Mistry Jadva Parbat & Company Limited v Kenyatta University (Commercial Civil Case E121 of 2008) [2021] KEHC 50 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)

Neutral citation: [2021] KEHC 50 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CIVIL CASE E121 OF 2008

DAS MAJANJA, J

SEPTEMBER 23, 2021

BETWEEN

MISTRY JADVA PARBAT & COMPANY LIMITED ..... PLAINTIFF

AND

KENYATTA UNIVERSITY ..... DEFENDANT

RULING

1. There are two applications for consideration before the court. The first application is the Plaintiff's Notice of Motion dated 26th July 2021 seeking stay of execution and setting aside warrants of attachment and sale dated 14th July 2021 and consequent execution proceedings. The application is supported by the affidavit and supplementary affidavit of Stephen Ndibui Kamau, its Operations Manager, sworn on 26th July 2021 and 14th September 2021 respectively. It is opposed by the Defendant through the replying affidavit of Prof. James Kungu, the Defendant's Acting Vice Chancellor Administration, sworn on 10th August 2021.

2. The second application is a Notice of Motion dated 5th August 2021 seeking orders that the judgment and decree herein dated 27th July 2018 be set aside. The application is supported by the affidavit of Stephen Ndibui Kamau sworn on the same day. It is opposed by the Defendant through the replying affidavit of Prof. James Kungu sworn on 10th August 2021. The application was canvassed by written submissions.

Background

3. In order to appreciate the matter, it is important set out its background given that this matter was concluded by the judgment of Tuiyott J., on 27th July 2018 which dismissed the Plaintiff's suit with costs and entered judgment for the Defendant against the Plaintiff for KES. 10,738,820.04 with interest at court rates from the date of filing of the Counterclaim together with costs. The Plaintiff

appealed to the Court of Appeal in NRB CA Civil Appeal No. 351 of 2018 [2020] eKLR. The Court of Appeal dismissed the appeal by the judgment dated 20th November 2020. The facts of the case, which I shall reiterate, are clearly outlined in both decisions.

4. In 1987, the Plaintiff and the Defendant entered into a building contract for construction works at the Kenyatta University Campus. The Plaintiff contended that the Defendant did not make payment in accordance with the terms of the contract prompting it to file suit; Mombasa HCCCNo. 109 of1991 ("the Mombasa Case") seeking KES 73,790,371.10, general damages for breach of contract, interest and costs. In the course of those proceedings, the parties entered a consent judgment in favour of the Plaintiff for KES. 50,243,818.00 together with costs and an agreed interest of KES 8,608,283.50. The Defendant was given credit for KES. 13,150,901.50 which it had already paid. Under the consent order, the parties agreed that the court would hear and determine two disputed claims for the sum of KES 7,172,000.00 and KES 16,374,553.00 respectively. The Plaintiff was ultimately awarded those sums with interest at 14% p.a. by a ruling dated 29th June 1995 delivered by Wambilyanga J.

5. Because of a dispute on the status of payments, the Defendant filed an application seeking accounts in respect of the decretal sum in order to examine the extent of its indebtedness. By a consent dated 6th July 2007 recorded before Maraga J.,(as he was then) the parties agreed that, "this Honourable Court be pleased to refer the accounts respecting the payments of decretal sum for examination and determination of indebtedness (sic), if any, of the Defendant to the Plaintiff pursuant to the Court Orders of 29th May, 1995 and 29th June, 1995 to Interest Rates Advisory Centre (IRAC)."

6. On 24th July 2007, IRAC filed a report dated 12th July 2007 ("the IRAC Report"). According to the report, IRAC found an overpayment of KES 28,440,268.14 by the Defendant to the Plaintiff and noted that even though CertificateNo. 15, which was for the sum of KES 17,701,448.10 was not part of the suit, it had been debited and thus the overpayment by the respondent to the appellant had been reduced to the sum of KES 10, 738,820.04. The IRAC Report was adopted by the Court (Azangalala J.) through an order made on 30th July 2009 on the following terms:

> I see no reason why the report of Interest Rates Advisory Centre dated 12th July, 2007 and filed on 13th July, 2007 should not be adopted to the extent that I find and hold that the decretal amount herein has been paid in full. With regard to costs it is my view that this long standing litigation should come to an end. The order that commends itself to me is that each party shall bear its own costs of the application. This file is now ordered closed.

7. The Plaintiff filed this suit claiming KES. 19,800,642.00 together with interest at 25% per annum from March 2002 to the date of judgment, totalling KES. 75,533,450 on the basis that the Defendant had not paid it Certificate No. 15. The Defendant denied the claim and raised a Set-Off and Counter-claim for a refund of KES. 10,738,820.04. The Defendant relied on the fact that the IRAC Report had confirmed it had overpaid the Plaintiff a sum of KES. 28,440,268.14.

8. In the judgment, Tuiyott J., noted that the dispute solely revolved around whether Certificate No. 15 had been paid. This certificate, which had been issued on 18th May 2001, was for KES 17,701,448.10. The trial court considered whether the decision by Azangalala J., of 30th July 2009, had any effect on this suit. The learned Judge noted the chronology of events leading up to the adoption of the IRAC Report. He found that there was definitive finding that the Defendant overpaid the Plaintiff by KES 28,440,268.14 as at 7th January 1998 and that Certificate No. 15 was issued three years after the overpayment by the Defendant and would settle the outstanding certificate. The court found that the Defendant had proved its case on the counterclaim on a balance of probabilities.

The application to set aside judgment

9. Since it is the judgment of this court being executed, I will deal with whether judgment ought to be set aside first.

10. The Plaintiff's case is that the IRAC Report on which the judgment against it is anchored has been confirmed to be irregular and fraudulent. The Plaintiff states that according to the report prepared by Kihunyu Mungai and Associates Certified Public Accountants on 14th April 2020, the findings in the IRAC Report are fraudulent as the Defendant is indebted to the Plaintiff to the extent of KES. 5,420,325,299.23 pursuant to the orders made in the Mombasa Case. The Plaintiff submits that the IRAC Report was prepared in order to shield the Defendant from paying what was due to the Plaintiff. The Plaintiff states that by an application dated 21st May 2021 it has now applied to set aside the judgment in the Mombasa Case.

11. The Plaintiff relies on section 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which preserves the inherent jurisdiction to the court to make such orders as are necessary to meet the ends of justice or to prevent an abuse of the court process. Counsel for the Plaintiff submits that this is a case where the court ought to set aside the judgment as its basis was a fraudulent report. It cites the case of *Hip Foong Hong v Neotia and Company [1918] AC 888* where the court held that a judgment tainted and affected by fraudulent conduct ought to be set aside and may be set aside by a motion presented to court in that regard.

12. The Plaintiff submits that the court out to set aside the judgment infected by fraud and deceit found in the IRAC Report. It submits that the application should be allowed and urges the court to set aside the judgment as the Defendant has not made any attempt to impugn to the report by Kihunyu Muigai and Associates Certified Public Accountants.

13. In response to the Plaintiff, the Defendant submits that the court does not have jurisdiction to set aside a judgment that has been upheld by the Court of Appeal. It cites the decision of the Court of Appeal in African Airlines International Limited v Eastern and Southern African Trade and Development Bank (PTA Bank) [2003] eKLR where it held that once an appeal was filed, the High Court cannot proceed with an application for review of the judgment.

14. On the substance of the application, the Defendant submits that the Plaintiff has not proved that the IRAC Report was fraudulent as it was prepared by consent of both parties. It asserts that the application has been brought 14 years after the report was adopted by in the Mombasa Case by the consent of both parties. The Defendant further submits that the Plaintiff has not established new facts or material that would entitle the court to review or set aside the judgment.

15. Although the Plaintiff has studiously avoided citing section 80 of the *Civil Procedure Act* which permits a party to apply for review of a judgment by relying on the inherent jurisdiction of the court under section 3A of the *Civil Procedure Act*, the application is in substance an application for review on grounds of fraud based on a new report prepared by Kihunyu Mungai and Associates Certified Public Accountants impugning the IRAC Report which was the basis of the judgment in this case and the Mombasa Case.

16. I agree with the Defendant that this court does not have jurisdiction to review the judgment of Tuiyott J., in this case as it was affirmed by the Court of Appeal. If anything, the Plaintiff should move the Court of Appeal for orders to set aside its own judgment. In *African Airlines International Limited v*

Eastern and Southern African Trade and Development bank (PTA Bank) (Supra) the Court of Appeal summed up the position as follows:

> It was succinctly stated in Sarkar's Law of Civil Procedure Eighth Edition Volume 2 at page 1592 as follows (omitting the citation of the case law):-
>
> "Review application should be filed before the appeal is lodged. If it is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of a court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard the review cannot be proceeded with." [Emphasis mine]

17. Once the Plaintiff appealed the judgment, it lost its right of review. Further, the IRAC Report was prepared by consent of the parties. The Plaintiff had the opportunity to challenge the findings in the Mombasa Case yet it did not. The issue now raised could have been raised in the Mombasa Case. The same issue could also have been raised at the trial of this suit. The Plaintiff, despite having this opportunity, to put forth its case failed to do so. It cannot come to this court, 14 years later, without any new facts, evidence or material that were not available at the material time, to impugn a judgment of this court that has been affirmed by the Court of Appeal. I therefore dismiss the application dated 5th August 2021 with costs to the Defendant.

Whether execution should be set aside

18. Since the judgment in favour of the Defendant is valid, the Plaintiff is still indebted to the Defendant. The next question is whether the Defendant was entitled to proceed with execution in the manner it did. The gravamen of the Plaintiff's case is that the Defendant proceeded with execution before taxation of costs and without leave being sought or granted under section 94 of the *Civil Procedure Act* which provides as follows:

> 94. Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

19. The Plaintiff submits that the Defendant's application by the letter dated 15th July 2021 applying for execution was irregular and did not comply with the law which requires a formal application to be made. It cites the case of *Commercial Bank of Africa v Lalji Karsan Rabadia and 2 Others* [2012] eKLR and *Bamburi Portland Cement Co., Ltd v Imranali Chandbhai Abdulhussein* [1996] eKLR where the Court of Appeal (A. B. Shah JA) observed that:

> I would like to end by making some pertinent observations as regards the execution of the decree. Section 94 of the *Civil Procedure Act* requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties.

20. The Defendant submits that it proceeded with execution because it was difficult to locate the Plaintiff in order to serve the draft decree and bill of costs hence it relied on Order 21 rule 9(2) of the *Civil Procedure Rules* which states;

> (2) In all other cases, and where the costs have not in fact been stated in the decree or order in accordance with sub-rule (1), after the amount of costs has been taxed or otherwise ascertained, it shall be stated in a separate certificate to be signed by the taxing officer, or in a subordinate court by the magistrate.

21. The Defendant urges that execution was procedural and should be upheld as it was merely executing the decree of the court which was already on record.

22. It is not in dispute that costs have not been agreed on or taxed. Therefore, under the provisions of section 94 of the *Civil Procedure Act* the Defendant could not proceed with execution except with leave of the court obtained in the proper manner. The provisions of Order 21 rule 9(2) of the Civil Procedure Rules relied on by the Defendant are inapplicable and cannot supersede the provisions of the Act which are clear in tenor and effect. I am therefore constrained to find and hold that the execution was irregular null and void as it was done without leave of the court. The Defendant shall meet the costs of the application.

Conclusion and disposition

23. As I stated, the Plaintiff's indebtedness is not in dispute. It is the duty of the court, under the overriding objective, to ensure that the matter now proceeds expeditiously to its logical conclusion bearing in mind that the judgment in this case was in 2018. For this reason and for the reasons I have set out above, I now order as follows:

> **a. The Notice of Motion dated 5th August 2021 is dismissed with costs to the Defendant,**
>
> **b. The Notice of Motion dated 26th July 2021 is allowed to the extent that the warrants of attachment and sale issued herein are set aside together with all consequent executions with costs to the Plaintiff.**
>
> **c. The Defendant is directed to file and serve its Bill of Costs for taxation within the next 14 days from the date hereof and shall be concluded expeditiously.**
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> **d. The Guarantee issued in favour of the Defendant shall remain in place pending the determination of the taxation or until payment of the decretal sum or further orders of this court.**

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Mwanzia instructed by Dubow and Company Advocates for the Plaintiff

Ms Kaguthi instructed by Lawrence Mungai and Company Advocates for the Defendant.