REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 135 OF 2014

SUNRICE RESORT APARTMENT & SPA LTD.....APPELLANT

VERSUS

ECOBANK KENYA LTD.....RESPONDENT

R U L I N G

1. For determination is the Notice of Motion dated 25/10/2019 brought by the defendant and seeking orders that the court grants to the said party an order which reviews or varies the court orders issued on 4/4/2019 and appointing the **Ms. Lobonyo & Associates** to carry out reconciliation of the two previous audit reports and to set aside the report by the said firm of auditors.

2. The reasons advanced to support the application and disclosed on the face of the application and on the Affidavit in support sworn by Ms. Elizabeth Hinga are that; there had been two previous audit reports one by Interests Rates Advisory Centre dated 26/10/2018 and another by PKF Consulting Ltd dated 31/7/2018 both of which showed that the plaintiff owed the defendant varied sums which variation necessitated the need for reconciliation to be done by Ms. Lobonyo & Associates but the said firm instead of complying with the mandate to reconcile the two report ventured into fresh audit and returned a verdict which is not a reconciliation and thus prejudicial to the defendant. Prejudice is alleged on the basis that the report materially varies and departs from the two it was to reconcile and therefore deemed not independent and lacks objectivity. In further support of the application the applicant exhibited to court previous rulings and orders of the court and the audit reports.

3. In opposition to the application, the plaintiff filed grounds of opposition dated 16/01/2020 in which the position was taken that the prayers sought are not available to the defendant because the orders appointing the firm of **Lobonya and Associates** was a consent which has not been set aside; and that there had been acquiescence with the court orders of 4/4/2019 and that to grant the orders sought would be tantamount to varying or reviewing the orders of 26/11/2018 as well as those of 24/01/2019.

4. It was then added that there being a consent, the applicant had not met the thresholds of setting aside a consent; that the application was a calculation to delay the conclusion of the matter and that the application was itself misconceived, frivolous and an abuse of the court process.

5. The application was directed to be canvassed by way of written submissions pursuant to which directions the Defendant/Applicant filed written submissions dated 8/1/2020 on the 14/1/2020 while the plaintiff/Respondent did not file any submissions. In order not to delay the matter further it was ordered that the matter be canvassed orally.

6. In arguing the application, Mr. Kamau was brief and precise that the report filed by Lobonyo and Associates was not a reconciliation of the previous reports but one based on fact finding thus went beyond the mandate thereby showing impartiality, bias and prejudice upon the applicant. On such basis it was urged that the same be set aside and reviewed. He then relied on Section 3A Civil Procedure Act and decisions on when to set aside *exparte* orders to meets the ends of the justice.

7. Even Mr. Amadi was equally brief essentially reiterating his grounds of opposition that order having been founded upon a consent demanded another consent to set aside and that there had been acquiescence by the applicant hence the orders were not available for grant.

8. On the criticism about the way the report was compiled and its conclusions, the counsel for the Plaintiff/Respondent submitted that the same could be settled by cross examination of the auditor. He cited to court the decision in **SMN VS ZMS & 3 Others CACA No. 204/2014** for the proposition of the law that an order made with the consent of the parties is binding upon all the parties and cannot be varied or discharged unless it be demonstrated to have been obtained by fraud collusion or by an arrangement contrary to the policy of the court or such other like vitiating factors.

9. I have had the benefit to consider the application on the basis of the facts availed by the parties together with the record of the file and I start from the stand point that the court is asked to upset, by setting aside or review, its orders of 4/4/2019 appointing the audit firm of

Lobonyo and Associates to reconcile the two reports filed by the respective parties. I consider that to be the substantive prayer by the applicant because the report filed herein on the 01/10/2019 has only a foundation in that order and therefore a determination of Prayer 1 will axiomatically determine Prayer 2.

10. The orders the court gave on 4/4/2019 were worded as follows:-

> "Parties are unable to agree on a mutual auditor to reconcile the two audit report presented to court by each side hence as directed by court on 24/01/2019, the court now appoints:
>
> **Ms. Lobonyo & Associates**
>
> **1st Floor, Super Contractors Building, Sotik Road**
>
> **Off Bunyala Road**
>
> **P.O. Box 62776 – 00200**
>
> **Tel: 0711-956305, 0700883723**

NAIROBI: To reconcile the two reports presented to court and compile own report within 30 days from the date this order and the two reports shall have been served upon them.

The audit fees to be agreed with the auditor will be borne equally between the parties and be paid within 7 days from the date the auditor shall have filed his report in court.

Mention on 13/5/2019 to confirm the progress made".

11. That order is plain on its language that the court was appointing an auditor because the parties had failed to do so. Secondly, it is clear that the mandate of the auditor was to reconcile the two reports already filed. That language clearly debunks the plaintiffs' contention that the appointment was by consent.

12. It was not and therefore it has no contractual effect that would dictate that it be only set aside by another consent. I find that the order of 4/4/2020 was not a consent order and is amenable to setting aside and review if such order shall meet the ends of justice.

13. As presented the application is premised upon the provisions on the overriding objectives of the court as well as the inherent powers of the court then invoking the powers to review the court orders once made. While I do agree that the inherent powers of the court are very wide and generally intended to meet the purpose of any court system, to do justice and avoid hardship and curtail the prospects of abuse of the court process, I also take the view that where the power is invoked the court must be satisfied that the orders sought are merited.

14. In the matter before me, the court had identified the dispute between the parties to be limited to the issue of how much was the sum outstanding if any, between the plaintiff and the defendant as a customer and its banker. The position having been accepted by the parties both did engage own auditors who, as expected did not return congruent verdicts thereby necessitating a reconciliation.

15. To this court, the accounts between the parties had been audited and all the court need was an assistance by an expert in the field of account by way of reconciliation. When I gave the order it was intended that the two reports be reconciled by the auditor pointing out the differences between the two and in the meanwhile moderating the difference of the sum due in the staggering sum of Kshs.18,916,632/=. That difference is not modest and makes me worry why a logical subject like accounts, not far from natural science, cannot be approached in a uniform or coherent manner as to lead to a definite result. It gives a bad impression that the experts ceased to be independent but give opinion based on the subjective desires of their appointing clients. That to this court is a sad state of affairs.

16. That notwithstanding, however, the task and mandate of the firm of Lobonyi and Associates was limited to reconciliation not fresh audit of the book. The firm ideally needed to just look at the two reports and point out where each overstated or understated the debt due and comes to a reconciled position. That to me the auditor did not do. Instead he apparently went on the tangent of conducting own audit while giving very little regard to the report he was to reconcile and mistakenly fell into the trap of exceeding his mandate. He must be seen to have been an appointee of the court for a specific task whose boundaries were well defined. Such an appointee is bound by the mandate imposed and when he exceeds the parameters of the mandate the outcome of his actions are outside the mandate are not acceptable.

17. To the extent that he went beyond the boundaries, he failed the court in the purpose for what he was appointed. For that departure I hold the view that his appointment having not met the purpose calls for being reversed and set aside. I so set the order of 4/4/2019 aside with consequence that the audit report dated filed in court on the 01/10/2019 is not a reconciliation report intended by the court.

18. This I have done well reminded that the court even when it referred the dispute for alternative resolution or for expression of opinion by an expert retains the duty to ensure that the determinations thereby reached, when it has to be adopted as an order of the court must be not only logical and coherent but ought to carry the chapter of being just and fair.

19. I am minded and guided by the established position of the law that the very purpose for the reservation of the reserve power called *'inherent power of the court'* is to reserve a wide scope and ambit in the court to meets its purpose of doing justice.

20. This file has also provided me with a lesson that many a times, parties come to court with no clear desire to have a dispute resolved but merely to put the matter in court and sustain a deadlock even where the same can be avoided. For that reason, and in order that this matter be brought to a conclusion before this court, I direct that parties shall call each of the auditors who prepared the two reports by IRAC as well as PFIK to attend court, produce their reports, the accuracy thereof be tested by cross examination to enable the court determine the only issue in dispute:- how much is the debt, if at all, owing by the plaintiff to the defendant. This can however be avoided if Mr. Kamau for the defendant maintains his position he told to the court by his oral submissions that he is prepared to adopt the report by IRAC.

21. On costs, I direct that the same be in the cause because this application could have been avoided had parties agreed on a mutual auditor.

Dated, **signed** and **delivered** at **Mombasa** this **6th** day of **March 2020**.

P.J.O. OTIENO

JUDGE