REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENV & LAND CASE NO. 240 OF 2014

JAGUAR PETROLEUM COMPANY LIMITED ..... PLAINTIFF/APPLICANT

VERSUS

BRIGHTON FOODS LIMITED ……..…1ST DEFENDANT/RESPONDENT

FUSION FOODS LIMITED ….....2ND DEFENDANT/RESPONDENT

RULING

1. The applicant who is also the plaintiff in this matter has moved this Court under Order 40 rule 7; Order 45 rule 1; Order 50 rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act vide her application dated 10th December, 2014. In the application the following orders were sought

    1. ……..

    2. ……..

    3. That pending the hearing and determination of this application, the orders made by Honourable Justice Mukunya and issued on 10th November, 2014 be stayed.

    4. That this Court be pleased to review and set aside the orders made and issued 10th November, 2014.

    5. That this Court do order that the notice of motion dated 4th September, 2014 filed by the applicant be heard de novo.

    6. The Court to make such further or other orders as it may deem just.

    7. Costs of this application be provided for.

2. The application is premised on the supporting affidavit of Kailesh Joban Putra and several grounds listed on the face of the motion under the headings for granting review to suit that is; good and sufficient reason, error apparent on the face of the record and that the orders were made in contravention of articles 157 (4) and 245 (4) and (5) of the Constitution. I do not see any need to reproduce the contents of the said grounds in this ruling but I will make references to them as appropriate in the body of this ruling.

3. The application is opposed by the respondents who are the defendants in the suit. The opposition is contained in the grounds filed and listing paragraphs 1(a) – (g) and two (2) to six (6). The Counsels on record for the parties filed written submissions as a way of arguing the application. The submissions were highlighted on 21st April, 2015. Mr. Mwenesi for the applicant submitted that there is jurisdiction in this Court to review the orders issued on 10th Nov 2014. That the Judge in 2014 erred in directing the police to investigate and report to the Court as well as deciding there was unlawful order without hearing the parties. The applicant continued in submission that there is no provision in the Constitution where a Judge can suo moto make the orders that were made by Mr. Jusice Mukunya on 30th October, 2014 and there is no direct right to appeal. Counsel referred this Court to the case of ***Abasi Balunda –Vs- Fredrick Kangamu & Another (1963) EA 557.*** Mr. Mwenesi submitted that the Courts operations is governed by the Judicature Act which is to regard the Constitution and anything done contrary to the Constitution is invalid.
4. It is further submitted that the order made which is contrary to the law is an error. That there was no replying affidavit sworn to say there are two opinions about this order. It is averred that the learned Judge varied the order of Gacheru J. when there was no such application before him. Once that order was varied, the applicant contends that it left the question of which order was to be obeyed.
5. Mr. Oloo for the respondents in opposing the motion submitted that the application did not meet the test for review and that the Judge's order was reasonable and given under the inherent powers of the Court in the prevailing circumstances. The respondents continued that in the case of ***Nyamogo and Nyamogo vs Moses Kip Kolum Kogo (2001) EA 170*** the Court found that a point that forms a ground of appeal should not form a ground for review. The respondents' view is that the fact that the trial Judge misconstrued the law was a ground for appeal. Mr. Oloo submitted further that on the ground for sufficient reason/cause must be in tandem with either new and important discovery of evidence or error apparent on the face the record but not to be treated independently. He cited the case of Ahmed ***Hassan Mulji –Vs- Shirnbai Jadavji (1963) EA 217*** to support this line of submission. In conclusion, he said this Court is being asked to sit on appeal of the Judge's order and that the option available to the applicant was to appeal. He posed the question that if the order was not appellable why was leave to appeal not sought? He urged the Court dismiss the motion with costs to them.
6. Mr. Mwenesi in reply to the respondent's submissions stated that the respondents have admitted the order is not appealable. In distinguishing the Ahmed Mulji case supra, he submitted they have come to Court on the basis of error which errors were

    (i) No date for the order.

    (ii) The order contravened the law.

    (iii) The Judge could not exercise his inherent power in the circumstances since there were provisions of the law available to the parties.

    He submitted that the application is properly before this Court and should be allowed.

7. The order complained of which forms the basis of this application was annexed as "*KJ 7*" in the applicant's supporting affidavit which is hereby copied;

    1. The respondent's premises (petrol station and restaurant) be opened forthwith

    2. That the Respondents shall comply with the orders issued by Gacheru J. until further orders of this Court.

    3. That this file be forwarded to the Provincial Director of CID in charge of investigations and fraud to find out if there was anyone to blame for deliberately extracting the unlawful order and if so, they be charged and prosecuted.

    4. That the Provincial Director of CID to file a report within forty five (45) days of

today's date.

5. That pending the results of the CID, the status quo as pertaining on the 16th September, 2014 be maintained.

6. That once the CID report is brought, this application and suit shall proceed on its merits.

8. The applicant is aggrieved by this ruling/order for among other reasons that her application had been heard on its merits on 9th October, 2014 awaiting ruling. But the order made requires that application to be heard de novo. Secondly, that the order for the return of the respondents to the suit premises was made without any determination of the applicants notice of motion and in the absence of any application by the respondents to be restored to possession. Thirdly, the applicant is aggrieved that the Judge referred this matter to the police for investigations in a matter that was purely civil and in contravention of the principles set out in the case of ***Mucuha -Vs- The Riples Ltd, Court of Appeal C. App. No. Nairobi 186 of 1992*** (Copy not made available to Court). This in the applicant's view occasioned the delay in prosecution of his application yet the matter had been investigated and finalized by the office of the Director of Public Prosecution - Mombasa. The applicant pleads that unless the orders are reviewed, the justice sought by the applicant will be inordinately delayed causing consequential loss and damage arising from the 1st and 2nd respondents continued occupation of the suit premises.
9. The question for this Court to answer is whether there was an error apparent on the face of the record therefore a reason to review the orders of Mr. Justice Mukunya made on 30th October, 2014. The applicant pointed out what she considered constituted the errors in part (d) (I) – (vi) in her grounds on the face of the application. The respondents submitted that the Judge made the orders under the inherent power of the Court which should be an issue for appeal and not review. The applicant avers that by the Judge ordering the C.I.D. to investigate a matter which was purely civil, the Judge erred and the order to the C.I.D. to investigate the extraction of the Order in the suit is ***ultra-vires*** the functions of the Judiciary. The applicant in paragraph (e) of the grounds said this action resulted in contravention of articles 157(4) and 245 (4) and (5) of the Constitution.
10. I have read the provisions of the articles referred to above in relation to the error the Judge is averred to have committed. In my understanding and analysis of the submissions made by the applicant, the applicant appears to me to draw a conclusion that the Judge contravened the provisions of the law in ordering the C.I.D to investigate the matter. No wonder the applicant uses the two words; the Judge ***erred*** and acted ***ultra-vires***. (Underline mine for emphasis). If the Judge erred or acted contrary to the provisions of article 157(4) and 245 (4) and (5) as submitted, then that cannot be said to be the equivalence of "the error apparent on the face of the record". Indeed if the Judge contravened the law, then it would be wrong for a Court of concurrent jurisdiction to find and correct such error. I do find that this was not an error apparent as envisaged under order 45 of the Civil Procedure Rules.
11. The other error submitted is that no application under order 40 Rule 7 was made by any of the Respondents for the variation of the injunctive orders granted by Gacheru J. Consequently Mukunya J. erred in varying the said 'Order' suo moto. Further the other limb of the error is that the order extracted indicated the order was read in open Court on 31st October, 2014 instead of 30th October, 2014 and it omitted to mention that investigations ordered was to be done in Nairobi. Finally, the applicant complaints that the draft order was not submitted to their advocate for approval. In the Judge reaching a decision on a matter that was 'not prayed for' under order 40 rule 7, was this an error apparent on the record or a misdirection of the law? In the case of ***Abasi Balinda vs Fredrick Kangwamu (1963) E.A. 557*** referred to by both parties herein, it was held;

"I) A point which may be a good ground of appeal may not be a ground for an application for review and an erroneous view of evidence or of law is not a ground for review …"

Similarly in ***Nyamogo Vs Kogo***, the Court of appeal stated at page 175 that,

"Mere error or wrong view is certainly no ground for a review although it may be for appeal".

In this instance, whether the Judge made a wrong decision in restoring the respondents to the suit property when there was no such application before him is, in my view not a ground for review. It is not within the purview of this Court to make such a finding that Mukunya J. was wrong when he made such a decision.

12. On the second limb of the error averred in terms of difference in dates when the order was issued that I agree constitutes an error. However changing the dates did not in any way affect the final order of the Judge as such error was made by the party who extracted the order not the Judge. These dates can and should be corrected to reflect the date of 30th October, 2014 when the ruling was delivered. The date of issue in my view is when the extracted order is signed and given out by the deputy registrar and therefore can be any date not similar to the date of delivery of the decision. As to the issue of approval of decrees, this is not the right forum to bring such a complaint.
13. The application was also premised on ***"the good and sufficient reason"*** principle and details given under paragraph C of the grounds of the application. The applicant averred that after hearing of the application, the ruling was reserved to be delivered on notice. However no notice was served on them but she indicates that a call was made to Mr. Kalove Advocate. On the date of delivery of the ruling, it is submitted that Mr. Kalove sought leave to appeal which was denied with no reasons given. The record does not show that leave to appeal was sought and or refused. Further that the Judge made no findings on the notice of motion. He averred that the effect of the ruling complained of required the application dated 4th September, 2014 to be heard de novo. In paragraph (f), the applicant submits this order is occasioning unwarranted delays in the determination of the motion of 4th September, 2014.
14. This submission on good and sufficient reason touches both on the decision reached by the Judge and its effect in relation to the determination of the motion dated 4th September, 2014. I have already stated in the body of this ruling that it is not within my purview to question the decision of Mukunya J. since we share concurrent jurisdiction. On its' effect on the motion dated 4th September, 2014, the Judge ordered that this file be forwarded to the Provincial Director C.I.D. Nairobi for investigations and on completion of those investigations file their report within 45 days. Once the report was brought, the application and suit shall proceed on merits. The Judge in his discretion had his reasons for ordering the application to be heard afresh once the report was filed. This order was made on 30th October, 2014 while the application for review was filed on 10th December, 2014 (40 days later). None of the parties made a mention of whether the Provincial Director of C.I.D. Nairobi ever commenced investigations as ordered.
15. The 'order' to be investigated was independent and therefore ought not to stay the hearing and determination of both the application and the suit. To this extent only, I find it reasonable in the circumstance to vary the order of the Judge and in place order that the investigations can proceed as per the order in force but such investigations shall not bar this suit and application from being prosecuted. In conclusion and on the basis of the reasoning contained in the body of this ruling, I do decline the prayers No. 3 and 4 of the motion dated 10th December, 2014. However I shall grant prayer 5 and order that the hearing of the application dated 4th September, 2014 do proceed de novo. Each party shall bear their costs of this application.

Ruling dated and delivered at Mombasa this 22nd day of June, 2015.

….....

A. OMOLLO

JUDGE

In the presence of:-

Learned Counsel for the Plaintiff/Applicant ….....

Learned Counsel for the Defendants/Respondents ….....

Court clerk ….....