



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MILIMANI COMMERCIAL COURTS**

**HCCC NO. 212 OF 2009**

**JOHN NAHASHON MWANGI.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA FINANCE BANK LIMITED**

**(IN LIQUIDATION) .....DEFENDANT/RESPONDENT**

**RULING**

1. This Court is asked to determine the Notice of Motion dated 20<sup>th</sup> June 2019 for the following orders:-

1. That this Honourable Court do review or set aside its decision of 31st May 2019 and in lieu thereof allow the application dated 13th February 2019.
2. That costs be provided for.

2. This Court is told that its ruling dated 31<sup>st</sup> May 2019 contains errors on the face of the record and which, if not rectified, will delay the finalization of this suit and create confusion in the proceedings.

3. As I understood it, the Court is said to have made the following errors:-

- i. That contrary to evidence presented to Court a sum of Kshs.800,000/= did not form the settlement sum of Kshs.6,351,327.52.
- ii. That the Court refused to order the release of the title on the basis that the discharge can only issue after costs of the suit and taxed.
- iii. That in any case costs have been paid.
- iv. That whereas the Court directed that costs be taxed, costs of the suit cannot precede the hearing of the suit.
- v. That costs are discretionary and no party has been awarded costs to warrant directions of the same.
- vi. The ruling did not take into consideration the ***in duplum rule***.

4. The application is opposed.

5. I have considered the application, its opposition and arguments made for and against the application for review.

6. Order 45 Rules 1(b) of the Civil Procedure Rules which are the provisions under which the Motion is brought reads:-

“By a decree or order from which no appeal is hereby allowed;

and who from the 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 or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.

7. The more I read the application before me in the context of my Ruling of 31<sup>st</sup> May 2019, the more I am persuaded that the course open to the applicant was to appeal this Court’s decision and not to seek review.

8. The application was consciously made on the Court’s appreciation of the material before it.

9. One of the premises upon which the Notice of Motion dated 13<sup>th</sup> February 2019 proceeded is stated in paragraph 7 of the supporting affidavit of the Applicant sworn on 13<sup>th</sup> February 2019.

[7] That despite of the Defendant being bound by its own pleading in respect of Kshs.4,832,358 following their own recalculations, the parties agreed that the suit be settled fully at Kshs.6,351,327.52.

10. The Applicant is stating that the suit was compromised at Kshs. 6,351,327.52 by agreement of the parties. I am not too sure I understand the complaint that this compromise was outside the pleadings. While parties are bound by their pleadings, they can compromise and settle a matter, by consent, which is outside the pleadings (see the decision in *Odd Jobs Vs Mubia (1970) EA 476*) on when unpleaded matters can properly fall for determination).

11. So where did the figure of Kshs.6,351,327.52/= come from. It is from the Bank’s working as follows:-

JOHN NAHASHON MWANGI LOAN ACCOUNT PROFILE

Loan drawn on 9/11/1984 Kes. 1,450,000.00

Add: Interest charged Kes. 4,168,557.07

Less: Loan repaid Kes. (800,000.00)

Loan due 4,818,557.07

Add:

Collection charges: Kes.1,204,001.40

Other charges Kes.328,769.05 1,532,770.45

AMOUNT DUE 6,351,327.52

12. Clearing the sum of Kshs.800,000/= earlier paid was credited before reaching a net figure of Kshs. 6,351,327.52/= which the Applicant accepts to be the settlement sum.

13. Did this figure include costs of this suit? From the consent of 24<sup>th</sup> January 2012 drafted by the Applicants lawyers and the letter of 8<sup>th</sup> October 2018, it is clear that the Applicant was proposing to pay Kshs.404,776.40/= at one time and Kshs.500,000/= at another as costs in addition to the agreed settlement of Kshs. 6,351,327.52/=. If there was a doubt ,an inference can be drawn that costs were not included in the compromise.

14. From the correspondence it is clear that the party to pay costs was the Plaintiff/Applicant and since there was no agreement on the quantum, then taxation was the way to go. In my impugned ruling I said;

“Yet because there is no consensus as to the amount, the costs shall be subject to taxation”.

Indeed, in the end, Mr. King’ara for the applicant conceded that

taxation or assessment by costs was the way to go.

15. As regards the argument that costs cannot be assessed because the taxation of costs “cannot precede the hearing of the suit”, the answer is that the parties herein have reached an agreement as to the settlement figure. The suit has been compromised.

16. The argument that the impugned ruling did not take into consideration the *in duplum* rule is really without merit. The settlement figure of Kshs. 6,351,327.52/= was reached by agreement of the parties who would have taken to account all relevant factors including the place of the *in duplum* rule, if any, in the dispute. Blame cannot be shifted to the Court.

17. Lastly as whether payment of costs has a correlation to the discharge of the property, one simply has to look at the charging clause of the charge. The charge remains as security as long as other charges, costs and expenses in respect to the borrowing remains payable to the lender. These include costs incurred in defending a litigation such as this.

18. In the end, this Court sees no reason to review its decision of 31<sup>st</sup> May 2019 and dismisses the Notice of Motion of 20<sup>th</sup> June 2019 with costs.

**Dated, Signed and Delivered in Court at Nairobi this 21<sup>st</sup> Day of February 2020**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Mirei for Plaintiff/Applicant

Muchiri for Thiga for Defendant

Court Assistant: Nixon