REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

HCC C NO. E119 OF 2018

ALPHA FINE FOODS LIMITED…….....PLAINTIFF

VERSUS

HORECA KENYA LIMITED…..…….....1st DEFENDANT

CHERRYPIK INVESTMENTS LIMITED……...2nd DEFENDANT

CHERRY DISTRIBUTORS KENYA LIMITED.....3rd DEFENDANT

ALEX KUTAI KHASAKALA……...……4th DEFENDANT

JULIUS KIBET BEIGON……...5th DEFENDANT

(COUNTER-CLAIM)

CHERRYPIK INVESTMENTS LIMITED……...1st PLAINTIFF

ALEX KUTAI KHASAKALA …….…….....2nd PLAINTIFF

JULIUS KIBET BEIGON ……..3rd PLAINTIFF

VERSUS

HORECA KENYA LIMITED……..……1st DEFENDANT

ALPHA FINE FOODS LIMITED.....2nd DEFENDANT

ALYKHAN KURII ……..…….2ndDEFENDANT

MINAZ KURJI …….……...4th DEFENDANT

RULING

1. On **24th** January 2020, Tuiyot J (as he then was) ordered *inter alia* that Cherrypik Investments Limited, the **2nd** defendant herein to furnish security for costs in the sum of **Kshs. 30,000,000/=** in favour of Alpha Fine Foods Limited, Alyhhan Kurji and Minaz Kurji, the **2nd, 3rd** and **4th** defendants respectively in the counter-claim. For the sake of clarity, it is important to mention that Alpha Fine Foods Limited is the Plaintiff in the main suit, while Cherrypik Investments Limited is the **2nd** defendant in the main suit and the **1st** Plaintiff in the counter-claim.

2. Vide a Notice of Motion dated **9th** March 2020 expressed under the provisions of Section **80** of the Civil Procedure Act, Order **45** Rules **1** & **2**, and Order **51** Rule **1** of the Civil Procedure Rules 2010, Cherrypik Investments Limited (hereinafter referred to as the applicant) prays that this court to sets aside, vacates, reviews or varies the Ruling/orders made on **24th** January 2020 directing it to furnish security of costs in the sum of **Kshs. 30,000,000/=** in favour of the **1st**, **2nd** and **3rd** Respondents and in substitution thereof, order that security for costs be provided in the form of the applicant's share in Horeca Kenya Limited.

3. The applicant also prays for an order that the Plaintiff in the original claim, (who is the **1st** Respondent in the counter-claim, furnishes security for costs to the applicant for an amount that this court deems fit in the circumstances. Further, the applicant prays that this court grants such other relief as it may deem expedient. Lastly, the applicant prays for costs of the application to be provided for. Prayers **(1)** & **(2)** of the application are spent.

4. The application is grounded on the grounds listed on the face of the application and the annexed supporting affidavits of Irungu Kangata, Advocate and Barbara Aromo annexed thereto. Essentially, the grounds are that there is discovery of new and important evidence which was not within the applicant's possession at the time of the hearing of the suit; that the **2nd** defendant has local assets within the Kenyan jurisdiction; namely, shares in the **1st** defendant and therefore a deposit for security of costs as ordered is unwarranted; that there are sufficient reasons for the court to set aside or review the said order; that there has been no unreasonable delay in filing the application; and that it is in the interest of justice and to uphold the constitutional guarantee of access to justice that the application be allowed.

5. The affidavit of Mr. Irungu Kangata was essentially in support of the prayer for recusal of the trial judge which prayer has since been dropped. In her Supporting affidavit, M/S Barbara Aromo, a director of the applicant deposed that the applicant injected **$1.5** million into Horeca Kenya Limited, (the **1st** defendant in the original claim), thus acquiring shareholding which shares remain local assets of the applicant. She exhibited a copy of the Board's Meeting dated **4th** June 2018 and averred that the said company is presently undergoing administration as a consequence of which the said minutes were in the hands of the administrator and inaccessible to the applicant, only being availed on **12th** December 2019 when this matter was already pending ruling.

6. She averred that the applicant's capital injection into Horeca Kenya Limited is expressly tabulated in its balance sheet and cash flow statements. She avers that the injection of the share capital is evidence of quantifiable assets of the applicant in the said company. She annexed a valuation report which she averred was part of the applicant's List of Documents dated **10th** December 2018. She averred that the court ought to have considered this information as evidence from the bar, available in the filed pleadings in its ruling. She deposed that there are sufficient reasons for the court to set aside or review the said orders.

The Respondent's Replying Affidavit

7. Mr. Alykhan Kurji, the **3rd** defendant and a director of the **2nd** defendant swore the Replying affidavit dated **20th** March 2020 in opposition to the application. The salient features of the affidavit are that the basis of the order for security was that the applicant is a foreign entity and it had no assets within the court's jurisdiction which could satisfy an award for costs; that applicant is aware that the liquidator of Horera Kenya Limited has already put-up the company's assets for sale and has already reported to the court that even after the sale, the creditors will not have their debts fully settled; that with the creditor's debts unresolved, the shareholder value in the company will be nothing; and, lastly, there is no value in the shares of a company that is insolvent.

The Applicant's further affidavit

8. Barbara Aromo, in her further affidavit essentially disputed the contents of the Replying affidavit and reiterating the contents of her earlier affidavit.

The applicant's advocates submissions

9. The applicant's counsel cited section **80** of the Civil Procedure Act[1] and Order **45** Rule **1** of the Civil Procedure Rules and submitted that the issue at hand is whether the applicant has met the threshold for review. He cited *D.J Lowe & Company Ltd v Banque Indo*suez[2] which held that *"where an application for review is based on discovery of fresh evidence, the court must exercise greatest care as it is easy for a party who has lost, to see weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."* He also cited *Rose Kaisa v Angelo Mpanju Kaiza*[3]which expressed the need for caution stating *"…Before a review is allowed on the ground of discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; …and if found that the Petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause…"*

10. Counsel argued that the applicant has local assets in the form of shares in the **1st** defendant, and, that the applicant injected **U.S. 1.5** million into the said company, which evidence was not within the reach of the applicant at the time of the ruling. He submitted that the said evidence was inaccessible because the company was under liquidation, so, the information was only available to the liquidators. He argued that the evidence was only available to the applicant in December 2019 when the ruling on security was pending, and that the said evidence could not be available even after exercise of due diligence. Additionally, counsel submitted that the application has been filed without delay,

11. He urged the court to order the Respondent to furnish security for the counter-claim and cited *Saudi Arabian Airlines Corporation v Sean Express Services Ltd*[4] which held that granting an order for security is a matter of courts discretion. He also cited *Gulf Engineering (East Africa) Ltd v Kalsi*[5] which held *inter alia* that if there is reason to believe that the company cannot pay costs, then security may be ordered, but not must be ordered. He submitted that the applicant has a *bona fide* counter claim which raises serious allegations of fraud, negligence and illegalities on the part of the **2nd** defendant.

The Respondent's advocates submissions

12. The Plaintiff/ Respondent's advocate submitted cited section 80 of the Civil Procedure Act[6] and Order 45 of the Civil Procedure Rules, 2010, and submitted that for an applicant to succeed in an application for review, he must satisfy that he has discovered new and important maters or evidence that the court did not have when making the decision; that there is a mistake or error apparent on the face of the record; or that there exists any other sufficient reason to review the decree or order. Counsel cited *R v Public Procurement Administrative Review Board & 2 others*[7]in which the court highlighted the grounds for review as set out in the above section and the rules. Counsel submitted that the applicant must demonstrate that he was not aware of the evidence, that they exercised due diligence and did not find the information and that the evidence is relevant and capable of altering the judgment.

13. Additionally, counsel cited *Pancras T. Swai v Kenya Breweries Limited*[8]in which the Court of Appeal held that the discovery of new and important matter or evidence or mistake or error apparent on the face or for any other sufficient reason relates to issues of facts which may emerge from evidence; and that the discovery does not relate pr refer to issues of law; and that the exercise of due diligence refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to. Counsel cited *Kipkorir v Langat & another (No 2),*[9]*Peter Waititu Njau v Biashara Sacco Society*[10]and *R v Public Procurement Administrative Review Board & 2 others* (supra) in support of the proposition that there is no justification why the applicant did not present the evidence at the time the application was heard and that an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence was not within his knowledge or could not be produced at the time when the order to be reviewed was made.

14. In addition, counsel argued that the applicant is already aware that the liquidator has already put-up assets of the company for sale and cited *Afapack Enterprises Limited v Punita Jayant*[11] in support of his proposition that the applicant failed to disclose material facts.

Determination

15. Whereas the High Court has power to review its own decisions, it must be emphasized that such power must be exercised within the framework of Section **80** of Civil Procedure Act[12] and Order **45** Rule **1**.[13] Section **80** of the Civil Procedure Act[14] provides: -

80. *Any person who considers himself aggrieved-*

(a) *by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

(b) *by a decree or order from which no appeal is allowed by this Act,*

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

16. Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides as follows: -

45 *Rule* ***1 (1)*** *Any person considering himself aggrieved-*

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby 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, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."

17. It cannot be denied that the review is the creation of the statute. The power of review is not an inherent power. It must be conferred by law or by necessary implication. An appraisal of the above provisions confirms that section **80** prescribes the power of review while Order **45** stipulates the rules. However, the rules limit the grounds for evaluating requests for review. Simply put, there are definite limits to the exercise of power of review. The rules prescribe the jurisdiction and scope of review. They limit review to the following grounds:

a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

b) On account of some mistake or error apparent on the face of the record, or

c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

18. The power of review can be exercised by the court in the event discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. As the Supreme Court of India[15] stated: -

"the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

19. The reason for the above limitation is that it is an indulgence given to a party to get the previous decision altered on the basis of discovery of important evidence which was not within his knowledge at the time of original hearing. So, in the fitness of things, a person, who relies on such circumstances to obtain a review, should affirmatively establish them. The latitude shown to a party by a court is conditional upon strict compliance with that requirement.

20. Ordinarily, the expression *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 order was made would refer only to a discovery made since the order sought to be reviewed was passed. An applicant alleging discovery of new and important evidence must demonstrate that he has discovered it since the passing of the order sought to be reviewed. In the instant application, the applicant claims to have injected capital to the tune of US **1.5** million prior to the granting of the order sought to be reviewed. He is now claiming that he was not aware of the said evidence at the time of passing the order yet he claims he is the one who injected the capital. He claims he did not have the minutes. However, he had the information, so, nothing prevented him from availing the information to the court by way of a sworn affidavit. To pass the test, it must be demonstrated that the applicant was prevented by circumstances beyond his control from tendering the evidence to the court at the time when the judgment sought to be reviewed was delivered against him. The instant application cannot pass this test. If the information was with the liquidator as alleged, nothing prevented the applicant from procuring such evidence either by way of witness summons or by a sworn affidavit. To satisfy the test under the rules, an applicant must demonstrate discovery of new evidence which he could not procure at the time the application was heard despite exercise of due care and diligence. Had the applicant exercised due care and diligence, certainly, he could have procured the evidence. The applicant has failed this crucial test.

21. In her affidavit, Babara Aromo averred that the court ought to have considered the information that the company has local assets, as evidence from the bar, available in the filed pleadings, in delivering its ruling. However, a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. It is important to distinguish grounds of appeal and grounds for review. As was held in *National Bank of Kenya Ltd vs Ndungu Njau*[16] :-

"In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue" In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."(Emphasis added).

22. As was observed in *Abasi Belinda v Fredrick Kangwamu and another*-[17] "a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal." A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.[18]

23. In *Evan Bwire v Andrew Nginda*[19] the court held that *'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.* In *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya*,[20] after analyzing decided cases on the subject, I discerned the following principles which are relevant in applications for review: -

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

24. Flowing from my analysis of the law and the conclusions arrived at, it is my finding that prayer for review is unmerited.

25. The applicant also prays that this court orders that that the Plaintiff in the original claim furnishes security for costs. For starters, an application for security for costs is an exception to the rule. In *Farrell v. Bank of Ireland*[21] Clarke J. explicated the law with remarkable precision. He said: -

"… the jurisprudence in relation to all of the areas where security for costs is considered … starts from a default position that, in the absence of some significant countervailing factor, the balance of justice will require that no security be given. The reasoning behind that view is that, if it were otherwise, all impecunious parties might, in substance, be shut out from bringing cases or pursuing appeals. Such a balance would be untenable and disproportionate. It is for that reason that there must be some additional factor at play before an order for security for costs can be made."

26. In exercising its discretion to order provision of security for costs, a court will consider the circumstances of each case and in particular whether it is fair and equitable, to both the parties, to require the furnishing of security.[22] When considering the circumstances of each case the court will take into account the financial status of the litigant and whether an order for security for costs may effectively preclude a Plaintiff from proceeding with his case.[23] The courts will also guard against placing unreasonable barriers in the way of either litigant to the extent that justice may be denied.[24] The court must bear in mind the following :-

*a. Article **159** of the Constitution vests judicial authority in the judiciary and prescribes the manner in which it should be exercised.*

b. The Constitution vests the courts with the inherent power to regulate their own proceedings and such discretion should be exercised in order to give effect to fairness and the interests of justice.

c. Courts should not adopt a position that forms part of our law, if it would infringe on the Constitution or constitutionally guaranteed rights.

*d. Section **7 (1)** of the Sixth Schedule to the Constitution provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.*

e. Courts are required to balance the interests of a plaintiff who is prevented from pursuing a litigant by virtue of an order for security for costs against the injustice that will befall a defendant who is unable to recover costs.

f. When developing the common law, courts must promote the spirit, purport and objects of the Bill of Rights in terms of Article 259 of the Constitution.

*g. Article **50(1)** of the Constitution provides that "every person has the right to have any dispute resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body."*

27. In an order for security for costs, the onus lies on the party seeking security for costs to go beyond merely showing that the Plaintiff is unable meet an adverse costs order. The applicant must satisfy the court that the main action is vexatious, reckless or otherwise amounts to an abuse. An action will be vexatious if it is obviously unsustainable. There was no argument before me to suggest that the Plaintiffs case is vexatious, reckless or otherwise amounts to an abuse.

28. The order sought is discretionary in nature. The court should have due regard to the particular circumstances of the case and considerations of equity and fairness to both parties. There must be some special fact, inherent to the action itself, which will persuade a court to exercise its discretion in favour of the applicant. The court should exercise its discretion in favour of granting the order only sparingly and in exceptional circumstances. The courts' discretion must be exercised in a manner which is not discriminatory. The discretion should be exercised in a manner reflecting its rationale, not so as to put a litigant at a disadvantage compared with the defendant.

29. The onus lies on the person alleging to persuade the court that it would be impossible to recover the debt in the event of the Plaintiff losing the case. No such argument was presented before me. In fact, the grounds cited in favour of this prayer are so thin that it can safely be said that no grounds have been cited to support such a drastic prayer. An applicant should furnish evidence to support its claim that the plaintiff is financially unstable so as to justify its claim that it will experience difficulties in recovering costs from the plaintiff should it be successful in the suit.

30. If the discretion to order security is to be exercised it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular Plaintiff. Impecuniosity of an individual within the jurisdiction is not the sole basis for seeking security. Other considerations include substantial obstacles to enforcing the judgment. In so far as impecuniosity may have a continuing relevance it is not the only ground showing that the Plaintiff lacks apparent means to satisfy any judgment but on the ground that the effect of the impecuniosity would be either (i) to preclude or hinder or add to the burden of enforcement against such assets as do exist or (ii) as a practical matter, to make it more likely that the Plaintiff would take advantage of any available opportunity to avoid or hinder such enforcement. If the discretion is to be exercised in favour of the applicant, there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).

31. Simply put, it is incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden meriting the protection of an order for security for costs. Even then it seems to me that the court should consider tailoring the order for security to the particular circumstances. If, for example, there is likely at the end of the day to be no obstacle to or difficulty about enforcement, but simply an extra burden in the form of costs (or an irrevocable contingency fee) or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden. Certainly, no evidence was presented before me to suggest that the defendants would, or even could, face any real obstacle or difficulty of legal principle in enforcing in the recovery for costs against the Plaintiff. No evidence was tendered to suggest that the Plaintiff is in the process of winding up or disposing its assets or concealing its assets. Flowing from the grounds discussed above, the prayer for security fails.

32. The upshot is that the applicant's application dated **9th** March 2020 is unmerited. The same is hereby dismissed with no orders as to costs.

Right of appeal

Orders accordingly.

Signed, dated and delivered via e-mail at **Nairobi** this **23rd** day of **August** 2021.

John M. Mativo

Judge

[1] Cap 21, Laws of Kenya.

[2] Civil Appeal No. Nairobi No. 217 of 1998, CA

[3] Mombasa Court of Appeal Civil Appeal No. 225 of 2008.

[4] {2014} e KLR.

[5] (1976- 80) 348

[6] Cap 21, Laws of Kenya.

[7] {2020} e KLR.

[8] {2014} e KLR.

[9] {2008} e KLR.

[10]{2018} e KLR.

[11]{2018} e KLR.

[12] Ibid

[13] See Sinha J in *Union of India vs B. Valluvan*, AIR 2007 SC 210; (2006) 8 SCC 686

[14] Supra.

[15] *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608.

[16]{1996} KLR 469 (CAK) at Page 381

[17] {1963}E.A 557, Bennet J also see *Chittaley &Rao in the Code of Civil Procedure*, 4th Edition, Vol 3, Page 3227.

[18] see This Court in *Thungabhadra Industries Ltd. v. Govt. of A.P*.1

[19] Civil Appeal No. 103 of 2000, Kisumu; {2000} LLR 8340.

[20] JR No. 317 2018.

[21] {2012} IESC 42, at para. 4.17.

[22] See *Magida v Minister of Police* 1987 (1) SA 1 (A) and *Blastrite (Pty) Ltd v Genpaco Ltd*; *In re: Genpaco Ltd v Blastrite (Pty) Ltd* (4530/15) [2015] ZAWCHC).

[23] See Vanda v Mbuqe & Mbuqe; Nomoyi v Mbuqe 1993 (4) SA 93 (TK)).

[24] See Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd, and Two Other Cases 2009 (5) SA 602 (C)).