

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
CIVIL APPLICATION NO 1 OF 2012

KOINANGE INVESTMENT & DEVELOPMENT LTD APPLICANT

VERSES

ROBERT NELSON NGETHE RESPONDENT

RULING

1. The applicant, **Koinange Investment Development Ltd**, moves the Court for orders that:-

“(i) This Honorable Court be pleased to review, discharge and set aside in their entirety the orders of the Ag Registrar Supreme Court issued on 11th October 2012 ordering the Applicant to comply with rules 30(2) of the Supreme Court Rules and seek leave from the Court of Appeal to lodge an appeal against the decision of the Court of Appeal of Kenya (Bosire, Karanja and Okwengu JJA) in its Civil Appeal NO. 108 of 2003, Koinange Investment Developers Limited v Robert Nelson Nge'the while she had no such powers.

(ii) That this Honorable Court be pleased to give directions to have the Applicant's Notice of Motion dated 19th April 2012 fixed for hearing.”

2. The genesis of this motion is the application dated 19th April, 2012, by which the applicant sought leave to lodge an appeal against the decision of the Court of Appeal in its Civil Appeal No. 108 of 2003.
3. On 3rd July 2012, the application was placed before two Judges of this court for directions and the following order was made:

“ORDER

- 1 This application shall be mentioned on 17-7-2012 for the purposes of fixing a hearing date.**
- 2 The respondent shall file and serve a replying affidavit within 10 days hereof.**
- 3 The parties herein shall also file skeleton written submissions within 10 days hereof.**
- 4 Leave is granted to the applicant to file a further affidavit to annex the missing proceedings from the High Court record.**
- 5. Costs in the application.**
- 6. The respondent undertakes not to execute the decree pending the hearing of the application.”**

4. However, on 11th October 2012, the Ag Registrar of the Court during the mention of the application, brought the attention of counsel to the court's decision in the **Sum Model Industries Ltd. Industrial and Commercial Development Corporation Ltd Supreme Court Civil Application No. 1 of 2011** the copies of which she supplied to counsel. It is on record that after a brief hearing during which there were arguments both in concurrence with and in disagreement with the **ratio decidendi** of the case, the Ag. Registrar held;

“In light of the provisions of rule 30(2) of the Supreme Court rules and the court's crystal clear directions in Sum Model Industries and Article 159 (2)(d) of the Constitution, the applicant is directed to seek leave from the Court of Appeal first”.

5. Mr. A.B Shah, the learned counsel for the applicant, avers that the Ag. Registrar exceeded her powers and usurped the jurisdiction of the full Court

and purported to give orders inconsistent with the directions given by the Court on 3rd July 2012. He contended that she had no powers to overrule the directions or orders of the Judges of the Supreme Court and that the said orders are unlawful and oppressive. He submitted that whether the applicant should seek leave from this Court or the Court of Appeal can only be decided upon by this Court and not by the Ag. Registrar.

6. Mr. Shah further submitted that this Court and the Court of Appeal have concurrent jurisdiction to hear this application and there is nothing to stop the applicant from coming to this Court if a substantial miscarriage of justice might have occurred or may occur unless the appeal is heard.
7. Mr. Murugara, learned counsel for the respondent, has countered these submissions by arguing that this Court has categorically held in the case of **Sum Model** that in view of the concurrent jurisdiction vested in the Court of Appeal and in this Court, such an application should first and foremost be made to the Court of Appeal. In any event, he argued, the matter in dispute relates to a private contract between the parties and there cannot be said to be any public interest in the matter. He saw no merit in the application and urged for its dismissal.
8. The orders made by this Court on 3rd July 2012 are very clear. No where is it stated that the Court shall hear the application. The orders so made are merely directory and could be enforced by the Ag. Registrar.

9. Even if the application were to be prosecuted before the full court, I have no doubt whatsoever in my mind that the same would have been dealt with in a similar manner as the Ag. Registrar disposed of it since this Court has firmly held in the **Sum Model** case, **Lawrence Nduttu and 6000 Others v Kenya Breweries Ltd and another; Supreme Court Petition No. 3 of 2012** and **S.K. Macharia and Others v Kenya Commercial Bank and 2 Others** that an application for leave, as a matter of good practice, should originate in the Court of Appeal, which would be better placed to certify whether a matter is of general public importance is involved; and if the applicant should be dissatisfied with its decision in that regard, would be at liberty to seek a review under **Article 163 (5) of the Constitution**.
10. Mr. Shah's submission is, however, correct largely in law. The Registrar cannot usurp the powers of the Court and cannot disregard express orders of the Court. In this instance, the Ag. Registrar, I would think, should not be villified or condemned for stating the obvious and the correct position in law.
11. In any case no injustice would be occasioned to the applicant if this court does not hear the application since the applicant has lodged another similar application before the Court of Appeal. That application is scheduled to be heard in February 2013 and it should be allowed to proceed.

12. This application fails and is accordingly dismissed. I make no order as to costs.

Dated and delivered at Nairobi this 30th day of January 2013.

P.K. TUNOI
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SUPREME COURT JUDGE

I certify that this is a
true copy of the original

REGISTRAR