



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, SICHALE & KANTAL, J.J.A.)

CIVIL APPEAL 379 OF 2017

BETWEEN

SANITAM SERVICES (E.A.) LIMITED.....APPELLANT

AND

RENTOKIL (K) LIMITED.....1ST RESPONDENT

KENTAINERS (K) LIMITED.....2ND RESPONDENT

(Being an Appeal against the Orders of the Commercial & Admiralty Court at Nairobi (Ochieng, J.) dated 3rd October, 2017 in H. C. C. C. No. 58 of 1999)

JUDGMENT OF THE COURT

The dispute that was at the High Court of Kenya at Nairobi involved the appellant, **Sanitam Services (EA) (Limited)** and the two respondents, **Rentokil (K) (Limited)** (the 1st respondent) and the second respondent, **Kentainers (K) (Limited)**. That dispute escalated to this Court and by an order recorded and made on 28th July, 2006, it was ordered that:

“1. This appeal be and is hereby dismissed SAVE

2. An injunction be and is hereby granted to last the life of the patent with effect from 16th December 1999 in terms of prayer (i), (ii), (iii), (iv) and (v) of the amended plaint set out as hereunder.

(i) Permanent injunction to restrain the defendant from manufacturing and or using the foot operated sanitary bin and or holding out to consumers the use of the bin.

(ii) Trading in Kenya in any manner likely to cause the business of the defendants to be confused with the business of the plaintiffs.

(iii) Trading in any manner which does not sufficiently differentiate or distinguish the defendants business from that of the plaintiffs.

(iv) Using the Patent registered under Certificate No. AP773 hereof or any other calculated to confuse the goods sold by the defendants as being goods manufactured or provided by and on behalf of the plaintiffs or otherwise infringing any of the plaintiffs registered patent.

v) Otherwise passing off the business of the defendant as or the plaintiffs business.

3. Each party bears its own costs of this appeal and in the court below”.

There were various applications which followed the making of those orders but it is not necessary to go into them for purposes of this appeal.

What is material for purposes of the appeal before us is a Notice of Motion filed in Court on 24th February 2016 by the appellant where it

was prayed that the Court be pleased to make orders for the 1st respondent to be held in contempt of the court orders made by this court on 28th July 2006 which we have set out above and that the court be pleased to hold the 1st respondent's directors Patrick Nyaga and Simon Mwago in contempt of the said orders; that the bins in possession and or control of the 1st respondent be destroyed and that costs be provided for. In grounds in support of the motion it was stated among other things that this Court had issued a permanent injunction on 28th July, 2006 restraining the 1st respondent from manufacturing or using foot operated sanitary bins registered under Patent No. AP773 or holding out to consumers the use of such bins. Further that the 1st respondent had deliberately disobeyed the said court orders by continuing to supply the said foot sanitary bins despite having knowledge of the existence of the permanent injunction that had been issued; that it was the second instance that the 1st respondent, its directors and senior management had defied the court orders in disregard of the rule of law; that it was wrong and unlawful for the 1st respondent to continue breaching the appellant's rights to the patent and that it was in the interest of justice that the 1st respondent, its directors and senior management be held in contempt of court to uphold the cause of justice. The affidavit of S.M. Kamau Nganga, a director of the appellant detailed the history of the matter and enumerated how the orders of injunction issued by this Court had been breached in contempt of court.

The application was heard and considered by **Ochieng J.**, who in a ruling delivered on 18th May 2017 made substantive findings which can be summarized as follows:

The Judge was in the first instance unable to find conclusively that the directors of the 1st respondent had been personally served with the court orders. The Judge however found that there was no doubt at all that the two named directors of the 1st respondent were aware of the orders of the Court finding that the directors had participated fully in the court proceedings and were fully aware of everything that had transpired. The Judge further found that in modern jurisprudence as opposed to the earlier position in law, a person could be punished for contempt of court if it was shown that that person was aware of the orders issued by a court without need of proving that a court order had been served. At paragraphs 18,19 & 21 of the ruling, the learned Judge found:

“18. First, I emphasize that the orders by the Court of Appeal were not limited to barring the defendants from manufacturing the foot operated sanitary bins.

19. Therefore, the fact that the 1st defendant was now importing bins, cannot exonerate them, if such bins were foot-operated or if such bins could be confused with the plaintiff's patented bins.

20.....

21. Accordingly, if the respondents were manufacturing or holding out foot-operated bins, which violated the plaintiff's patent, that would amount to contempt of court.”

The Judge further found that the respondents were obligated to ensure that their business did not pass off as that of the appellant and had a duty to ensure that their business was sufficiently differentiated or distinguished from the appellants' business. After further analysis of the material before him the Judge concluded the ruling by holding:-

“27. In the circumstances, the plaintiff is hereby authorized to enter onto the premises of the 1st respondent, and the premises of the clients of the 1st respondent, with a view to obtaining therefrom, the bins deemed to be violating the court orders.

28. In the first instance, the bins will not be destroyed. Instead, the bins will be gathered together, and the parties will thereafter have the opportunity of addressing the court, with a view to having the court make a determination on whether the bins so gathered, violated the court orders.

29. If any bins should be found to be violating the court orders, the same shall be destroyed.....”

This ruling was followed by a Notice of Motion filed on 6th June, 2017 on behalf of the 1st respondent. It was said to be brought under various provisions of the law and it was prayed in the main that there be stay of execution of the court orders delivered on 18th May, 2017 and all consequential orders pending hearing of the application; that the said orders be reviewed and reversed specifically paragraph 27 of the ruling which we have set out, and further, paragraph 28 of the said ruling in the sentence reading *“instead, the bins will be gathered together.....”*

In grounds in support of the motion and in a supporting affidavit of Simon Mwago, the Finance Director of the 1st respondent, it was stated amongst other things that the said ruling was delivered in the absence of the 1st respondent; that the said respondent was not served with a notice for the ruling; that the 1st respondent's reading of that ruling indicated that the reason for seizing its stock of bins was for sampling to determine whether they were in violation of court orders but that it was not meant to paralyze the operations of the 1st respondent; that enforcement of clause or paragraph 27 of that ruling would cause irreparable harm to the 1st respondent and its clients or customers; that it was unnecessary and excessive for the court to order seizure of the 1st respondents entire stock for purpose of sampling to determine whether they were in violation when the 1st respondent was ready and willing to cooperate with the court and provide necessary samples; and that the 1st respondent was to suffer irreparable loss and damage if the orders prayed were not granted.

That application was opposed by the appellant during a hearing before the same Judge who upon hearing the motion issued what is titled *“RULING NO. 2”*. The learned Judge considered the application for review and reversal of part of the orders he had made on 18th May, 2017 and weighing the case made before him by the 1st respondent and the appellant, he stated at paragraph 16 & 17 of this latter ruling:-

“16. Upon further reflection, I find that the complaint lodged by the applicant is reasonable. I so find because, whilst the plaintiff believes that it was removing bins which contravened its patent, the applicant was of a completely different

opinion.

17. Indeed, I do recall that it is the difference in the opinions of the parties which led the court to first consider it necessary to have the bins allegedly contravening the patent, gathered together.”

At paragraphs 25 to 30 of the ruling, this is what the learned Judge says:

“25. The court admits that it did not envisage the practical difficulties which would arise when the orders given were being given effect.

26. I now see that clients of the applicant could easily have their businesses interrupted, when the plaintiff was searching the clients’ premises, looking for the “offending bins”. That was totally unexpected and I must admit that I did not anticipate it.

27. If the plaintiff continued to execute the orders in their current form it is possible that persons who were not parties to this suit, could end up seriously prejudiced without being accorded a hearing.

28. Not only would such Third Parties be prejudiced, but the applicant would also be prejudiced if the court were to ultimately conclude that the applicant had not committed contempt of court.

29. I find these factors to constitute sufficient reason to warrant a review of the orders made on 18th May 2017.

30. Accordingly, the plaintiff shall still have authority to enter into the premises of the 1st defendant but shall not cart away any bins from such premises. Instead, the plaintiff may take an inventory of bins considered to be violating the rights vested in the plaintiff, by virtue of its patent. The plaintiff will also be entitled to obtain photographic or such other evidence which would thereafter be made available to the court.”

It was further ordered in lieu of the order for entry into the premises of the 1st respondent’s clients’ that the 1st respondent provide to the court and to the appellant an affidavit detailing the clients to whom it had sold to bins which the appellant considered to be contravening its patent. Further that for the avoidance of doubt the appellant would inform the 1st respondent about the bins it considered to be contravening its patent. There were other orders but we need not set them out for purposes of this judgment.

The holding and orders of the said Ruling No. 2 delivered on 3rd October, 2017 have not sat well with the appellant who filed this appeal which is premised on five (5) grounds set out in Memorandum of Appeal drawn by R. M. Mutiso & Co. Advocates for the appellant. It is said that the learned Judge erred in law in reviewing the orders of 18th May, 2017 when the 1st respondent had not established sufficient reasons for the court to do so. It is further urged that the Judge erred in law and fact by holding that difficulties in enforcing a court order were sufficient grounds for issuing orders in review. The Judge is also faulted for issuing what the appellant says are conflicting directions incapable of helping the court in determining whether the 1st respondent was in contempt of court. It is also said that the orders issued by the court were unhelpful to the appellant in enforcing a judgment in its favour and rendering the same a pyrrhic victory. Lastly that the orders granted subject of the appeal created a legal conundrum in that the alleged contemnor was being ordered to provide evidence that it was or was not in contempt of court.

When the appeal came up for hearing before us on 2nd October, 2018 learned counsel **Mr. R. Mutiso** appeared for the appellant while learned counsel **Mr. Jared Matuga** assisted by **Mr. Thomas Obel** appeared for the 1st respondent but there was no representation for the 2nd respondent and we were informed that the 2nd respondent had not participated in the matter before the High Court. That is why we allowed the appeal to proceed for hearing.

Both parties had filed written submissions and appeared before us for a highlight of the same.

In combining the 1st and 2nd grounds of appeal, Mr. Mutiso submitted that a court had jurisdiction to review its judgment or order but that the Judge in the subject matter of the appeal erred in granting orders when the applicant in the application before him had not brought itself within the purview of the order in the *Civil Procedure Rules* allowing for review. According to counsel, review should not be granted if grant of such orders would amount to a departure from the original orders. Counsel reminded us that the original application before the court was for parties to be found guilty of contempt of court for disobeying court orders and, according to him, the orders granted on the review application were not in accord with the original motion. Counsel faulted the learned Judge for making a finding that there would be difficulty in executing the orders made when there were no parties before the court to show or prove such difficulty. To conclude this cluster of grounds, it was counsel’s submission that the Judges findings that he, the Judge, had realized that he had made an error in the original ruling amounted to sitting on appeal against his own orders which the law did not allow him to do.

In the second cluster of grounds Mr. Mutiso faulted the learned Judge for imposing the duty to the 1st respondent to produce evidence before the court of what was being complained about. Counsel submitted that that was unfair to the appellant which had orders in its favour in a judgment of the High Court and the orders of this Court issued on 28th July, 2006.

Mr. Matuga did not agree. According to him the orders granted on 18th May, 2017 which gave the appellant the right to access all the 1st respondent’s premises interrupted operations of the 1st respondent and its clients. According to counsel, this was sufficient reason to allow for review under *Order 45 Civil Procedure Rules*. According to counsel, in the 2nd ruling, the learned Judge balanced the interests of parties’ inclusive rights of 3rd parties without affecting rights of the appellant. Learned counsel concluded his submissions by telling us that the Judge in issuing the orders in review exercised a discretion and that we should not interfere with such exercise of discretion.

In a brief reply Mr. Mutiso submitted that the learned Judge in the 2nd Ruling had changed the character of the original orders as the appellant was now only allowed to enter the 1st respondent's premises but not the premises of its clients which it had been allowed to enter in the original orders.

Jurisdiction to review a judgment or order of a court is donated by **Section 80** of the **Civil Procedure Act** and **Order 45 Civil Procedure Rules**. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is allowed and who from the 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 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 – a person who fits within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay.

It is the appellant's case before us in this appeal that the learned Judge of the High Court exercised his discretion wrongly in the said ruling which appeared to alter the orders given in the ruling of 18th May, 2017.

We have set out at the onset of this judgment the orders that were granted by this Court on 28th July, 2006. The respondents were by those orders restrained from manufacturing or using foot operated sanitary bins and or holding out to consumers the use of such bins. They were also restrained from trading in Kenya in any manner likely to cause their business to be confused with the business of the appellant. They were also ordered not to trade in any manner that would not sufficiently differentiate or distinguish their business from that of the appellant amongst other orders.

When the appellant made its case for contempt of court before the learned Judge, the Judge found that the 1st respondent and its directors and senior management were all along aware of the orders of the court as we have shown in this judgment. The Judge was of the view that a contempt of the orders of the court could have occurred and, in the premises, as we have set out in this judgment, he allowed the appellants to enter onto the premises of the 1st respondent and those of the 1st respondent's clients with a view to obtaining therefrom bins deemed to be violating the said court orders. The Judge was then moved as we have shown through a motion which sought to review the said ruling specifically paragraphs 27 & 28 of the same and that the Judge should alter those paragraphs as desired by the 1st respondent. In the 2nd Ruling delivered on 3rd October, 2017 the learned Judge altered the original orders stating amongst other things that upon reflection he had discovered that there may be difficulties arising from giving effect to the orders issued on 18th May, 2017. The appellant in the 2nd Ruling was still allowed to enter the 1st respondent's premises but it would now not carry away bins from those premises. It would instead take an inventory of bins and may take photographic evidence of the same.

In the case of ***National Bank of Kenya Limited v Ndungu Njau [1997] eKLR*** quoted by the learned Judge in ruling No. 2, this court held:

“In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a concise decision in the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree that the learned Judge would be sitting on appeal on his own judgment. An issue which has been hotly contested, as in this case, cannot be reviewed by the same court which had adjudicated upon it”.

Mr. Mutiso learned counsel for the appellant laid emphasis on the “slip rule” as discussed by the Supreme Court in the case ***Fredrick Otieno Outa vs. Jared Odoyo Okello & 3 Others [2017] eKLR*** where it was held *inter alia* that the slip rule does not confer upon a court any jurisdiction to sit on appeal over its own judgment or to extensively review such judgment as to substantially alter it. It was further held in that case in respect of **Section 21 (4)** of the **Supreme Court Act** that corrections made become part of the judgment or order as initially rendered and that the purpose of the said section was to steer a judgment, decision or order of the Supreme Court towards logical or clerical perfection.

The orders that were made on 18th May, 2017 were clear. The appellant was authorized to enter the premises of the 1st respondent and the premises of the 1st respondent's clients with a view to obtaining therefrom bins deemed to be violating orders that had earlier been issued by this court. The learned Judge after being addressed on the 2nd application found amongst other things that there were difficulties into giving effect to the orders that had earlier been issued. The Judge found that, upon reflection, he had found that the 1st respondent's business and that of its clients could be interrupted by the orders that had been issued. The said **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Rules** made thereunder allow a court to review a judgment or order in circumstances that we have enumerated in this judgment. The purpose and purport of the said provisions of law is not to change or alter the judgment of the court as originally decreed. A party must satisfy the court that there is discovery of new and important matter which that party, on exercise of due diligence was not within his knowledge or that there is a mistake or error apparent on the face of the record or for such other sufficient reason that would satisfy the court to review the judgment or order and the application must be made without unreasonable delay.

As we have stated, the Supreme Court while considering a slip rule under a provision of the **Supreme Court Act** found that the slip rule did not confer upon any court jurisdiction or powers to sit on appeal over its own judgment or to extensively review such judgment as to substantially alter it. The **Court of Appeal Rules**, particularly **Rule 35** thereof allows for correction of errors in the same manner and in a similar situation as the said provision of the **Supreme Court Act**. The slip rule does not allow or permit a court to give an order which alters the judgment or orders made earlier. It is for purposes of correcting clerical errors and giving effect to the judgment of the court. The total effect of the 2nd Ruling was to take away rights that had been granted to the appellant in the Ruling delivered on 28th May, 2017. The learned Judge had no jurisdiction or power in the application for review to give orders that substantially altered the said orders. The effect of Ruling No. 2 was that the learned Judge sat on appeal against his earlier orders, something that the law did not allow him to do.

We have not seen the material that was placed before the learned Judge on which he could exercise his discretion in an application for review as was before him.

This appeal has merit and the complaints by the appellant are valid. The learned Judge sat on appeal against the orders he had earlier made

and this was an erroneous exercise of discretion or power which we should correct. In the event, the appeal is allowed. The orders of the High Court made on 3rd October, 2017 are hereby set aside and the application for review dated 6th June, 2017 is hereby dismissed. The appellant will have the costs of this appeal and the costs below to be paid by the 1st respondent.

Dated and delivered at Nairobi this 23rd day of November 2018.

H. M. OKWENGU

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR