THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCT-00-CC-MA-602/08
(ARISING FROM HCT-00-CC-MA-498-2008)
(ARISING FROM HCT-00-CC-CS-250-2008)

HAMZA MOTORS (U) LTD……APPLICANT

VS

DAMANICO LIMITED …….RESPONDENT

BEFORE: HONOURABLE JUSTICE MR. ANUP SINGH CHOUDRY

R U L I N G:

This is an application under Sec. 35 of the Judicature Act, Section 98 Civil Procedure Act and Order 46 Rule 1 (a) and (b), Rule 1 & 8 of Civil Procedure Rules by the Applicants Hamza Motors (U) Limited for review of the order made by this court on 21st October 2008 on the grounds that there was mistake apparent on the face of the record when the Judge relied on the rent figure of US$10,000 and that the Judge erred in finding that the Applicant ought to pay US$ 10,000 per month until they vacate the premises at the end of November 2008 and that this would amount to unjust enrichment.

The Respondents are the lessees of the premises known as LRV 2888 Folio 5 Plot 36 Mukabya Road Kampala and the Applicants are the Sub lessees operating a Car Bond. The Car bond license expires in December 2008.
At the hearing on 21st October this court made an order ex-parte that the applicants do pay the Respondent loss of rent of US$10,000 per month which the Respondents would have received if the Applicants had vacated the premises under the terms and conditions of the sub lease dated 18th September 2003.

The Court had before it the Affidavit of Jyoti Daman sworn on 13th October 2008 which stated in Paragraph 7 that on the 7th July 2008 the Respondents let the Sub-lease to one Tadashi (U) Ltd and the sub lease was to run from 1st October 2008. The Applicants were supposed to have vacated by 30th September 2008.

Mr. Sembatya learned Counsel for the Respondents submitted to the court (See transcript of hearing p.3 last paragraph) that they were claiming loss of earnings from the period 1st October when the Applicants were still in the premises.

The Agreement dated 7th July 2008 with Tadashi (U) Ltd stated that the tenancy would commence on 1st October (as reiterated by the learned Counsel) and the rent was payable 12 months in advance.

The Respondents confirmed that they were paid but the proposed sub -lessee – Tadashi (U) Ltd were seeking refund of the rent paid because under sub –lease they have not obtained control of the premises notwithstanding that they have nearly 100 vehicles on the premises occupying over half of the let area.

Mr. Bob Kasango learned Counsel for the Applicant submits that the ex-parte order should not have been made because it amounts to error on the face of the record and the Judge erred in awarding 10,000 US dollars being the rent payable. They Applicants submit that the Respondents were already in receipt of the rent, and payments of similar amount by the Applicants would amount to unjust enrichment.

The learned Counsel Mr. Kasango submits that the Respondent's failure to attend the hearing on 21st October was caused by confusion over the listing of 2 Applications that is application No. 499 and 498 at the same time one before the Judge and the other before the Registrar although the Application before the Judge had taken precedent. That was a bad point because the Respondent's Lawyers ought to have contacted the court and sought clarification as to the status of the two applications.

Mr. Sembatya submits that the Application under Order 46 Rule 1(a) and (b) is misconceived as there is no ground for review and the appeal should have been preferred. He submits that the Applicants have not shown any new or important matter or evidence which was not within their knowledge after due diligence when the order was made and no sufficient reason has been shown for the application. And they state that the Affidavit of Jyoti Damani formed part of the court record.

The issue before the court is whether the order made ex-parte gave sufficient reasons to apply for review if and whether the Applicants have under Rule 46 1 (a) & (b) shown any new matter or evidence after due diligence which was not within their knowledge when order was made or shown error on the face of the record.

In my judgment the making of ex-parte order was sufficient reason to apply for review where the confusion was caused by the listing of 2 applications, and if the party was aggrieved.

Jyoti Damani's Affidavit and Counsel's request for loss of earnings was clearly misleading the court into making the order which was made on 21st October 2008. There was error on the face of the court record.
The Respondents cannot seek to be paid twice as that would be making profit on rent and amounting to unjust enrichment. The rent by Tadashi is in consideration of the vehicles parked there and enjoying the bond operation license even if the premises are not under their control.

The Judge has therefore erred in finding that the Applicant ought to pay US $ 10,000 per month.

The Applicants have raised an important matter which was not before the court. And which came to their knowledge after due diligence on learning the contents of the order made ex-parte.

The learned Counsel for the Respondent cited 2 cases in support of his argument:

> ***Abias Balinda –vs- Frederich Kangwamu & Others*** *where a review was not allowed as it was a matter of review of costs and the case of* ***Tantitalia Ltd. –vs- Mawe Handels Austalt*** *where the case concerned a consent judgment and where the court exercised its discretion to award costs on higher scale.*

These cases can be distinguished from the case before the court where the court was misled and there was mistake apparent on the face of the record. The Application is granted with costs and the order of 21st October is amended to rescind the figure of US$ 10,000 and substituted by the current rent of US$ 2,300 plus VAT.

Anup Singh Choudry

Judge

27/11/2008