**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)**

**CIVIL APPEAL (APPLICATION) NO. 270 'A' OF 2015**

**BETWEEN**

**LANDBANK REAL ESTATE**

**INVESTMENT TRUST LIMITED.....APPLICANT**

**AND**

**SICHUAN HUASHI ENTERPRISES**

**CORPORATION EAST AFRICA LIMITED.....RESPONDENT**

**(*Application for Review of the judgment/decision of the Court of Appeal***

***(Musinga, Gatembu & Murgor, JJA.) delivered on 9th June 2017***

**in**

**HCCC NO. 381 OF 2015)**

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**RULING OF THE COURT**

In the Notice of Motion dated 24th July 2017, ***the applicant, Landbank Real Estate Investment Trust Limited*** is seeking to review the decision of this Court rendered on 9th June 2017 wherein this Court upheld an order of injunction by the High Court which restrained Standard Chartered Bank (Kenya) Limited, *(the Bank)* from paying out monies to it on account of a Bid Bond No. 20102115846 issued on 9th July 2015 *(the Bid Bond)* that had been secured by ***Sichuan Huashi Enterprises Corporation East Africa Limited, the respondent***.

The background to the application before us is that on 3rd August 2015, the respondent filed a Notice of Motion against the applicant, in the High Court seeking a temporary injunction to restrain the applicant from illegally and irregularly calling in and/or receiving payments from the Bank in respect of the Bid Bond, pending the hearing and determination of the application; and a temporary injunction restraining the applicant from illegally and irregularly calling in and/or receiving payments from the Bank in respect of the Bid Bond pending the hearing and determination of the suit in the High Court.

The motion before the High Court was premised on the grounds that, in June 2015 the applicant had invited bids for the construction of a boundary wall and a guard house on its property L.R. No. 8529/1 in Kamulu. In response, the respondent submitted its Tender Bid on 29th June, 2015, together with the Bid Bond issued by the Bank. According to the respondent, Clause 28.1 of the applicant's Instructions to Tenderers Document expressly provided firstly, that the Notification of the Award was to be contemporaneously accompanied by the Contract Documents and secondly, that a Performance Bond would be furnished in accordance with the Conditions of Contract, in the Performance Security Form specified in the Tender documents or in another form acceptable to the applicant.

In a letter of 17th July 2015 marked **"SUBJECT TO CONTRACT"** the applicant's Chairman, Mr. Kenneth Omolo, informed the respondent that it had been awarded the tender. The letter of notification also expressly stated that the contract terms would be embodied in a contract that it was in the process of drafting, and which would be provided in due course.

In a letter dated 21st July, 2015, the respondent raised concerns, regarding the nature of the contract document governing the construction; the duration of the contract; the damages for delay which it found to be high and onerous on the contractor; the suitability and acceptance of a performance bond from an insurance company, as opposed to a bank. On 29th July, 2015, the applicant responded to the concerns raised by annulling the tender awarded, and on the same day, calling upon the Bank to honour the terms of the Bid Bond for reasons that the respondent had failed to furnish it with a Performance Bond.

Apprehensive that the Bank would irregularly and illegally pay out the Bid Bond sums and leave it without any recourse to recovery of the amounts from the applicant, the respondent sought the injunctive orders from the High Court.

After considering the motion and the submissions, the learned judge concluded that a prima facie case was made out, and granted the injunctive orders sought. The appellant was aggrieved by the decision of the High Court and filed an appeal to this Court on the grounds that the learned judge failed to consider the law on demand guarantees; failed to correctly interpret and apply the principles of injunctions, and failed to consider the general principles on injunctions.

Upon considering the appeal and the submissions of the parties, this Court determined that the High Court had rightly exercised its discretion to grant the injunction for reasons that a prima facie case had been made out, and the respondent stood to suffer irreparable damage if the Bid Bond sum was paid out, prior to the hearing and determination of the dispute.

Aggrieved by this Court's decision, the applicant filed the motion, now before, us seeking orders of review or setting aside of our decision on the grounds that, there were serious mistakes or errors of law and fact apparent on the face of the record; that the orders granted were contrary to law and commerce and therefore inimical to public interest; that the whole judgment was highly prejudicial to the applicant as it was erroneous unjust and that there was sufficient reason to warrant the review.

***Mr. Miyare,*** learned counsel for the applicant submitted that an error was apparent on the record because, counsel argued, for there to have been a prima facie case made out, there must have been a right that was violated; that this Court also fell into error when it found that no contract had crystallised between the parties following acceptance of the tender offer by the respondent; that once the tender was confirmed and accepted by the applicant, a valid contract had come into existence. It was further argued that since the Bid Bond was grounded in the Tender, the applicant was entitled to demand the release of the Bid Bond sums.

***Mr. Muchiri,*** learned counsel for the respondent submitted that what was before this Court was an appeal against the High Court's decision granting the injunctive relief; that, in seeking review orders, this Court was being asked to sit on appeal on its own decision in an interlocutory application, where the issues including, whether an agreement, referred to as being "*subject to contract"* were matters that had yet to be determined by the High Court.

It was further submitted that the trial court rightly exercised its discretion to grant the injunction as the applicant continues to demand the Bid Bond sums, yet has failed to demonstrate that if the sums are paid to it, that it would be in a position to refund the sums demanded.

We have considered the motion and the submissions of the parties. The issues for consideration are whether this Court can review its decision, and if so whether the applicant has raised sufficient grounds to warrant such review.

***Article 164 (3)*** of the Constitution defines this Court's jurisdiction Court thus;

> ***"The Court of Appeal has jurisdiction to hear appeals from;***
>
> ***(a) the High Court; and***
>
> ***(b) any other court or tribunal as prescribed by an Act of Parliament."***

***Section 3*** of the ***Appellate Jurisdiction Act*** which confers jurisdiction on this Court specifies that;

> ***"i. The Court shall have jurisdiction to hear and determine appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament in cases in which an appeal lies in the Court of Appeal under law; (emphasis ours).***
>
> ***ii. For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.***
>
> ***iii. In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court."***

As concerns re-opening or reviewing decisions, ***rule 35 (1)*** of the ***Court of Appeal rules*** provides that;

> ***"A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or the application of any interested person so as to give effect to what the intention of the Court was when judgment was given."***

While ***rule 57 (1)*** specifies thus;

> ***"An order made on an application heard by a single judge may be varied or rescinded by that judge or in the absence of that judge by any other judge or by the Court on the application of any person affected thereby, if –***
>
> ***a. the order was one extending the time for doing any act, otherwise than to a specific date; or***
>
> ***b. the order was one permitting the doing of some act, without specifying the date by which the act was to be done, and the person on whose application the order was made has failed to show reasonable diligence in the matter."***

It is discernable from the above provisions that this Court's jurisdiction is limited to hearing and determining appeals, and in the case of reviews of this Court's orders or appeals, these can only be undertaken in certain specific circumstances—under ***rule 35***, commonly referred to as the *'Slip Rule'* where clerical or arithmetical errors have arisen, or under ***rule 51*** for the purposes of extending time in applications heard by single judges to do a particular act or for dealing with a situation where a particular act requires to be done and no time frame was specified.

More recently, in the case of ***Manchester Outfitters (Suiting Division) Limited (Now known as King Woollen Mills Limited & 2 others vs Standard Chartered Financial Services Limited & 2 others, Supreme Petition No. 6 of 2015,*** the Supreme Court applied the principles set out in ***Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai Estate & 4 others, SC Petition No. 4 of 2012; [2013] eKLR*** and ***Fredrick Otieno Outa vs Jared Odoyo Okello & 3 others [2017] eKLR*** expanded the parameters of review of this Court to include those circumstances that would meet the ends of justice. In identifying applicable instances, the court cited circumstances set out in the case of ***Jasbir Singh Rai & 3 others (supra)*** which are;

> ***"(a) where there are conflicting past decisions of the Court, it may opt to sustain and to apply one of them;***
>
> **(b)*the Court may disregard a previous decision if it is shown that such decision was given*** *per incuriam****;***
>
> ***(c)a previous decision will not be disregarded merely because some, or all of the members of the Bench that decided it might now arrive at a different conclusion; and***
>
> ***(d)the Court will not depart from its earlier decision on grounds of mere doubts as to its correctness."***

As well as in the case of ***Fredrick Otieno Outa (supra)*** such as where the judgment, ruling, or order, is obtained, by fraud or deceit, or the judgment, ruling, or order, is a nullity, such as, when the Court is itself incompetent or was misled into handing down a judgment, ruling or order under a mistaken belief that the parties had consented thereto or the judgment or ruling was rendered on the basis of a repealed law, or as a result of a deliberately concealed statutory provision.

In this case, the applicant has sought a review of this Court's decision for the reason that it reached the conclusion that no agreement existed between the parties in error, particularly since the Tender offer from the applicant was accepted by the respondent hence creating a valid contract, so that a prima facie case was not established, to warrant the granting of an injunction.

But when the situations that warrant a review of the impugned decision, and within which a party must bring themselves are considered, we are not satisfied that the reasons set out herein meet the requirements stipulated above. The applicant's claim is that the acceptance of the Tender created a valid contract. The respondent on the other hand denies the existence of a contract as the Tender document specified that the bid was subject to a valid contract coming into existence. These are matters that are yet to be determined by the trial court. They are not complaints concerned with clerical or arithmetical errors as defined by ***rule 35***, or with unspecified timeframes as required by ***rule 51.*** Neither was the judgment borne out of fraud nor deceit, nor the Court's incompetence nor a mistaken belief that the parties had reached a consent. Nor are they based on a repealed law, nor a deliberate concealment of a statutory provision. That being the case, we have no basis or mandate on which to entertain this application for review.

As such, the motion for review dated 24th July 2017 is dismissed with costs to the respondent.

***It is so ordered***

***Dated and delivered at Nairobi this 6th day of March, 2020.***

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

**.....**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**