First Community Bank Limited v Hanif Tours and Travel Agency Limited & 2 others (Commercial Case E210 of 2019) [2023] KEHC 24513 (KLR) (Commercial and Tax) (31 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24513 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E210 OF 2019

A MABEYA, J

OCTOBER 31, 2023

BETWEEN

FIRST COMMUNITY BANK LIMITED ..... PLAINTIFF

AND

HANIF TOURS AND TRAVEL AGENCY LIMITED ..... 1ST DEFENDANT

HASSAM MOHAMUD MOHAMED ..... 2ND DEFENDANT

KASSIM MOHAMUD MOHAMED ..... 3RD DEFENDANT

RULING

1. By a ruling dated 17.03.2023 ("the Ruling") the court struck out the Defendants' Statement of Defence dated 06.08.2019 and entered judgment for the Plaintiff ("the Bank") against the Defendants jointly and severally for Kshs. 36,982,503.61 with a profit rate of return at 14% per annum from 03.07.2019 until payment in full.

2. The Defendants have now filed the Notice of Motion dated 20.06.2023 invoking, inter alia, section 80 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 45 of the *Civil Procedure Rules*. They seek review and setting aside of the Rulingon the basis of discovery of new and important evidence and leave to enter a proper defence. The Defendants also seek an order directing the firm of T. O Nyang'au, Kemunto & Company Advocates ("the Advocates") to adduce the evidence from which instructions they acted on behalf of the Defendants and that the they disclose in writing the interest they have in the substantive matter that warranted their false representation. The application is supported by the grounds on its face and the undated supporting affidavit of the 2nd Defendant. It is opposed by the Bank through the replying affidavit sworn by its Legal Manager, Claris Ogombo, on 25.09.2023. The Bank has further supplemented its arguments by filing written submissions.

The Application

3. The Defendants' case is that they only became aware of this suit on 12.05.2023 as they have never been served personally with any pleadings in this suit. They deny issuing any instructions to any counsel to act on their behalf in this matter. The Defendants aver that they recently discovered that the Advocates misrepresented them by fraudulently entering appearance and filing pleadings which were liable to be struck out to their detriment. That apart from moving the court, they reported the Advocates to Nairobi Central Police Station under OB No. 36/18/6/23. Further, in exercise of due diligence, the Defendants made formal complaints against the Advocates regarding their conduct to the Law Society of Kenya, Advocates Complaints Commission and Advocates Disciplinary Committee established under section 60 of the *Advocates Act* of the conduct of the Advocates. The Defendants also instructed their advocates on record to write a demand letter to the Advocates asking them to justify and clarify where the Advocates got instructions to act for the Defendants but they have not received any response.

4. The Defendants aver that they recently discovered that the Statement of Defence dated 06.08.2019 drafted by the Advocates does not contain sufficient evidence and that they now have the evidence which could not be adduced at the time the judgment was passed. The Defendants aver that the judgment, which is prejudicial to them, has been entered against them as a result of fraudulent misrepresentation by the Advocates hence they should be directed to disclose to this court where they obtained instructions to act on their behalf and adduce such evidence including but not limited to a signed instruction note and proof of paid fees by the Defendants. Further, that the Advocates ought to be interrogated on the misrepresentation, fraudulent action and gross professional misconduct and show what interest they have for acting without proper instructions. That the Advocates ought to inform this court and the Defendants why they have denied the Defendants the right to the representation of their choice in line with Article 50 of the *Constitution*.

5. The Defendants add that it is likely that the Advocates have an ulterior motive and interest in the subject matter since they filed an authority to plead and a verifying affidavit which bears a fraudulent and forged signature of the 2nd Defendant. The Defendants state that they have a right to be heard and defend themselves appropriately with their defence before being condemned based on false representation and an alleged admission filed as a defence by the Advocates. They pray that the court reviews the Ruling on the basis of the compelling evidence of the Defendants not limited to bank statements evidencing payment to the Bank that is likely to persuade the court contrary to what has been alleged in the Plaint hence they should be granted leave to defend the suit.

The Bank's Reply

6. The Bank opposes the application. It avers the Ruling and consequent judgment was regular as evidenced by the chronology of events. It states that once it filed suit, its former advocate instructed Mr. Hudson Chanzu, a Process Server, to effect service of the Plaint together with three copies of Summons to Enter Appearance upon the Defendants. That on 10.07.2019, he proceeded to the Defendants' offices and effected service of the Plaint and Summons on the 2nd Defendant who despite being served, declined to sign on the face of the Process Server's copy as evidence of service. The Process Server prepared an affidavit of service which was filed in court on 31.07.2019.

7. That on 06.08.2019, the Bank filed a Request for Judgment under Order 10 Rule 4(1) of the *Civil Procedure Rules* requesting for interlocutory judgment for Kshs. 36,982,503.62 but before the court could enter interlocutory judgment, the Advocates filed a Memorandum of Appearance together with a Statement of Defence, an Authority to Plead and Swear Affidavit(s) and verifying affidavit on behalf of the Defendants all dated 06.08.2019.

8. The Bank thereafter filed an application dated 07.01.2020 seeking to strike out the Defendants' Statement of Defence on grounds that it contained admissions of indebtedness. The Bank contends that despite having been served way back in 2020, the Defendants did not file any response to the application. That the Advocates previously on record were served with the hearing notice for the application which was heard and the Ruling delivered thereafter.

9. As concerns the application for review, the Bank avers that it is not only defective and should be struck out, it also lacks merit. That it purports to join the Advocates as a Respondent without the leave of the Court and that failure by counsel to attend court cannot in any way be termed as discovery of new and important evidence. That the failure by the Defendants' advocate to attend court was deliberate as the Court served the advocates with a ruling notice on 16.03.2023 via email. The Bank avers that the application fails to meet the threshold for the grant of review orders and despite the fact that the review application is anchored on the discovery of new evidence, the Defendants have not tendered any evidence before this Court of the 'new evidence' that they purport was not within their knowledge when this Court delivered the Ruling.

10. The Bank states that the Defendants have not explained how they became aware of the Ruling on 12.05.2023 or who told them of the existence of the suit which they allege was never served on them. That the only way the Defendants would have known of the Ruling is from being advised by their Advocates or perusing the court file as parties to the suit, being fully aware of the proceedings before the Court. That the Defendants have not challenged the return of service filed by Mr. Hudson Chanzu, the Process Server on 31.07.2019 and that the Defendants' claim that there was no service is an afterthought. The Bank contends that the complaints filed by the Defendants to various bodies is by itself not proof that service of the Summons and the Plaint was irregular or that representation by the Advocates was fraudulently acquired but a belated attempt to impugn the character and integrity of the Advocates.

11. The Bank asserts that the Advocates having entered appearance and filed a Statement of Defence on behalf of the Defendants confirms that the Defendants were properly served and duly instructed the advocates on record and that the court should decline the invitation by the Defendants to set aside the Ruling on the basis of the frivolous allegations now being raised by the Defendants.

Analysis and Determination

12. The main issue for determination is whether the Ruling that entered judgment against the Defendants ought to be reviewed, set aside and/or varied. The principles governing the exercise of discretion to review a decree or order are now settled and are common to the parties. Under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, an applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter which was not available despite the exercise of due diligence or for any other sufficient reason for the court to review.

13. The Plaintiffs' application is anchored on the discovery of new information. On this, the Court of Appeal in *Rose Kaiza v Angelo Mpanju Kaiza* [2009] eKLR held as follows:

> The motion before the superior court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is

> ".....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....."
>
> The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by Mulla on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726, thus:
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> "Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a 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; where review was sought for on the ground of discovery of new evidence but it was 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. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

14. The Defendants' case is anchored on the grounds that they were never aware about this suit until 12.05.2023 and thus were never heard and that they never instructed the Advocates or any such advocate to represent them in this suit. They also further contend that they have newly discovered evidence which the court ought to allow them to file in their defence.

15. I agree with the position taken by the Bank that the proceedings are regular on their face as the Bank followed all the procedures upto the Ruling and consequent judgment. There is no allegation against the Bank or its advocates or indeed any evidence to show that it was involved in any fraudulent action or collusion with the Advocates. Likewise, the Defendants have not challenged the service of the Summons to Enter Appearance and the Plaint on them as explained and deponed to by the Process Server. I take the same position as the court in *Pravinchandra Jamnadas Kakad v Lucas Oluoch Mumia* [2015] eKLR where it was confronted with such a similar situation and expressed the following view:

> What I hear him saying is that he did not instruct Mr. Ombeta's firm to enter appearance on his behalf or even to file a defence in the matter. If that is the case, then where does professional negligence arise? In my view, the defendant is the author of his own misfortune. He had the opportunity to enter an appearance which he did, but did not bother to file defence in time and is now using "lack of instructions" to Mr. Ombeta for the delay in filing a defence and or filing it in a wrong court out of time without leave of the court. That is argument is too cheap to be brought by any sensible legal mind.

16. I take the view that without challenging the issue of service of Summons to Enter Appearance, it would be a leap of faith to conclude that the Advocates did not have instructions. It also amounts to non-disclosure of material facts and would not be a ground for review as contemplated in section 80 of the *Civil Procedure Rules* and Order 45(1) of the *Civil Procedure Rules*. I would be reluctant to imply any wrong doing against the Advocates without giving them an opportunity to be heard as they would be liable in another forum or suit for breach of the Defendants' rights in the event of prejudice.

17. At the end of it all, what remains is that the Advocates entered a memorandum of appearance and filed pleadings including the statement of defence on behalf of the Defendants. The Bank made an application for judgment and striking out of the deence which the Defendants did not respond to

despite the court serving the Advocates with a hearing notice of the same. The court, in the Ruling perused the defence and found that the same amounted to a clear and unequivocal admission of the debt hence no purpose will be served by maintaining the Defence and proceeding to trial. In as much the Defendants claim that they have discovered new evidence that might change the court's position aforementioned, they have not provided to the court any new evidence.

18. Even taking an expansive view of the court's jurisdiction to review its own order or decree, this is a case I must decline to exercise discretion bearing in mind that the Defendants have not provided any evidence, documentary or otherwise, to show that it was not indebted to the Bank or for some other reason, the debt claimed by the Bank was not due or could not be claimed from the Defendants or any of them. In other words, there is not material upon which the court may conclude that the Defendants have a good defence. Ultimately, the application for review is an application to set aside judgment in disguise and for the reasons I have given, I reject and dismiss the application.

Disposition

19. The Defendants' application dated 20.06.2023 fails and is dismissed with costs assessed at Kshs. 45,000.00.

SIGNED AT DUBAI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER 2023.

A. MABEYA

JUDGE

Court of Assistant: Mr M. Onyango