



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 142 OF 2017

1. T.S.S. INVESTMENTS LIMITED

2. JUJA COFFEE EXPORTERS LIMITED.....PLAINTIFFS

VERSUS

NIC BANK LIMITED.....DEFENDANT

R U L I N G

1. The application before me for determination is the Notice of Motion dated 8th June 2018 seeking in the main an order that the court reviews varies or sets aside the condition requiring the 1st and 2nd plaintiffs to pay 205 of the outstanding debt monthly as a condition for the injunction issued on the 31/5/2018.

2. The grounds upon which the application is premised are that the condition imposed was onerous, stringent and amounted to a denial of the injunction as it demands of the plaintiff the payment of some Kshs.41,000,000/= or thereabout on a monthly basis. It was added that the plaintiffs/applicants had already filed a notice of appeal and the appeal would be fast tracked as it is a matter of common knowledge, in Mombasa, that appeals are disposed of within exceptionally short period hence the defendant/respondent would not be exposed to any prejudice.

3. The defendant/respondent did oppose the application by the Replying Affidavit of KENNETH WAWIRA, the legal services manager of the defendant, who deponed to have read and understood the Application and affidavit in support thereof. The deponent takes the position that none of the thresholds for review have been established and therefore the application cannot but fails and that an injunction pending appeal is a matter for the discretion of the court and that there is no demonstration that the court overlooked the sum outstanding as demanded by the defendant. It was lastly submitted that there was no demonstration of inability to pay when the sum outstanding had been established by the court. He then concluded that ever since the order was made the plaintiff has not made any effort to comply and therefore that the application wholly lacks merit.

Submissions by the parties

4. For the plaintiff/applicant submissions were offered to the effect that the application fits within the thresholds set by Section 80 and Order 45 for review because the sum demanded is about 2.5billion hence 2% per month is about 42 million which the plaintiff/applicant is unable to pay to meet the condition of injunction pending appeal. In addition counsel added that the outstanding sum is part of the dispute to be canvassed on appeal hence it is not a settled figure. To the counsel, the court in imposing that condition proceeded on the wrong basis as if the sum was undisputed.

5. He then referred to the exhibited grounds of appeal and added that the condition is so harsh and amounts to giving the order of injunction by one hand and taking it away by another. In the alternative to the submission that the thresholds of Order 45 Rule 5 have been made and in answer to the Defendants position that the same have not been met, counsel said that his client relies on the limb of **sufficient reason**.

6. On the jurisdiction of the court to vary terms of an injunction counsel relied on Order 40 Rule 7 and pointed out that the order subject of this application was issued pursuant to the inherent powers of the court which he submitted are unfettered.

7. For the defendant/ respondent it was submitted that there were no sufficient grounds to interfere with the orders of 31/5/2018. The counsel stressed the fact that an injunction being an equitable remedy is given by the court upon exercise of discretion and there was no demonstration that the discretion was not properly exercised nor was there demonstration that the court overlooked the amount involved. It was then added that no evidence of inability to pay was availed and that no other sum was offered in place of the sum deemed exorbitant. It was also submitted that ever since the order was made not even a cent had been paid by the plaintiff. To the respondent the Applicants had exhibited lack of clean hands and deserved no discretion of the court being exercised in their favour. Lastly, it was submitted that the

Respondent used deposits by the public to lend to the plaintiff and therefore the continued default to pay is unfair to the depositing public.

Analysis and determination

8. Even though expressed to be brought pursuant to the overriding objectives provisions of the court as well as the inherent powers of the court, the order being sought is essentially one for review. The law is that whereas the court retains its inherent powers at all times and must always focus on its overriding objectives to do justice, where the Act provides a specific threshold and procedure, that procedure must be followed and the threshold maintained.

9. For this determination, the question remains whether or not I should review the orders of 31/5/2018 and remove the condition of payment of part of the debt or otherwise interfere with that condition.

10. In coming to that condition, the court did observe and say, in the subject ruling:-

“All considered, I grant to the plaintiff/applicant an order of injunction pending appeal but equally recognize that the debt disclosed to exist between the parties, which is not disputed, is huge and colossal. Being so colossal, I reckon that every day the appeal pends, while the plaintiff does not pay the debt or part thereof, both side suffer. The plaintiff suffers the burgeoning debt while the defendant suffers being kept away from a debt which is not denied. I do grant the injunction pending Appeal but on terms that would protect both parties. The terms I consider just and expedient are that:-

· **The plaintiff shall continue to pay monthly, towards the liquidation or reduction of the debt, a sum of at least 2% of the outstanding debt. Such payment shall commence on the 10/6/2018 and then on the 10th of each succeeding with pending the determination of the Appeal.**

· **I direct that costs of the application be costs in the appeal.**

11. It can thus not be genuinely argued that the court was averse to or oblivious of the sum in dispute between the parties. That sum was the very reason the conditions were put and reasons for imposing conditions disclosed.

12. However given, and by whichever name called, an injunction remain an equitable remedy and invokes the court's discretionary powers. The law as I understand and appreciate is that an Order for review cannot issue when what the court sought to do was to exercise a discretion or merely on the basis that another judicial officer could have found and held otherwise. It is also not available where the court is seen to have taken an incorrect exposition of the law and arrived at an erroneous conclusion^[1]. Review is only available to correct an error of mistake obvious on the face of the record, upon a discovery of view and important matter of evidence which was not available to the applicant at the time the order was made, due diligence notwithstanding and for any other sufficient reason. I construe the expression sufficient reason to be a reason that the court considers to further the interest of justice between the parties. It cannot be just any reason.

13. In this matter, it is obvious that no error or omission has been demonstrated to be present on the face of the record. It is equally not the applicants case that there has emerged a new and important matter of evidence which was not within reach at the time of the decision. The applicant only say that the sum represented by 2% ordered is so huge and beyond his ability to pay. How does that reason mirror on the need of the justice between the parties?

14. Even though the sum due may in dispute, the debt itself is not in dispute. The debt is not in dispute because in the plaint, it is pleaded at paragraph 9 that:-

“Following the meeting held on 16/03/2017, the Plaintiffs wrote a follow-up, email to the Defendant thanking it for the opportunity to engage with the Plaintiffs to find an amicable way of settling the outstanding amounts. The email proceeded to request copies of the Letter of Offer, Charges and Statements of Accounts to correct the impaired knowledge of the affairs of the Plaintiffs. The Defendant failed, refused and or neglected to respond to the email.”.

15. If the debt is not disputed and the only reason the plaintiff came to court is what they viewed bad faith in the defendant seeking to realise their security before the engagement could be pursued to desired conclusion, can it be just that more than 18 months later, the debt has not been paid even in small bits and no offer is being made but the plaintiff must get time to pursue their appeal on no conditions at all? That to this court is not just nor fair and it cannot be a sufficient reason to grant an order for review of the discretionary orders given by the court. So long as the reason given does not address the ultimate solution of the dispute, payment or reduction of the debt, it fails of a sufficient reason and therefore the application lacks merits and I order it dismissed with costs to the Respondents.

Dated and delivered at **Mombasa** this **26th** day of **October 2018**.

P.J.O. OTIENO

JUDGE

^[1] National bank of Kenya ltd vs Ndungu Njau [1997] eKLR

