IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & GATEMBU, JJ.A)

CIVIL APPEAL NO. 301 OF 2010

BETWEEN

ADOPT A LIGHT LIMITED.....APPELLANT

AND

CITY COUNCIL OF NAIROBI.....RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (Koome, J) dated 21st May, 2010

in

H. C. C. C. No. 637 of 2006)

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JUDGMENT OF THE COURT

Adopt A Light Limited (the company), which is the appellant before us, is a pioneer of sorts. Under the tutelage of its founder and indefatigable Chief Executive, Ms. Esther Muthoni Passaris, it established and cut out an enviable niche for itself in the business of commercial advertising on street light posts. In the year 2002 it proposed to the City Council of Nairobi **(NCC)**, which agreed to allow the company to adopt street lights on various streets of the city which it would maintain, and in turn be allowed to lease out advertising space to any willing party. The agreement was dated 28th March, 2002. A subsequent variation of the agreement was for the company to instal street lighting on other streets where none existed and use the lighting posts for commercial advertising. The business thrived, and so did the envy of other persons who found out that it was lucrative.

Four years down the line, in the year 2006, the company was shocked when the NCC attempted to terminate or otherwise interfere with the agreement for reasons the company found wanting. Other players in the business also joined in but the company engaged them all in several court cases. Some were lost and some were won.

As relevant to this appeal, the company referred the main dispute to arbitration which the agreement provided for. Pending the commencement of the arbitration process, the company invoked ***section 7*** of the **Arbitration Act, 1995** and ***Order 39 rule 1*** and ***2*** of the **Civil Procedure Rules (CPR)**, seeking interim injunctive relief through a chamber summons dated 21st November, 2006. We are unable to find the chamber summons in the record of appeal as only the affidavit in support thereof is exhibited. From the extracted order, however, the prayers made in the chamber summons were these:

> *"2.* ***An order that the defendant do forthwith return all the advertising media taken down the permitted streets.***
>
> ***3. An injunction restraining the defendant through its servants or agents from removing any advertising media, including inter alia bill boards and advertising frames, placed by the plaintiff within the streets of the City of Nairobi.***
>
> ***4. An injunction restraining the defendant, either through its servants or agents from removing any advertising media, including inter alia bill boards and advertising frames that have been or will be re-installed onto the permitted streets as a result of their***

unlawful removal by the defendant".

We shall henceforth refer to it as "Waweru, J. order".

On 27th November, 2006, **Waweru, J.** gave interim orders after adjourning the application for hearing *inter partes*, on the following terms:

> ***"That an interim injunction be and is hereby granted restraining the defendant through its servants or agents from removing any advertising media, inter alia bill-boards and advertising frames, placed by the plaintiff within the streets of the City of Nairobi until the inter partes hearing of the application. Provided that this injunction does not authorise the plaintiff to re-erect the bill-boards that may have already been pulled down by the defendant.***
>
> ***That there be liberty to the parties to apply.***
>
> ***That the Chamber Summons application dated 27th November 2006, be and is hereby certified as urgent and is hereby fixed for hearing on 30th November 2006".***

The Order was extracted and issued on 8th December, 2006, but there was a dispute as to whether it was served on NCC.

The company then took out another chamber summons on 21st February, 2007 complaining about breach of the **Waweru, J. order** and sought to cite the NCC for contempt. It asserted that NCC had gone ahead and removed several advertising frames and bill boards from street lights on Nyerere Road and Arboretum Drive despite the interim order. Once again, that chamber summons is not in the record of appeal and does not appear to have been pursued to conclusion. Two other applications for mandatory injunctions dated 31st March, 2007 and 31st May, 2007 respectively, were instead filed by the company, while NCC filed its own application dated 4th July, 2007 seeking to have the Waweru, J. order set aside or varied. There were several other skirmishes between the parties through other applications, preliminary objections, and two amendments to the plaint, before all the four pending applications fell before Azangalala, J. for hearing and determination in September 2007. In a Ruling delivered on 26th November, 2007**,** which is not on record, the following orders were made

(Azangalala, J. orders):

> ***"1. THAT an injunction be and is hereby issued in terms of prayer 3 of the application dated 21st November 2006 and the defendant, its servant and/or agents are restrained from removing any advertising media, including inter alia, Billboards and advertising frames placed by the plaintiff within the streets of the City of Nairobi Pending arbitration.***
>
> ***2. THAT the plaintiff is hereby allowed to return, replace and/or restore all the advertising media taken down by the defendant from Nyerere Road and Arboretum Drive in the City of Nairobi without prejudice to any of its rights to claim compensation or any other rights it may have against the respondent with regard to the foregoing on condition that the plaintiff files by 1.00 pm on 30th November 2007 an appropriate undertaking under its seal as to damages.***
>
> ***3. THAT application dated 31st May 2007 be and is hereby dismissed.***
>
> ***4. THAT defendant's application dated 4th July 2007 be also dismissed.***
>
> ***5. THAT costs shall be in the arbitration".***

No appeal was filed to challenge the Azangalala, J. orders.

Two years later, on 17th July, 2009, the company filed two applications simultaneously: firstly, a notice of motion invoking ***sections 3*** and ***63*** of the **Civil Procedure Act (CPA)** and ***Orders XXI Rule 28 (5)*** of the **CPR,** seeking to enforce the Azangalala, J. orders; and secondly, a chamber summons invoking ***section 63*** of the CPA and ***Order 39 Rule 2A*** of the CPR, seeking to cite some officers of NCC for contempt. Leave to commence contempt proceedings was issued *ex parte* by Lesiit, J**.** on 20th July, 2009, while an order was made for service and hearing of the motion *inter partes* **(Lesiit, J. orders)**.

The *inter partes* hearing of the motion fell before Kimaru, J. on 29th July, 2009 and a ruling was delivered thereon on 27th October, 2009, dismissing the motion **(Kimaru, J. ruling).** The company was aggrieved by that ruling and sought to have it reviewed by the same Judge who disqualified himself, and so, the application for review went before Koome, J. (as she then was) for hearing. The basic complaint by the company was that Kimaru, J. had dealt with and decided the chamber summons, which was already spent, instead of considering and deciding on the motion. In its view, that was an error apparent on the face of the record, warranting an order for rehearing of the motion.

In a ruling delivered on 21st May, 2010 **(Koome, J. ruling),** the learned Judge found no reason to review the Kimaru, J. ruling and dismissed the application. It is that dismissal which provoked the appeal before us.

In its memorandum of appeal, written submissions and oral highlights of counsel, the company challenges the exercise of discretion by Koome, J. asserting that the learned Judge ignored a glaring apparent error on the face of the record and therefore wrongly exercised her

discretion, thus inviting our intervention. The alleged error is captured in one paragraph of the Kimaru, J. ruling where the learned Judge stated:-

> ***"The issue for determination by this court is whether the plaintiff established a case, firstly for the citing of the principal officers of defendant for being in contempt of the orders of the court and secondly whether the plaintiff established a just case for intervention by the court. Before giving reasons for this court's ruling, I would like to point out the strange procedure that the plaintiff adopted in prosecuting the present application. As stated earlier in this ruling, the plaintiff was granted leave to cite the principal officers of the defendant named in the application for leave for being in contempt of the orders of the court. However, when the plaintiff filed the substantive motion, instead of proceeding with the application for which leave was granted by the court, the plaintiff changed tact and sought the enforcement of the order of this court purportedly under the provision of Order XX1 Rule 28 (5) of the Civil Procedure Rules.."***

Learned counsel for the company, **Mr. Mansur Issa** referred to the provisions of ***section 80*** of CPA and Order ***XLIV Rule 1*** on which the application for review was anchored. He also cited several authorities, among them ***Pancras T. Swai vs Kenya Breweries Limited [2014] eKLR*** for the proposition that *'the discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law'.* The case of ***National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR*** was also cited in which this Court stated 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 the 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."***

Turning to the Koome, J. ruling, counsel criticized the learned Judge for failing to notice that Kimaru, J. had expressly stated that he was determining the application for contempt, but instead mischaracterised the decision made by the learned Judge. According to counsel, it was not inconsequential, as found by Koome, J., that Kimaru, J. made a mistake or error in deciding the wrong application. It meant that the motion filed and urged on behalf of the company was never decided on merits, which would amount to a miscarriage of justice, he concluded.

On the other hand, learned counsel for NCC, **Mr. D. G. Gacha**, submitted both in writing and orally, that Koome, J. made no error in dismissing the application for review. That is because the learned Judge analyzed the Kimaru, J. ruling and confirmed that the learned judge was aware that the application urged before him was the motion for enforcement of earlier orders and even reproduced the provisions of the law on which it was based. According to counsel, the reference made by Kimaru, J. to the contempt application was to emphasize his view that the failure to file the motion for contempt after grant of leave, and instead filing a motion for enforcement, was a procedural misadventure.

According to counsel, Kimaru, J. determined the motion for enforcement when he finally held:

> ***"This court cannot enforce a particular order of this court when it is apparent that other courts have issued orders whose effect is the contradiction of the particular order that is sought to be enforced. Further, the plaintiff failed to establish to the required standard of the law that the principal officers of the defendant have breached the said order of the court and therefore liable to be punished for being in contempt of the orders of the court. This court is not oblivious of the fact that if the order sought by the plaintiff in this application is granted, the court would in effect be infringing on the defendant's statutory mandate. This court will in the circumstances be seen to be usurping the powers granted to the defendant to regulate the physical planning of the city under the Physical Planning Act if it allows the application sought by the plaintiff."***

Koome, J. properly appreciated that the ruling amounted to a merit decision of the motion which could only attract an appeal and not review, and so, in counsel's view, there was no error in principle.

We have considered the matter fully. The only issue before us, as correctly surmised by learned counsel for the appellant, is whether Koome, J. misdirected herself in the exercise of her discretion to review the Kimaru, J. ruling. Interfering with judicial discretion is not akin to a 'walk in the park'. So long as the discretion is exercised in a judicious manner and upon reason, it cannot be interfered with simply on the ground that if the appellate court was sitting at first instance, it might have given different weight to that given by the trial judge to the various factors in the case. The court will only interfere if *"..the judge misdirected himself in law; misapprehended the facts; took account of considerations of which he should not have taken into account; failed to take account of considerations of which he should have taken into account, or that his decision, albeit a discretionary one, is plainly wrong"* -- to paraphrase Madan, JA (as he then was) in ***United India Insurance Co. Ltd & 2 Others vs East African Underwriters (Kenya) Ltd [1985] eKLR***. Did Koome, J. misdirect herself as urged by the appellant?

Koome, J. was alive to the principles applicable in applications for review and indeed reproduced the relevant statutory provisions. She appreciated, and properly so, that it was upon the applicant to *'show that there was a mistake or error apparent on the face of the record'* and that '*the error must be manifest and does not require any examination in order for this court to review it'.* The learned Judge then analyzed

the Kimaru, J. ruling before coming to the conclusion that:

> ***"The judge appreciated the history of the matter and analyzed the application that was before him which was brought under several sections of the law to wit; section 3 and 63 of the Civil Procedure Act and order 21 rule 8 (5) and 50 of the Civil Procedure Rules. He even recited the order that the applicant sought and quoted verbatim the provisions of orders 21 rule 28(5). The judge went further to question why the plaintiff despite having been given leave to institute contempt proceedings failed to pursue that matter which the Judge found was a procedural misadventure (to use his exact wording). That notwithstanding he analyzed the merits of the application in particular on page 7..... As far as the application seeking to enforce the mandatory order of injunction through the appointment of a court bailiff or an auctioneer is concerned, I find a Judge of coordinate jurisdiction determined the matter. If the court made a mistake in the appreciation of the material that was presented before the court based on both law and facts and arrived at an erroneous decision that is not a subject matter of review but an appeal. This court cannot sit on its own judgment to correct its errors."***

On our own evaluation of the record, we find that there was a proper and reasonable basis upon which Koome, J. could come to the conclusion that Kimaru, J. considered the motion for enforcement on its merits. Whether that consideration was accurate or not is not the issue. Errors of fact and law made in considering any court matter are amenable to appeal. That is what this Court said in the ***National Bank of Kenya Limited case (supra).*** There can be no doubt that in the opening paragraph of his ruling which is reproduced above, Kimaru, J. appears to conflate the two applications which were filed simultaneously. He seems to have been of the view that the grant of leave to pursue the contempt matter was ignored. But the learned judge quickly turned his focus to the motion which he henceforth considered on merits. After referring to the two applications, he stated:

> ***"No matter. Notwithstanding the procedural misadventure by the plaintiff, the court will render its decision on the merits of the application."***

And he proceeded to analyze and consider the motion for enforcement. As correctly observed by Koome, J. the reference to the application for contempt was nothing more than *obiter* since no motion had been filed after grant of leave and none was before Kimaru, J. for consideration.

For the above reasons, we hold that this appeal has no merits and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 24th day of May, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR