



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CIVIL SUIT NO. 01 OF 2018

ELIZABETH KAVERE.....1ST PLAINTIFF

TERESA GIMISI.....2ND PLAINTIFF

VERSUS

LILIAN ATHO.....1ST DEFENDANT

REAL TIME COMPANY LTD.....2ND DEFENDANT

RULING

1. This is a ruling on an application by Notice of Motion dated 6th March 2020 for review of the ruling and order of the Court made on the 25th February 2020 seeking specific relief principally as follows:

“NOTICE OF MOTION

2. ***THAT*** this Honorable Court be pleased to **review** its own Ruling delivered on 25th February 2020 that granted the 1st Defendant/Applicant conditional leave to defend herself in this suit upon setting aside the Judgment of the Court delivered on the 2nd October 2018; and thereby grant the 1st Defendant/Applicant herein an **unconditional Leave** to be heard in her Defence to the present suit filed against her.

3. ***THAT*** in the alternative and without prejudiced, this Honorable Court be pleased to reduce the conditional sum in the interest of justice and/or grant an Order enlarging the time within which the 1st Defendant/Applicant is to deposit in Court the conditional sum in tandem with here substantive Defence to the suit.”

2. The application was expressed to be founded on grounds set out in the application as follows:

GROUND OF THE APPLICATION

1. ***THAT*** this Honourable Court delivered its Ruling of on the 25th February 2020 in which the Default Judgment entered on 2nd October 2018 was set aside and the 1st Defendant/Applicant granted conditional Leave to defend the suit upon the deposit of Kshs.2,600,000/- in Court, the default of which the conditional leave shall lapse and be of no effect and the ex parte Judgment thereby reinstated.

2. ***THAT*** the ratio decidendi of this Honourable Court in granting the said condition for leave to defend the suit was premised on the fact that the 1st Defendant/Applicant admitted receiving the said Kshs.2,600,000/= in the terms of the Joint Venture Agreement the subject matter of the suit, which admission was categorically then and now denied in toto.

3. ***THAT*** the 1st Defendant/Applicant did not at any point in time receive the said conditional sum or any other monies from the Plaintiffs, which conditional sum being Kshs.2,600,000/- was pursuant to the Joint Venture Agreement, if at all, paid to the 2nd Defendant herein together with the 1st Defendant's Agreement, if at all, paid to the 2nd Defendant herein together with the 1st Defendant's contribution of Kshs.7,200,000/-

4. ***THAT*** that bit of the said Ruling as such appears to be an error apparent on the face of the record for which this Honorable Court

has the Powers and duty to rectify by a revision of it's Ruling to reflect the same.

5. *THAT* from the foregoing, and going by the Court's reasoning in agreeing with the Court's decision in CONTINENTAL AL BUTCHERY vs NTHIWA (1978) ECLR in determining that the claim by the Plaintiffs for profits to the tune of Kshs.22,937,900/- which the 1st Defendant denies there should be unconditional leave to defend, so it follows that by dint of similar reasoning and the fact that the 1st Defendant never received any monies from the Plaintiffs herein pursuant to the Joint Venture Agreement or otherwise, it is only fair and in the interest of justice that the condition upon which the 1st Defendant/Applicant was granted leave to defend the suit against here be lifted and the Court be pleased to determine the matter on its merits.

6. *THAT* considering all above, the 1st Defendant/Applicant prays for a review of the Ruling issued on 14th February, 2019 and a chance to be heard and to ensure that the Honorable Court reaches a just and fair determination of the suit."

3. The plaintiffs/respondents filed a replying affidavit sworn by the 1st plaintiff on the 8th April 2020 as follows:

"REPLYING AFFIDAVIT

4. *THAT* vide the ruling of this Honourable Court of 25th February, 2020 the ex parte Judgment of this Court of 2nd October, 2018 was set aside on the condition that the Applicant deposits in the Court a sum of Kshs.2,600,000/= within fourteen days from the date of the ruling and in default of which the conditional leave would lapse.

5. *THAT* on the eleventh day after the said ruling of the Court and barely three days to the lapse of time given to the Applicant to deposit the security of Kshs.2,600,000/=, the Applicant brought the present Application and served it via email late in the evening of Friday, 7th March, 2020.

6. *THAT* the manner in which the said Application has been brought therefore depicts it as an afterthought, and in bad faith with the motive to frustrate and/or delay the cause of justice.

7. *THAT* looking at the Application, the Applicant approbates and reprobates at the same time such that it is not whether she is genuinely seeking a review of the ruling or she accepts the ruling of the Court of 25th February, 2020 and is just seeking an order of extension of time to comply.

8. *THAT* under paragraph 4 of the Affidavit in support of her Application, the Applicant seeks depones and admits that the sum of Kshs.2,600,000/= was received from the Applicant but paid to the 2nd Respondent together with her contribution of Kshs.7,200,000/=. These averments are only misleading to the Court for the following reasons:

9. *THAT* neither in her Application dated 6th March, 2020 nor the annexed draft defence did the Applicant bring out the alleged contribution of Kshs.7,200,000/=: and therefore her attempts to bring out at this stage amounts to introduction of new evidence which the Respondents have no opportunity to challenge;

(a) *THAT* the Applicant is being economical with the truth as she has neither refuted the averments by the Respondents in their plaint that the Applicant was the sole director and shareholder of the 2nd Defendant, which was merely a vehicle which they traded in, and

(b) *THAT* a review on the grounds aforesaid will be inviting the Court to delve into evidence at the interlocutory stage and without the benefit of examination of witnesses.

(c) *THAT* I have been advised by my Advocates on record, which advice I verily believe to be true, that Order 10 Rule 11 of the Civil Procedure Rules upon which the Court was moved to set aside this Court's ex parte Judgment of 2nd October, 2018 gives this Court discretion to set aside its ex parte Judgment "upon such terms as are just."

10. *THAT* the conditional leave granted to the Applicant by the Court on 25th February, 2020 was just and fair as the Applicant had, during the hearing and in pleadings, admitted receiving the said sum from the Respondents.

11. *THAT* the Court underscored the main objection to the ex parte Judgment of the Court by the Applicant under paragraph 31 of its ruling as being; "to determine the defence being claims that the defendants are to blame for losses that occurred in the joint venture with the plaintiffs and the 1st defendant all partners and joint managers running the venture and thus if losses occur, all the three of them are to contribute in these losses."

12. *THAT* there was no objection at all on whether the amount of Kshs.2,600,000/= was received by the Applicant from the Respondents as their capital investment in the joint venture.

13. *THAT* I have been advised by my Advocates on record, which advice I verily believe to be true, that the jurisdiction of this Court under **Order 45 of the Civil Procedure Rules** is limited to correction of errors on the face of the record of the Court and not inadvertent or erroneous admissions of the parties or what the Court understood parties to mean in their pleadings, which is the Applicant is in inviting the Court to do.

14. THAT the determination of the Court was made on the basis of the pleading and submissions of the Applicant's counsel.

15. THAT the errors sought to be reviewed are not apparent on the face of the record and a review thereof would involve an elaborate investigatory and reasoning process by the Court to arrive at the conclusion, an exercise which would offend the settled precedence.

16. THAT I have further been advised by Advocates, which advice I verily believe to be true, that where an allegation of an error on the face of the record is made pursuant to Order 45 Rule 1 of the Civil Procedures Rule, the record within which that error is reflected should be produce, a condition which the Applicant has not fulfilled in the instant Application.

17. THAT for the foregoing reasons, the instant Application has been brought in bad faith and is calculated to frustrate and delay the ends of justice.

18. THAT the application is therefore devoid of merits and has been instituted after considerable delay and should be dismissed.”

4. The application could not earlier be heard and determined because of the intervening closure of open courts effective 16th March 2020 upon COVID 19 management arrangement by the National Council on Administration of Justice (NACJ), and the application finally came up for hearing by virtual ZOOM session on 25th August 2020 when ruling was reserved for 29th September 2020.

Written submissions

5. In urging their respective contentions, Counsel for the parties filed written submissions, respectively dated 11th March 2020 for the applicants and 7th May 2020 for the plaintiffs/respondents.

Supplementary Affidavit

6. Before the hearing of application but after the parties had filed their submissions, the 1st defendant/applicant filed a supplementary affidavit sworn on 10th August 2020 in response to the plaintiffs' replying affidavit as follows:

“SUPPLEMENTARY AFFIDAVIT

4. THAT I verily believe that the 1st Plaintiff/Respondent's averments are riddled with blatant untruths and misconceptions, intended to cloud the issues raised for determination and that can only serve to mislead the Court herein in its bid to arrive at a just determination of the Application before this Honourable Court.

5. THAT in response to paragraph 4, 5 and 6 of the 1st Plaintiff/Respondent's Replying Affidavit, it is clear that I made this Application for Review on the 6th day of March 2020 well before the lapse of the Fourteen days conditional leave granted by the Court and immediately upon discussing the Ruling of the Court dated 25th February 2020 with my advocates on record, hardly a week after the delivery of the Judgment on the evening of the 25th February 2020 definitely without any inordinate delay on my part and in any event not an afterthought by any standards.

6. THAT in response to paragraph 7 of the 1st Plaintiff/Respondent's Replying Affidavit, I urge the Respondents herein to take their time to read and properly comprehend my Application and indeed the Court's Ruling for clarity on their part so as to avoid the attempt to mislead this Honourable Court with a myriad of incorrect allegations that will only cloud issues for the Court in arriving at a just determination of the dispute before this Honourable Court.

7. THAT the contents of paragraph 8 of the 1st Plaintiff/Respondent's Replying Affidavit are completely misguided in its entirety and an attempt by the 1st Respondent to distort my statement as she has done it the entire suit. I reiterate the contents of my application and Affidavit in Support and confirm to the Court that I did NOT at any point, in my own capacity, receive any money from the Respondents.

8. THAT I have repeatedly confirmed that I did not receive any monies from the Respondents herein and that I cannot speak for the 2nd Defendant who is yet to be properly served for them enter appearance and defend itself in the suit. This Honourable Court is invited to read the contents of paragraph 4 of the 1st Defendant/Applicant's Supporting Affidavit that reads:

“That I did not at any point in time receive the said conditional sum or any other moneys from the Plaintiff's herein, which conditional sum being Kshs.2,600,000/- was pursuant to a joint venture Agreement, if at all, paid to the 2nd Defendant herein together with my contribution of Kshs.7,200,000/-”

9. THAT I am equally advised by my advocates, that in law, a Company is a distinct legal person capable of suing or being sued on its own capacity and being a Director or a shareholder of a Company cannot warrant a suit against me in my personal capacity and not the Company.

10. THAT for avoidance of doubt, I am advised by my advocates that the Court can take Judicial Notice of any part of the Court Record without having to have it annexed to it for reference and that from a causative reading of the Ruling at paragraph 20

thereof, this Honourable Court took cognizance of the terms of the Agreement of parties that contributions by the parties to the Joint Venture were made to the Partnership and not to any one individual Partner of the **Partnership** and that the NB at the foot of it is an admission that the Plaintiffs' contribution of Kshs.2,600,000 has been paid to Real Time Company Limited as at 9th June 2017 by Elizabeth Kavere.

11. **THAT** contrary to paragraph 10 and 12 of the 1st Plaintiff/Respondent can purport to put words into my mouth and plead a confession on my behalf in opposition to the suit by them against me. The Plaintiffs/Respondents are put to strict proof thereof.

12. **THAT** in response to the contents of paragraph 13 of the 1st Plaintiff/Respondent's Replying Affidavit, I am advised by my advocates on record which advise I verily believe to be true that this Honourable Court has not been moved to Rule on any inadvertence or erroneous admissions and I reiterate the contents of paragraph 6 above as the law is the law and facts speak for themselves.

13. **THAT** the contents of paragraph 15 and 16 of the 1st Plaintiff/Respondent's Replying Affidavit are utterly outrageous and I reiterate that the errors sought to be reviewed are so apparent on the face of the record and a glaring error that can be seen from paragraphs 24 and 46 of the Ruling dated 25th February 2020 by one who reads it, that it is an obvious mistake that can be obtained from the court records and the Draft Statement of Defence and would not need any evidence to look into.

14. **THAT** in light of the foregoing, my Application for Review dated 6th March 2020 and Supporting Affidavit thereon, I pray that my Application be allowed as prayed with costs to the 1st Defendant as is deserved."

7. The applicant sought leave to file the supplementary affidavit at the hearing of the application and the court granted the same pursuant to Order 51 Rule 14 (3) which provides for grant of leave to file supplementary affidavits as follows:

"(3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit."

8. There is no requirement that leave be obtained prior to the filing of a supplementary affidavit and in many practical circumstances it is sought ex post fact upon filing of the supplementary affidavit. Indeed, the provisions of the Civil Procedure Rules on the extension of time under the Rules show that this may properly be done even after time limited for taking the particular step for action has lapsed, as shown in Order 50 rule 6 of the Civil Procedure Rules. And I respectfully agree with the decisions **Board of Trustees of African Independent Pentecostal Church of Africa v. Peter Mungai Kimani & 12 Others** (2016 eKLR) and **Caltex Oil (K) Ltd. v. Rono**, Court of Appeal CACA NAI NO. 97 Of 2008 cited by the applicant's counsel confirming the power of the court to enlarge or extend time even after expiry of the time for doing any act and despite imposition of a default clause thereon because "the fact that a default clause has been imposed by a court does not necessarily deprive a court of its jurisdiction to extend time."

9. For the same reason, the plaintiffs' objection that the present application for review of the ruling of 25th February 2020, which was filed within 14 days on 6th March 2020, was delayed is declined.

10. In the interest of justice, the court allowed the plaintiffs leave to respond by way of further submissions any point taken or raised in the supplementary affidavit which was filed by the 1st defendant after the plaintiff's counsel had filed her written submissions. Despite such grant of leave and adjournment granted for that purpose, the plaintiff did not file any further submissions in the matter.

The issue of determination

11. The question before the court is therefore whether there exists an error on the face of the record in the court's determination by its ruling of 25th February 2020 that the 1st defendant had on the evidence received the sum of Ksh.2,600,000/- as to justify the order for conditional leave to defend the suit upon deposit into court of the said sum of money.

Determination

Standards of review

12. The standards of review by a court of its own decision are set out in section of the Civil Procedure Act and Order 45 (previously XLIV) of the Civil Procedure Rules as follows:

Section 80 of the Civil Procedure Act:

"Review

80. Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,"

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the Civil Procedure Rules:

“Application for review of decree or order [Order 45, rule 1.]

(1) Any person considering himself aggrieved—

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. 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.”

Nature of review

13. The nature of a review was given in contradistinction with an appeal in the Court of Appeal decision in **William Karani & 47 Others v. William Wamalwa Kijana & 2 Others** (1987) KLR 557 where (per Platt, JA) it was held as follows:

“Both section 80 and Order XLIV [now 45 of Civil Procedure Rules 2010] commence by explaining the fundamental nature of review. It is to be a means of curing gross or obvious errors where an appeal is allowed by the Act, from a decree or order, but no appeal has been preferred; and secondly, in cases where no appeal is allowed at all. The broad division then between the appeal procedure as the general method of curing errors, with its scope to deal with errors of evidential fact or law, or mixed fact and law, the review procedure, to cure a narrower compass of defects, which cannot be allowed to stand in justice, simply because there is no appeal. From the nature of section 80 and Order XLIV both procedures cannot be adopted at once.”

As submitted by Counsel for the applicant, the jurisdiction of a court to correct its own mistakes has been accepted even in cases of **judicial review** proceedings, which is not in issue here, as held by the Court of Appeal in **Nakumatt Holdings Ltd v. Commissioner of Value Added Tax** (2011) eKLR and followed by Odunga, J. in **R. v. Kenya Revenue Authority** (2015) eKLR.

14. In **National Bank of Kenya Limited v. Ndungu Njau** [1997] eKLR the Court of Appeal also adverted to the nature of the remedy of review as follows:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

Error on the face of the record

15. The Court agrees with the counsel for the plaintiff/respondents that wrongful interpretation or erroneous view of evidence or law, or non consideration of evidence is not a ground for review but rather one of appeal, and I respectfully agree with the decisions of the court in **Silvia Wangui Wandeto v. Francis Wandeto Kahoi** (2007) eKLR and **Grace Akinyi v. Gladys Kemunto Obiri & Another** (2016) eKLR. See also **National Bank of Kenya v. Njau**, supra. With respect to counsel for the plaintiff, however, this is not a case of misinterpretation of evidence or wrong conclusion of law.

16. The position is not that the court considered, which would have been an interpretation of fact and law, that the payment **to the 2nd defendant** company was payment **to the 1st defendant**. The court merely took it, in error, that the money had been paid to **the 1st defendant**, hence its statement at paragraph 24 of the ruling that -

“24. The 1st defendant admits receipt of ksh.2,600,000/- as the plaintiff’s contribution to the alleged joint venture.”

17. I accept that an error in a ruling or order of a court is an error on the record, and if it is apparent without need to call evidence and make protracted legal argument is an error **on the face** of the record. As in **Nyamogo & Nyamogo v. Kago** (2001) 1 EA 173, **Peter Muchiri Mwangi v. Molo Line Services Ltd.** (2014) eKLR and **R v. Advocates Disciplinary Tribunal Ex Parte Apollo Mboya** (2019) eKLR the point taken here, namely that payment was made to the 2nd defendant company is one which does not require elaborate argument and it raises a substantial point of law which stares one in the face, being the principle of corporate personality of the company as distinguished from its human director the 1st defendant applicant.

18. A distinction must be made between an error on the face of the record alleged in the context of judicial review proceedings where the impugned record is part of the proceedings of an inferior court, tribunal or authority, which, therefore, calls for the bringing up of the said

record to the High Court for purposes of **Judicial Review** in accordance with Order 53 of the Civil Procedure Rules. With respect, the requirement of attachment of the record in which an error is alleged belongs to the category of judicial review proceedings, not where, as here, the record sought to be reviewed is part of the same suit or proceedings.

19. Review under Order 45 of the Civil Procedure Rules is a special procedure for the quick correction by a court of error in its own decisions as opposed to appeal on the merits from its decision. See **William Karani & 37 Others v. William Wamalwa Kijana** supra.

Impact of principle of Salomon and Salomon & Sons

20. The court readily accepts the principle of corporate personality and therefore separate legal entities of a company and its shareholders as held in the well know House of Lords decision in **Salomon v. A Salomon & Co Ltd** [1896] UKHL 1, [1897] AC 22. In this regard the 1st and 2nd defendants are separate legal persons. The living person could only be held accountable for the acts of the company upon a lifting of the veil in circumstances well known in the law. Such lifting of the veil would require evidence to show that the 1st defendant and the 2nd defendant were one and the same person in that, as alluded in the plaintiff's replying affidavit -

“the Applicant was the sole director and shareholder of the 2nd Defendant, which was merely a vehicle which they traded in”.

21. Indeed, the subject Agreement indicates that the plaintiffs and the 1st defendant were all members of the 2nd defendant company, and it will require evidence to demonstrate that receipt which was by the text of the Agreement acknowledged by the company was receipt by the 1st defendant to the exclusion of the plaintiffs as the other members of the 2nd defendant company. The preamble of the Agreement appears to list the human parties in this suit as members of the 2nd Defendant company in the following terms:

““ JOINT VENTURE AGREEMENT

THE JOINT VENTURE AGREEMENT is made the 9th day of JUNE, TWO THOUSAND AND SEVENTEEN among:

- LILIAN ATHO
- TERESA K. GIMISI
- ELIZABETH KAVERE GIMISI

All of REAL TIME COMPANY LIMITED of post office Box Number 56362-00200, Nairobi in the Republic of Kenya (hereinafter referred to as “partners” which expression shall where the context admits include their successors and assigns)”

22. It is, therefore, a matter of evidence whether the 1st defendant was the **recipient** of the money and not the company, and it is a question best determined upon trial on the facts and merits. At this stage, therefore, it cannot properly be said that the acts of the company are the acts of its alleged “sole” director, as alleged by the plaintiffs.

Per incuriam

23. To ignore the effect of the doctrine of corporate personality in this matter would be mean that the court would engage in *per incuriam* determination. Surely, the plaintiffs cannot ask the court to leave a *per incuriam* order standing, when there is opportunity to correct it by an order in review.

Receipt of the sum of Ksh.2, 600,000/-

24. Payment of the money was pleaded in paragraph 7 of the Plaint as follows:

“7. Consequently, the Plaintiffs invested capital in the aforesaid joint business venture to a tune of Ksh.2,600,000/= which monies were paid to Real Time Company Ltd (the 2nd Defendant herein) by the Plaintiffs.”

25. In response thereto, the draft Defence at paragraph 5 answered that:

“5. The 1st Defendant denies the content of paragraph 7 of the Plaint and puts the Plaintiff to strict proof thereof. The 1st Defendant in addition reiterates that the Plaintiffs and herself had at all times engaged as business partners with each having shares equal to their contribution and none of them made a capital investment in each other.”

25. According to the Agreement between the parties shown as exhibit in the Affidavit of the Plaintiff of the payment of the said sum of money is shown as follows:

“NB: The said contributions of Ksh.2,600,000 (two million six hundred thousand) has been paid to Real Time Co. Ltd as at 9th June 2017 by Elizabeth Kavere on account:”

I have not found anything on the record of the proceedings at the hearing of the application for setting aside to indicate that the 1st defendant or her counsel admitted receipt of the money as urged by counsel for the plaintiff in their written submissions.

27. The context in which the observation that the 1st defendant had admitted payment was made is set out in paragraphs 20-22 of the Ruling as follows:

“20. The defendants allege a joint venture business which is described in the preambular sections of the Agreement dated 9th June 2017 as follows:

“JOINT VENTURE AGREEMENT

THE JOINT VENTURE AGREEMENT is made the 9th day of JUNE, TWO THOUSAND AND SEVENTEEN among:

- LILIAN ATHO
- TERESA K. GIMISI
- ELIZABETH KAVERE GIMISI

All of **REAL TIME COMPANY LIMITED** of post office Box Number 56362-00200, Nairobi in the Republic of Kenya (hereinafter referred to as “partners” which expression shall where the context admits include their successors and assigns)

WHEREAS:

The partners are desirous of jointly venturing into dried grains (products) supply business for a profit; the partners have jointly and severally agreed to be bound contents of this Agreement.

TERMS:

The terms of this agreement shall be outlined as follows:

1. CONTRIBUTIONS

The partners will make an initial contribution to the partnership as follows:

- LILIAN ATHO: 7,200,000 (seven million two hundred thousand shillings.)
- ELIZABETH KAVERE: 1,600,000 (one million six hundred thousand shillings)
- TERESA K. GIMISI: 1,000,000 (one million shillings)

NB: The said contributions of Ksh.2,600,000 (two million six hundred thousand) has been paid to Real Time Co. Ltd as at 9th June 2017 by Elizabeth Kavere on account:”

21. **Although the receipt of the sum of Ksh.2,600,000/- is admitted,** it appears to the court the claim of profits amounting 22million is disputed, the 1st defendant asserting that the joint venture business did not do well and the partners should be ready to absorb the losses in accordance with their partnership rights and liabilities. The counsel’s submission on the point is as follows:

“The main reason from seeking to set aside or vary the judgment in this case would be for the court to determine the defence being claims that the defendants are to blame for losses that occurred in the joint venture with the plaintiffs and the 1st defendant all partners and joint managers running the venture and thus if losses occur, all the three of them are to contribute in these losses.”

22. That, I respectfully think, is a triable issue not necessarily one that must succeed but a bona fide trial issue between the parties nonetheless.”

Clearly, the court did not presently reflect on the fact that the payment was shown on the Agreement to have been made to the company the 2nd defendant and not the 1st defendant.

28. There is, therefore, a clear error on the face of the record of the court’s ruling of 25th February 2020 in holding at paragraph 24 thereof, which is in terms that -

24. The 1st defendant admits receipt of Ksh.2,600,000/- as the plaintiff’s contribution to the alleged joint venture. ”

that the payment of the money was admitted by the 1st defendant as receipt is expressly stated to have been to a company (the 2nd defendant), which on the principle of corporate personality is a different person from the 1st defendant.

Conclusion

29. Having considered the agreement between the parties, it is clear to me that the payment of Ksh.2,600,000/- is shown to have been to a

company **REAL TIME COMPANY LTD**, the 2nd defendant herein and not to the individual 1st Defendant, and it will call for evidence to show that receipt by the company was receipt by the individual director, as alleged.

30. This court accepts, and much regrets, the error on its part in failing to observe that the payment of the money subject of the conditional leave to defend granted to the 1st defendant was shown in the subject agreement as paid not to the 1st defendant herself but to a company in which the plaintiff is alleged to be “**sole**” director and shareholder.

31. The plaintiffs may upon full hearing yet show themselves to be entitled to the same relief sought in the plaint for the refund of the money paid by them together with profits but the defendant will have had an opportunity to urge such defences appropriate to her case in the circumstances. That is the essence of the right to fair hearing.

Orders

32. The interest of justice, which the court is enjoined by section 3A of the Civil Procedure Act to serve, requires that the applicant 1st defendant who has denied receiving the money subject of the application and which, according to the agreement subject of the suit was paid to a separate legal entity, be heard on the merits *unconditionally*. The plaintiffs shall also have opportunity to demonstrate at the trial that their money was indeed received by the 1st defendant/applicant. Accordingly, the court grants prayer 2 of the Notice of Motion dated 6th March 2020 as prayed, and directs that the 1st Defendant’s Defence be filed with seven (7) days from the date of this ruling.

33. The circumstance of this case of bitter disagreement of the parties arising from their business arrangement subject of the suit which culminated in the application for committal to civil jail of the applicant demonstrates a cause sufficient for the court to order for expeditious disposal of the suit in terms of Order 17 Rule 2 (2) of the Civil Procedure Rules, which provides as follows:

“(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.”

The court, therefore, directs that the suit be fixed for hearing on priority basis within the next ninety (90) days or such other period as the court may direct for the vindication of the innocent party or parties, as the case may be finally adjudged.

34. Costs in the cause.

Order accordingly.

DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER 2020.

EDWARD M. MURIITHI

JUDGE

Appearances: -

M/S H & K Law Advocates for the Plaintiff.

M/S MS Law Advocates LLP for the Defendants.