneficiary of the orders of 25/10/2006 and failure to follow the laid down procedure to come on to the record, the court finds them to be sound. However, in the absence of proof that the firms of Satish Gautama and company are properly on record, it is premature for this court, to reopen the matter for them to be heard on those issues.

Issue was also raised about the advocate on record deponing the supporting and further affidavit. Indeed the supporting affidavit as well as further affidavit in support of the application were deponed by counsel. This court, has judicial notice of the fact that the circumstances under which counsel should and or should not depone an affidavit in any litigation are now well settled by case law emanating from the court, of appeal, as dutifully followed by the superior court.

There is the case of KENYA HORTICULTURAL EXPORTERS (1977) LTD VERSUS PAPE (TRADING AS OSIRUA ESTATE (1986) KLR 705 where the Court of Appeal held inter alia that:-

“ In the absence of an affidavit by the Respondent himself it was doubtful whether the respondent advocate could by his own affidavit prove all the statements of informational belief.”

The case of AGIP CO. LTD VERSUS HIGH LANDS TYRES LIMITED (2001) KLR 630 in which Visram J as he then was, (now (JA) held inter alia that:-

“ an advocate is not entitled to depone to matters that are in controversy. By deponing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar, into the witness box. He is liable to be cross-examined on his deposition. It is impossible and unseemly for an advocate to discharge his duty to the court, and to his client if he is going to be drawn into the controversy as a witness. He cannot be both counsel and witness in the same case.”

Lastly the case of ODUOR VERSUS AGRO FREIGHT FORWARDERS (2002) 2 KLR 652 where Onyancha J held inter alia that:- *“ The replying affidavit was sworn by the plaintiffs advocate and it is not stated that he had the plaintiffs authority to do so. That affidavit was therefore sworn by a stranger as the deponement fails to reveal his source of authority to swear. That failure was a substantial defect, which rendered the replying affidavit incompetent and the court, would strike it out...”*

From the above decisions, it is clear that the criteria to be applied by a court, of law, in determining whether an affidavit deposed by counsel is to be axed or not are as follows:-

- (1) It has to be demonstrated that the same has been deposed with authority from the client.
- (2) It has to be demonstrated that the counsel has not deposed to controversial and contentious issues by reason of which, the advocate might be called upon to move from his privileged position at the bar to the witness box for cross-examination.
- (3) Matters in number 1 and 2 above means that in order to determine whether the deponment are controversial or not one has to scrutinize the deponements paragraph by paragraph.

This court, has applied the afore set put principles on both the supporting as well as the supplementary affidavit, and proceeds to make the following findings on the same:-

(1) In paragraph 1 of the supporting Affidavit deposed on the 14th day of July 2008, and filed the same date, the deposing counsel deposes that he is counsel in the employ of Satish Gautama and is duly authorized to swear this affidavit on behalf of the applicants. But does not disclose on whose authority he so deposed, was it on the authority of the applicants or the counsel under whose employ he is.

(2) Paragraph 2,3,4,5,6,7,8 and 9 depon to matters that transpired in the court record. This court, has judicial notice of the fact that matters of perusing court records are matters handled by counsels on record as opposed to litigants themselves. It is therefore the finding of this court, that these paragraphs are not controversial.

(3) As regards paragraph 10 of the supporting affidavit the court, finds this paragraph controversial in that it introduces one Kulwinder Sirgh Sandhu as a representative agent but has not disclosed whose representative agent the said named person is. How and why is he a representative and agent, the basis of the said representation and agency, it does not also mention why the defendants applicants have not featured anywhere in the said affidavit and no explanation as to why no affidavit was forthcoming from them.

(4) The remedy for a controversial paragraph that this court, has judicial notice of is that, the faulted paragraph is a proper candidate for striking out and on that account and by the reason given above, paragraph 10 of the supporting affidavit is duly struck out.

(5) Turning to the supplementary affidavit, the court, has perused the same and finds that in paragraph 1, he says he had authority from the applicants to so depon. Paragraph 2, 3, 4,5 deal with transactions that took place on the record and as such these are not controversial. Paragraphs 6, 7, 8, 9, 10 and 11 deal with transactions between the counsels office and that of the Registrar of Companies registries. These too do not invite controversy as they deal with only documentation.

(6) Paragraph 12 is controversial in that the counsel laid himself bear with a likelihood of him being called into the witness box and be cross-examined on facts that go to support existence of fraud. This is therefore a proper candidate for striking out and it is duly struck out.

(7) Paragraph 13 is also controversial as counsel exposed himself to likely cross examination on facts that go to justify the grounds on the basis of which Knight Investments Limited which is not yet a party to these proceedings can be impeached.

This is a proper candidate for striking out and it is accordingly struck out.

Lastly to be dealt with, is the undertaking to pay damages dated 14th day of July 2008 and filed on the same 14th day of July 2008. The undertaking has been given by one Kulwinder Sirgh Sandhu. He undertakes to pay damages. The undertaking does not specify in what capacity he was giving that undertaking in view of the fact that he is not a party to the proceedings. He has not specified or

demonstrated the ability to pay damages by deciding the means of that disability.

For the reasons given in the assessment this court, proceeds to make the following findings in disposing off this matter:-

(1) Though prayer 2 was granted herein by my senior brother judge and this court is alive to the fact that it has not been invited either orally or formally to revisit that issue, none the less it found it fit to consider the regularity of the order granted in view of the fact that it had been requested to issue orders against the said entity. Due consideration was made by the court on the said issue and found that the learned judge did not specify the provisions of law under which a party can be added to an application. Jurisdiction only exists as donated by order 1 rule 10 (1) and (2) to add parties to suits and not applications. In this courts opinion the order granted in favour of the applicant in favour of prayer 2 is irregular.

(2) The injunctive relief sought for in prayer 3 of the said application has been disallowed because:-

(i) Sana Investments Ltd had not been enjoined to these proceedings as observed by this court, in number 1 above.

(ii) An injunctive relief is only available where a suit is in existence. Indeed although a suit is in existence herein, the party sought to be enjoined is not a party to the said suit. It follows that in order for any valid injunction order to issue against the said intended party herein, the applicant had to reopen the proceedings by setting aside the judgement on the record, apply for amendment of the pleadings and join the said entity as a plaintiff herein, amend its defence to include a counterclaim, before an injunctive relief could be sought to issue against the said entity

(iii) Alternatively commence fresh proceeding against them

3. The applicants main reason for seeking to have the orders of 25/10/2006 set aside is because service for the hearing of the application which gave rise to those orders was served onto the firm of Rustam Hira Advocates as opposed to having them served on the firm of Satish Gautama advocates.

(i) This court's perusal of the court' record confirms that memo of appearance and defence were filed by the firm of Rustam Hira & Co. advocates.

(ii) Indeed along the lines Satish Gautama started filing processes in the matter such as an application to set aside the exparte judgement but this court, has not traced a notice of change of advocates from Rustam Hira advocates to Satush Gautama advocates.

(iv) Although counsel who deponed both the supporting affidavit as well as the supplementary affidavit deponed that the firm of Satish Gautama was on record as at the time the said application was served, there is no disclosure as to when exactly the firm of Satish Gautama came on to the record. This is also not backed up by exhibition of a notice of change of advocate.

(4) Although this court, found merit in the argument on locus standi, and failure to follow the correct procedure when enjoining the next friend into these proceedings, which points are arguable, failure to demonstrate and or exhibit proof that the firm of Satish Gautama had procedurally taken over the conduct of the suit from Rustam Hira, they cannot receive any relief as regards the orders sought.

(5) From what has been stated in the assessment, the grounds for review are absent herein.

(6) But the ground for setting aside as per the provisions of order 35 rule 10 CPR were present, but setting aside was declined by reason of failure to demonstrate that the firm of Satish Gautama is properly on the record.

(7) The mandatory injunction in prayer 5 is declined by reason of what has been stated above in No 1,

2, 3, 4, 5 and 6 above.

(8) Although prayer 5 called for the presentation of this relief by way of notice of motion, in view of the presence of the other reliefs required to be presented by way of chamber summons, namely the injunctive relief whose presentation is by way of chamber summons, was the most ideal as the two procedures could not be twined up in one application.

(9) Counsel is not precluded from deposing an affidavit on behalf of a client save that this is limited to merely routine matters, but not matters that are controversial which are likely to invite the deposing counsel into the witness box for cross-examination.

(10) The defendant/applicants counsel has not disclosed the authority to depone the said supporting affidavit, as he has not declared in paragraph 1 thereof as to whether the authority came from the employer or Satish Gautama or the defendant/applicant.

(11) Paragraph 10 of the supporting affidavit is found controversial in that the deponent is likely to be invited into the witness box to demonstrate how the said Kulwinder Singh Sandhu is a representative and or agent of the defendants/applicants.

(ii) Also there is no demonstration and disclosure as to why the undertaking was not given by the defendants themselves.

(iii) No demonstration as to why no depositions were sourced from the defendants/applicants themselves.

Paragraph 10 therefore is accordingly struck out.

(12) Paragraph 13 of the supplementary affidavit is also controversial as it invites the deponent in the witness box to demonstrate the particulars of fraud attributed to the transfer of the property to Knight Investment Limited.

(ii) The relief sought in paragraph 13 against the said Knight Investments Ltd can not issue on the basis of this deponement in the first instance, and in the second instance Knight investments limited is not a party to these proceedings.

(iii) As mentioned when dealing with the relief sought against Sana investments limited, in order for the applicant to seek relief against Knight investment Ltd they can only do so after the matter is reopened, pleadings amended to add Knight Investment Limited as plaintiff, amend the defence and include a counterclaim before a relief can be sought against them.

(13) The undertaking given by Kulwinder Singh Sandhu has been faulted on the ground that:-

(i). It has not been demonstrated in what way he is linked to the proceedings.

(ii). The undertaking is not attached to a deponement on how the undertaker will be called upon to meet that commitment.

(iii). No demonstration of possession of sufficient means to meet that commitment has been made.

(14) By reason of what has been stated above in number 1,2,3,4,5,6,7,,8,9,10,11,12, and 13 above, the application dated 14th day of July 2008 be and are hereby dismissed.

(ii) Prayer 4 is also declined but should the applicant secure documentation to show that they were regularly on record as at the time Rustam Hira was served, they have liberty of this court, to represent the said prayer in a subsequent application if they so wish.

(15) Since the applicant has failed in all the prayers sought by the applicant, the respondent/plaintiff will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 3RD DAY OF JULY 2009

R.N. NAMBUYE

JUDGE