REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 153 OF 2009

SYNERGY INDUSTRIAL CREDIT LIMITED……..……APPELLANT

-VERSUS-

TENDERWOOD INDUSTRIES LTD…….....1ST RESPONDENT/APPLICANT

JOHN SPEKE MONGARE…….....2ND RESPONDENT/APPLICANT

JANE WAHU KARANJA…….…….....……3RD DEFENDANT/APPLICANT

RULING

1. The Notice of Motion, dated **7th October 2014**, was presented by the defendants seeking orders to the effect that the ruling of the court delivered on **31st July 2012**, be reviewed in view of the fact that the plaintiff lawfully took possession of motor vehicle registration number KAQ 250W Renault Tipper valued at Kshs.2,500,000/= on **29th June 2012,** pursuant to a court order dated **14th June 2012,** issued in **Kisii CMCC No. 629 of 2009**, which motor vehicle had given rise to the plaintiffs claim of the sum of Kshs.6,367,658/=, yet the court's ruling was based on the assumption that the said motor vehicle was and remained the property of the defendants. That, the ruling of the court be reviewed so as to ascertain the rate and interest payable on the original principal sum so as to comply with statutory provisions of the interest chargeable and payable on a non-performing loan and that the ruling be reviewed so as to give the defendants/applicants credit of sums that were paid to the respondent for which credit has never been given.

2. The grounds for the application are contained in the body of the Notice of Motion as supported by the applicants' averments contained in the supporting affidavit dated **7th October 2014**.

The plaintiff/respondent opposed the application on the basis of the grounds of opposition filed and dated **22nd September 2014**. Both parties through their respective advocates i.e **Messrs Nyamurongi & Co. Advocates** and **Messrs Ongegu & Associates Advocates**, presented written submissions in canvassing the application.

Due consideration has been given to the rival submissions by this court which thereby notes that the basic issue for determination is whether the applicants have established a good valid cause for the review of the ruling delivered by the trial court on the **31st day of July 2012.**

3. The said ruling was in effect a culmination of the contested application dated **7th January 2010**, made

by the plaintiff for striking out the statement of defence filed by the defendants which was based on hire purchase agreements entered between the plaintiff and the defendants in the years **2004** and **2005** for the purchase of vehicles by the defendants from specified third parties which purchases were financed by the plaintiff and the repayments of the purchase price and incidental charges were guaranteed by the second and third defendants in their capacity as directors of the first defendant. In the fulfillment of their obligation to repay the agreed amounts, the defendants through the first defendant drew cheques in favour of the plaintiff but the same were returned unpaid for want of sufficient funds. The first defendant was thus indebted to the plaintiff in the total sum of Kshs.8,080,368/- as at **31st March 2009**. The amount was made up of Kshs.6,367,658/-, Kshs.34,651/= and Kshs.1,678,059/= respecting all the hire purchase agreements. The indebtedness extended to the second and third defendants due to the guarantees executed by themselves in favour of the plaintiff respecting the hire purchase agreements which were eventually terminated by the plaintiff on the **7th June 2006**, due to breach thereof. Several demands made to the defendants by the plaintiff to discharge the outstanding amounts were neglected thereby prompting the institution of this suit on **6th August 2009**.

4. A statement of defence dated **10th September 2009**, was filed by the defendant. This prompted the plaintiff to file a chamber summons dated **7th January 2010**, for striking out the defence and for judgment to be entered for the plaintiff as prayed in the plaint. The court considered the application and the opposition thereto and rendered its ruling on the **31st July 2012**, to the effect that:-

> ***"(1) The statement of defence filed herein be and is hereby struck out and judgment be and is hereby entered for the plaintiff/applicant as against the 1st, 2nd and 3rd defendants jointly and severally as prayed in the plaint.***
>
> ***(2) The costs of this application and of the substantive suit be borne by the 1st, 2nd and 3rd defendants jointly and severally."***

It is this ruling which prompted the defendants to file the present application pursuant to the provisions of **Section 3A, Section 80** of the Civil Procedure Act and Order 45 Rules (1) (2) and 3(2) of the Civil Procedure Rules.

5. ***Section 80*** of the Civil Procedure Act provides that:-

> ***"Any person who considers himself aggrieved –***
>
> ***(a) by a decree or order from which an appeal is allowed by the 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 think fit."***

Order 45 Rule 1 (1) of the Civil Procedure Rules 2010, provide for factors to be considered by a court in an application for review. Thus:-

> ***"Any person considering 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 exercise of due diligence, was not within his knowledge or would 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 the judgment to the court which passed the decree or made the order without unreasonable delay."

6. The circumstances under which a person may apply for a review are clearly spelt out under the aforementioned provision of the Civil Procedure Rules. A person must thus consider himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is hereby allowed before he can apply for review.

Herein, it is admitted by the applicants/defendants that they filed a notice of appeal but did not file a memorandum of appeal within time meaning that there was no appeal at the time of making the application.

However, in their submissions, they state that they were aggrieved with the disputed ruling and hence filed a notice of appeal to the Court of Appeal on **7th August 2012**, but the appeal is yet to be heard to this day.

Indeed, the said notice of appeal was filed in this matter on the **7th August 2012** and lodged in the Court of Appeal registry at Kisumu on the **8th August 2012.** It remains valid to date. This being the case, it was not open to the defendants to move this court under Order 45 Rule 1 of the CPR and by doing so they clearly abused the court process.

7. Further abuse of the court process by the defendants is demonstrated by the fact that the present application was filed on **8th October 2014**, yet the disputed ruling was delivered on **31st July 2012.** The delay in filing the application was rather unreasonable. Be that as it may, review may also be available where there is discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed nor the order made.

It was herein submitted by the defendants that while the disputed ruling was pending there were new developments in that one of the motor vehicles registration numbers KAQ 250W Renault Tipper was attached in execution of decree in **Kisii CMCC 629** of **2009** and orders were made by the lower court for its release to the plaintiff. Thus, when the disputed ruling was delivered the trial court was not aware of this new development and had it been aware, then it would not have arrived at the disputed decision.

8. The defendants contend that this new evidence was not within their knowledge at the time of the application and even if they were to pursue the appeal no new evidence would be admitted at the appeal stage.

On its part, the plaintiff contended that there is no discovery of new and important matter or evidence as implied by the defendants. This court would readily agree with this contention because the defendants were well aware of the existence of **Kisii CMCC No. 629 of 2009** and its possible impact on this case yet they did not bring the fact to the attention of the court during the hearing of the application by the plaintiff to strike out defence and prior to the delivery of the disputed ruling. They were indolent and sat on their rights. The case in the lower court was filed against them by a third party and the plaintiff was incorporated into it at the execution stage due to its interest in the subject motor vehicle registration number KAQ 250W. Surely, they (defendants) had all the opportunity to bring these facts to the attention of the court even before the disputed ruling was delivered on the **31st July 2012.**

9. With regard to the exhibits marked *"JSM -002A & B" "JSM-003* and *JSM-005"*, these were in possession of the defendants and that is why they presented them in this application. They cannot now be heard to say that they could not produce the documents at the hearing of the material application because they did not have them at the time. Even if they did not have them at the time they were very much aware of the accruing facts which ought to have been brought to the attention of the trial court but was not perhaps due to their misguided confidence that the material application was headed for dismissal. They have not expressly stated herein that the disputed ruling ought to be reviewed on account of some mistake

or error apparent on the face of the record even though they have suggested that the computation of the amounts owed to the plaintiff was erroneous as it did not take into account the payments already made, the credit not given to the defendants, the accrual interest payable and the release of vehicle to the respondent by means of a court process.

10. It is apparent that the trial court computed the amount owed to the plaintiff by the defendants on the basis of the material availed before it at the time. The failure to avail the perceived right material at the time lay squarely on the defendants who could not therefore expect the court to compute the amount owed to the plaintiff in the manner desired by them. This application is so far as it is intended to re-open the case for purposes of a fresh computation of the amount owed to the plaintiff by the defendants is an abuse of the court process.

In the upshot, this court must find that the defendants have failed to establish good and valid cause for the review of the disputed ruling.

The defendants would do justice upon themselves if they pursue the appeal that they have already lodged in the Court of Appeal against the disputed ruling.

Their notice of appeal dated **7th August 2012**, has never been withdrawn. The matters canvassed herein would be good fodder for the Court of Appeal in exercise of its appellate jurisdiction on matters arising from this court. Otherwise, the present application is lacking in merit and is hereby dismissed with costs to the plaintiff.

Ordered accordingly.

J.R. KARANJA

JUDGE

[Delivered and signed this 28th day of January 2016