REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2236 OF 1988

JARVIS NJOROGE & 104 OTHERS (suing in representative

capacity for Kariobangi South Civil Servants

Estate tenant Purchasers)…… PLAINTIFFS

VERSUS

SAVINGS & LOAN KENYA LTD & ANOTHER.....……DEFENDANTS

RULING

This is an application by M/s Savings and Loan Kenya Limited, the first defendant in this case (which for brevity will hereinafter be referred to as “the applicant”) for a review of this court’s order and of 22nd September, 1988, whereby an injunction was granted to restrain the applicant from disposing of plaintiffs’ houses situated at Kariobangi South Civil Servants Scheme until the final determination of this suit. The application which was by a motion on notice was brought under order 44 rule 1(a) of the Civil Procedure Rules and section 3A of the Civil Procedure Act on the ground that there is an error apparent on the face of the record. It was grounded on an affidavit of Mr G Oraro of 23rd September, 1988. Although the plaintiffs opposed the application they do not seem to have filed grounds of opposition as laid down under order 50 rule 16 of the Civil Procedure Rules nor was any replying affidavit tendered challenging the various points raised by the applicant.

The second defendant does not appear to have been affected or involved in these interlocutory proceedings and was therefore not represented at the hearing of this application.

On 9th June, 1988, the two plaintiffs as representatives of Kariobangi South Civil Servants Estate tenant – purchasers filed this suit in the court naming the two defendant companies as the defendants. At the same time the said plaintiffs filed an *ex-parte* chamber summons under order 39 rules 2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act.

The orders sought by the plaintiffs in this chamber application were as follows:-

(a) To dispense with service of the application upon the defendants due to reasons of urgency.

(b) That the first defendant be forthwith restrained by an injunction from realizing securities in respect of

all those houses situate at Kariobangi South Civil Servants Scheme whereby the plaintiffs are the tenant-purchasers until the final disposal of this suit.

(c) That an order of injunction do issue restraining the first defendant, their agents or representatives from disposing of or in any way alienating or giving any third party instructions to so dispose or alienate the houses belonging to the plaintiffs situate at Kariaobangi South Civil Servants Scheme until the final disposal of this suit.

(d) An order directing that any sale that has taken place in respect of houses within Kariobangi South Civil Servants Scheme was *mala fides* unscrupulous illegal and null and void and no transfer in connection therewith should be effected.

(e) That an order do issue directing that the letter from the Office of the President dated 25th February, 1988

(5) is to form the basis of a settlement between the parties to the suit and the concessions as contained therein should be followed.

This chamber application was supported by two affidavits of Jarvis Njoroge and C Ogutu Momyango the plaintiffs and annexed thereon were copies of several documents. The matter came before the judge on 10th June, 1988, and being an *ex parte* application the orders sought were granted and *inter parte* hearing of the same was fixed for 22nd June, 1988. The *inter parte* hearing of the application did not take place until 13th September, 1988. In the meantime the defendants were served with the application and the applicant having engaged its advocates on record filed grounds of opposition on 21st June, 1988, and a replying affidavit sworn by Mr L K Mutuku. Several copies of other documents were annexed to this replying affidavit. On 7th September, the plaintiffs filed a reply to the grounds of opposition together with a replying affidavit sworn by Jarvis Njoroge. An affidavit of Mr C Bakhoya, the advocate for the plaintiffs of 17th August, 1988, was also filed with the above documents. This prompted filing of a further affidavit by the applicant on 12th September, 1988.

When the hearing of the application commenced before Mbito, Ag J, a preliminary objection was taken by the applicant on the ground that the plaintiffs' authority to act for all 309 tenant-purchasers in the suit was in law defective. This matter was urged by the advocates for the parties and a ruling was given by the court, amending the proceedings to read 104 members instead of 309 members. After this ruling was made the hearing of the main application proceeded and a ruling on it was delivered on 22nd September, 1988. That order gave rise to the application before me in which the applicant is seeking that that order be reviewed and be set aside. As stated above the order complained of was made by Mbito, Ag J who heard the application and by the provision of order 44 rule 4 this application should have been taken to him but on 26th September, 1988, the Chief Justice directed that it be heard by me.

As stated above this application was brought by a notice of motion under order 44 rule 1(a) of the Civil Procedure Rules and section 3A of the Civil Procedure Act. During the hearing of the application no grounds based on the provision of section 3A of the Civil Procedure Act were advanced and canvassed and in this ruling I do not intend to refer to it anymore.

Order 44 rule 1(a) provides:-

"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) .....

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 a review of judgment to the court which passed the decree or made the order."

This rule merely lays down the conditions or circumstances under which a judgment decree or order can be reviewed by the court. Section 80 of the Civil Procedure Act by providing that –

"May apply for a review of judgment to the court which passed the decree or made the order and the court may make such order there on as it thinks fit." confers jurisdiction of reviewing orders to the court which passed them.

There appear to be very little case law in East Africa on the exercise of this discretion especially on its limitations and distinctions between it and appeal. Bennet, J in the Uganda case of *Balinda v Kangwamu and another* [1963] EA 557 at page 558 said –

"Order 42 rule 1 of Uganda Civil Procedure Rules is identical with order 47 rule 1 of the Indian Civil Procedure Rules (and identical with our order 44 rule 1). In IAR *Commentaries On The Code of Civil Procedure* by Chitaley and Rao (4th Edn) Vol 3 page 3227 the learned authors in explaining the distinction between a review and an appeal have this to say –

'A point which may be good ground of appeal may not be a ground for an application for review. Thus an erroneous view for evidence or law is no ground for a review though it may be a good ground for an appeal."

There is also a helpful passage in the 13th Edition of *Mulla on the Indian Code of Civil Procedure* where order 47 rule 1 on review is discussed and at page 1672 it states:-

"A mere error of law is not a ground for review under this rule. It must further be an error on the face of the record. The line of demarcation between an error simplicitar and an error apparent on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established."

Of course these authorities are not necessarily binding on me but they have a persuasive authority, especially as order 47 rule 1 of the Indian Civil Procedure is identical with our order 44 rule 1. I accept them as providing the necessary guiding principles on this subject. In the circumstances an application for a review should not be taken as a form of appeal. To warrant a review of an error alleged to be on the face of a record, such an error ought to be so clear as to be without any disputes. Where the very existence of an error on a record is contestable by parties, I think, such a matter is a ground which should be canvass on an appeal.

Applying the above test to the instant case it is clear that almost all the grounds advanced and canvassed before me by the applicant are not proper grounds for a review. Just as an example, it was urged before me that the learned judge failed to judicially determine the issue whether or not there was a representative suit. Another ground was that the learned judge proceeded on the wrong principles in

granting the orders of injunction. In urging on such grounds the applicant was inviting me to reconsider evidence on record, weigh it and come to my own conclusions. With respect I think this is not within my jurisdiction on this matter. As shown by the authorities quoted above the exercise of discretion on review is not as wide as claimed by the applicant.

In my view the only ground advanced by the applicant in this application which I consider to be properly before me for review is the claim that the orders of injunction as finally granted do not tally with the decision made by the court on 13th December, 1988. The applicant further pointed out that the orders of injunction granted are as prayed under prayers (b) and (c) of the chamber summons of 8th June, 1988. According to the applicant the orders applied to all 309 plaintiffs' houses whereas the court had reduced the number to 104.

The question that arises in such a situation is; what is meant by the word 'record'. Does it mean the judgment alone" In an English case of *R v Patents Appeal Tribunal* (1962) 2 QB 647 the same word was considered. The relief sought by the applicant in that case was an order of *certiorari* to quash certain record on the ground that there was an error apparent on the face of it. The court had to decide what was record and it held that a record includes documents which are the basis of the decision as well as the statement of the decision itself.

In the instant case the documents forming the basis for decision would in my view include the chamber summons of 8th June, 1988, the affidavits in support of it, the grounds of opposition, the replying affidavits, further affidavits, all the annexures to the affidavits, replying affidavits and further affidavits and the proceedings of the hearing of the application of 8th June, 1988. The statement of decision itself comprises the final decision and order of the ruling of 22nd September, 1988. The record in respect to this matter would include all the above enumerated documents and to be able to assess whether the applicant's claim that there is an error on it we have to scrutinize all of them.

To begin with it is noted that the learned judge in giving his ruling on the preliminary objection on 13th September, 1988, said on page 9 of the proceedings:-

"After considering the preliminary objection, I hold that only 104 persons have provided their authority to the applicants. The proceedings are therefore hereby amended to read 104 members instead of 309 members."

On 22nd September, 1988, the learned judge delivered his ruling on the main application of 8th June, 1988. No mention is made of the amendment quoted above but he said:-

"In the event I find that a case for injunction has been made by the plaintiffs. An order for injunction is hereby granted as prayed for in paragraphs (b) and (c) of the chamber summons dated 8th June 1988."

These prayers are quoted above in full. Both prayers do not indicate the number of the houses involved but they say the plaintiffs' houses situate in Kariobangi South Civil Servants Scheme. In paragraph 5 of the affidavit of Jarvis Njoroge of 8th June, 1988 it was stated that this scheme comprises 309 units. In circumstances the order of 22nd September, 1988, granted injunction affected 309 houses whereas the court had earlier on reduced the number to 104. This in my view is an error apparent on the face of the record. It cannot be disputed that the court had reduced the number of plaintiffs to 104 from 309. It is obvious and self-evident and I think the court has the necessary jurisdiction and duty to correct this error on a review. Accordingly I set aside the order of 22nd September, 1988, with costs to the applicant. Orders accordingly.

Dated and Delivered at Nairobi this 16th Day of November, 1988

B.K.TANUI

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JUDGE