



REPUBLIC OF KENYA



KENYA LAW

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**Willesden Investments Limited v Kenya Hotel Properties Limited;
Development Bank of Kenya Limited (Objector) (Civil Case
367 of 2000) [2023] KEHC 21650 (KLR) (18 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21650 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 367 OF 2000
A MABEYA, J
AUGUST 18, 2023**

BETWEEN

WILLESDEN INVESTMENTS LIMITED PLAINTIFF

AND

KENYA HOTEL PROPERTIES LIMITED DEFENDANT

AND

DEVELOPMENT BANK OF KENYA LIMITED OBJECTOR

RULING

1. This is a ruling on the Motion on Notice dated May 24, 2021 by the decree holder. The same was brought under sections 3A and 80 of the [Civil Procedure Act](#) and Order 22 Rules 54 and 45 of the [Civil Procedure Rules](#).
2. The applicant sought the review and setting aside of the order of this Court made ex-parte on May 15, 2021. The grounds for the Motion were set out in its body and were to the effect that; the Court had no jurisdiction to grant the orders on May 15, 2023.
3. That the orders contradicted the express orders of this Court made on February 4, 2011 and it was akin to sitting on appeal on those orders. That the Supreme Court had on November 20, 2020 declined to grant a stay to execution. That under Order 22 Rule 52, the Court could not grant a stay for more than 14 days. That there was material non-disclosure that the objector had been ordered to honour its guarantee.
4. The application was opposed vide a preliminary objection dated May 31, 2021. The objection was that there was no ruling that was annexed to warrant inviting the court to review the same. That it sought to preempt the Court's ruling on whether the decree was properly extracted under Order 21 Rules 7



- and 8 of the Rules. That it would defeat the overriding objective of the law under sections 1A & 1B of the *Civil Procedure Act*.
5. In the grounds of opposition, the objector contended that May 15, 2021 was a working day under the *Judicature Act*, that the orders were properly extended on May 20, 2023. That the application does not meet the threshold under Section 80 of the *Civil Procedure Act* and Order 45 for review. That the issue of the guarantee remains a matter to be resolved by the Court of Appeal. That the Order by the Supreme Court was not issued against the objector as the objector was not a party to the proceedings before the Supreme Court.
 6. I have considered the application and the record. This is an application for review under Order 45 of the *Civil Procedure Rules*. In such an application an applicant must demonstrate that there is an error apparent on the face of the record, or there is discovery of new matter or evidence which was unavailable at the time the order or decree was made or passed or for sufficient cause.
 7. I propose to deal with the preliminary objection first. The first objection was that the ruling or order sought to be reviewed had not been annexed. While it is good practice to annex a ruling or order sought to be reviewed, my view is that failure to do so is not fatal where an applicant properly identifies the ruling or parts of the order or decree sought to be reviewed. Since the ruling and order is part of the record, it is expected that the Court will have an opportunity of seeing the same before acting on the review. That objection is declined.
 8. The other objection was that the application sought to preempt delivery of the ruling whether the decree was issued in contravention of Order 21 Rules 7 and 8 of the *Civil Procedure Rules*. The simple answer to that is that, since the application is based on a point of law, on jurisdiction, nothing prevents this Court from considering the same.
 9. In any event, extraction of a decree in contravention of Order 21 Rules 7 and 8 of the Civil Procedure Rules *per se* does not invalidate a decree. See Misc E 230/2021 *Standard Investment Bank Ltd v Bomas of Kenya Ltd* [2023] eKLR.
 10. The other ground was that the application sought to preempt the Court from delivering a ruling on whether the execution was unlawful and contrary to Order 22 Rule 18 the decree having been more than a year. I have looked at the record. The decree sought to be executed is shown to have been issued on May 6, 2021. This is so since the original decree was varied by the Court of Appeal on April 4, 2009. That objection also fails.
 11. Finally, the last objection was that the application sought to re-open and re-argue the application dated May 12, 2021 which was pending ruling. That is not the case as what is being challenged is the jurisdiction of this Court to make the Orders it made on May 15, 2021.
 12. Accordingly, the preliminary objection is without merit and is hereby dismissed with costs.
 13. Turning to the application, the application did not specify on which limb of Order 45 Rule 1 the same was being made. There was no claim that there was an error apparent on the face of the impugned order or discovery of new evidence. However, looking at the grounds of the Motion, the same squarely falls on any other sufficient cause.
 14. The first ground is that the Court could not make the order on a Saturday. That is absolutely unarguable. At this digital age, the Court is entitled to deal with any urgent matter on any day at any time and at any place provided the matter is listed for hearing before that Court. That ground fails.
 15. The other ground was that the stay order was against the express order of Njagi J made on February 4, 2011. In that order, the objector was ordered to pay a sum of Kshs 61,979,918/37. I have looked at the



record. I have seen the order made on February 4, 2011 by Njagi J. The same was issued on February 7, 2011, in the following terms:-

“2. That pursuant to the Orders of this Honourable Court made on November 10, 2010 and pursuant further to the Security/Bond/Guarantee No DBK/2007/30 dated April 4, 2007 issued by the Development Bank of Kenya Ltd in Civil Appeal CA No 332 of 2006 Kenya Hotel Properties Ltd v Willesden Investment Ltd for Kshs 70,902,400/= the said Development Bank of Kenya Ltd be and is hereby ordered to pay a sum of Kshs 69,979,918.37 to Willesden Investment Limited forthwith.”

16. That order was not brought to the attention of the Court. It is clear that the liability of the objector was determined by that order. There is no evidence that the same was ever set aside. To my mind that is sufficient cause to review and set aside the order of May 15, 2021. That order was made in error.
17. Accordingly, the application dated May 24, 2021 is meritorious and is hereby allowed as prayed.
18. Before concluding I do apologize to the parties for the delay in delivering this ruling. The delay was caused by an error that caused the Original file to be mistakenly taken back to the registry and took a long time to be traced. Once it was traced, the Court took urgent steps to deliver the present ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF AUGUST, 2023.

A. MABEYA, FCI Arb

JUDGE

