



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1719 OF 1999

PLAZA TRUST LIMITED PLAINTIFF

VERSUS

HARDROCK CAFÉ LIMITED 1ST DEFENDANT

EDWIN OCHIENG YINDA 2ND DEFENDANT

JOSHUA KULEI 3RD DEFENDANT

RULING

The plaintiff/applicant has filed a Notice of Motion dated **19th November 2015** under Section 80 of the Civil Procedure Act Cap 21 Laws of Kenya and Order 45 Rules 1 and 2 of Civil Procedure rules. The applicant seeks that;

- i. The court reviews and/or vary the judgment and decree issued on 30th September 2015 to the extent of the refusal to grant the prayer for mesne profits and service charge.
- ii. That upon review, judgment be entered in favour of the plaintiff against the defendants jointly and severally for the sum of Kshs.3,669,032.90 with interest at 24% per annum from 1st September 1999 until payment in full.
- iii. That cost of the application be awarded to the application

The application is supported by the affidavit of Antony Mulisa a director of Plaza Trust Ltd dated the 20/11/15. He avers that the plaintiff in its re-amended plaint dated 28/9/2007 pleaded for mesne profit and service charge at paragraph 11 and qualified the claim at Kshs. 2,100,000/- and Ksh.1,569,032.90 respectively. That the said quantified amount was then claimed in the aggregate under paragraph 12 of the said plaint and that the sum of Kshs. 6,095, 538.80 as claimed was a cumulative total of the amounts claimed in paragraph 10 and 11 as restoration costs, mesne profits and service charge. That he has been advised that the amendment to the prayer was in conformity with the law on pleading special damages and that the court mistook the amendment to be abandonment for the prayer mesne profits and service charge and as such is a clear error on the face of the record. That the judgment of 30/9/2015 therefore should be reviewed in the interest of justice and the plaintiff sought be granted the relief sought.

This application was opposed, the defendant filed grounds of opposition stating that the plaintiff's applicant cannot be granted under order 45 (1) Rule (2) of the Civil Procedure Rule as the court did not

make a determination that the prayer for Mesne Profits could be granted so that the error referred to by the plaintiff could be one that is apparent on the face of the record. That the provisional service charge increment of Kshs.224, 147.56 together with interest of 24% per annum as sought by the plaintiff's a contested issue and cannot be dealt with by way of an application for review under order 45 Rule (1) of the Civil Procedure rules. That the rent as provided for in the lease agreement dated 25/8/03 between the plaintiff and the defendant which is the 4th item in the plaintiffs list of documents dated 10/6/05 is clear that rent would be Kshs. 3,000,000/- for the following 18 months translating to Kshs. 166,666,66 per month and service charge of Kshs. 1,011,192/- per year translating to Kshs. 84,226 per month. That the prayer for payment of Kshs. 3,669,032/90 to the plaintiff by the defendant is therefore misplaced and the interest sought of 24% per annum is grossly exaggerated and an illegality that is not provided for anywhere. There are no valid grounds to warrant an order of review as sought by the plaintiff/applicant as there is no error apparent on the face of the record as stated by the plaintiff/applicant.

The defendant filed an application dated **10th of November 2015**. It is brought under the provisions of order 45 rule 1 and 2 of the Civil Procedure rules, and section 3A and 63 (e) of the Civil Procedure Act. The defendant seeks the following orders;

That the honourable court be pleased to review the judgment /decree of this honourable court given on 30th September 2015 so that the Kshs.950,000/- paid as deposit by the 1st defendant/applicant and still being held by the plaintiff to date be factored in the judgment thereof so that the judgment amount becomes Kshs. 1,476,505.90 instead of Kshs.2,426,505.90.

That the plaintiff/respondent be condemned to pay the costs of this application.

The application is supported by the affidavit of Edwin Ochieng Yinda. He deposes that having gone through the judgment of the court delivered on the 30th of September 2015, there is an apparent error the court failed to factor in which is the undisputed amount of Kshs. 950,000/- held by the plaintiff. Therefore the judgment amount should be reduced from Kshs. 2,426,505.90 to Kshs.1,476,505.90. That the said amount was acknowledged by Mr. David Otieno the plaintiff's witness in his testimony. He states that the omission is an error apparent on the face of the record warranting the invoking of the provisions of order 45 of the Civil Procedure Rules. That if the court does not review or correct the mistake then they stand to suffer double jeopardy in that they will be forced to pay the plaintiff the sum in full without credit being given for the Kshs. 950,000/- held by the plaintiff since 1993 (22 years), upon execution of the lease between the plaintiff and 1st defendant. That the said Kshs. 950,000/- must be reduced from the judgment amount so that the interest of 19% as awarded by the court runs only on the reduced judgment sum of kshs.1,476,505.90 and not on the whole judgment sum amount of Kshs.2,426,505.90. That the court should also consider and factor in interest for the said Kshs.950,000/- from the date it was paid on 25th August 2015 when the lease was executed to date. The plaintiff filed grounds of opposition as follows; that the application is misconceived and bad in law, the decretal amount is well in excess of the deposit, no set-off was pleaded. The court has no jurisdiction to review on the grounds stated in the application, the deposit will be taken into account at the time of payment of the decree, interest and costs, the counterclaim has been dismissed with costs, there are no or no valid grounds for review.

Counsels made oral submissions in court. Mr. Morara for the defendant reiterated what is deposed in the affidavit of Mr. Yinda. On the plaintiff's application dated 19th November 2015 the defendants argue that the court dealt with the issue on its judgment after having had a chance to look at the pleadings and proceedings and making a finding on the issue. That the court invoked the relevant provisions and as such the court has dealt with the issue in finality and that the issues raised can only be handled on appeal. That a party is bound by his pleading, that the plaintiff did not attach the re-amended plaint for consideration to confirm the position as alleged. The defendant sought the dismissal of the plaintiff's application for review arguing it had no merit.

Mr. Gachuhi argued that his application has merit. He recalled the provisions of order 45 Rule (1) and (2) and submitted that the defendant's application does not fall within the purview of the said order. That there is no error apparent on the face of the record and that the evidence of a witness is no bases for a

review of a judgment. Further that there is no pleading in the re-amended defence in the counterclaim for a claim in connection with the deposit and therefore this court has no jurisdiction to review the judgment. That they have stated that the deposit will be taken into account in the decree and there is already a decree in Civil Case no. 96 of 2000 under certificate of costs issued in the decree in the said suit as shown in the plaintiff's bundle of documents at page 70 to 73. That there is evidence in the proceedings that the defendant admitted that the said decree had not been settled. That the said amount shall be applied as it arose from the said suit. On the plaintiff's motion it was submitted that they seek a review of the court's judgment. That the Court at page 53 of the judgment dealt with the issue of mesne profits. That at paragraph 11 of their re-amended plaint their claim for mesne profits is pleaded. The total amounts claimed are at paragraph 12 as stated at paragraph 10 and 11 of the said plaint. That from the body of the plaint it is clear that the actual is pleaded since the total amount was pleaded at Kshs. 6,095,538.80. That that is the amount prayed for at paragraph (a) of the re-amended plaint and what is struck out at paragraph (c) was the original pleading at the time when the defendant was still in possession of the premises unlawfully. That when possession was recovered pursuant to a preliminary decree of 10th March 2000 the period of mesne profit was clear the seven months ran from 1st September 1999 and possession was recovered on the 10th of March 2000. That this is an error apparent on the face of the record as there was no striking of the prayer for mesne profits. It was repleaded at paragraph 7 and this court can review the judgment. Counsel referred the court to the evidence in the plaintiff's bundle at page 85 on the defendant witness. That the court made the finding when the rate of interest was 19%. It was submitted that the court can appreciate the evidence and award the sum of Kshs. 3,237, 591/- being the rent at Kshs. 300,000/- and service of 162,513/- per month multiplied by 7 months from September 1999 to March 2000. That the court has the powers to review the judgment under Order 45 Rule 1 and 2. The plaintiff sought a review of the judgment in the sum of Kshs. 3,237, 591/- together with interest at 24%.

I have considered the submissions made by the parties and the law as provided under Order 45 Rules 1 and 2 which provides that:

An application for review of a decree or order of a court can be made by a party who is aggrieved upon 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, or for any other sufficient reason. This rule provides the circumstances under which a review can be done. Both parties allege an error apparent on the face of the record. The issue I have to deal with first is whether this court has jurisdiction to review this judgment. Under order 45 the court has jurisdiction to review the judgment on the range given from discovery of new important matter to error apparent on the face of the record. I will first deal with the defendant's application. The defendant seeks a review that the sum of Kshs. 950,000/- should be given as credit in the judgment and judgment entered for a lesser sum. The plaintiff witness from the evidence adduced acknowledged the defendant having paid the said sum. It has been submitted by the plaintiff that they will give credit for the sum in the decree arising from a judgment in HCCC 96 of 2000. In the amended counter claim the defendants did not seek credit for the said sum in the event the court entered judgment against them. I therefore find no merit in the defendant application and dismiss it with costs.

On the plaintiff's application it was pointed out that the court made a mistake in not seeing that praye (a) of their plaint of Kshs. 6,095,538.80 was inclusive of their claim for mesne profits and service charge for the period 1st September 1999 to 31st March 2000. In declining to grant the said claim the court held that plaintiff had struck off/ cancelled prayer (c). The Court of Appeal. **Civil Application No.Sup. 16 Of 2012 Benjoh Amalgamated Limited and Another Vs. Kenya Commercial Bank Limited** observed that

“In the high court, both the Civil Procedure Act in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review”.

Having looked at the re-amended plaint again paragraph 11 of the plaint sets out the plaintiff's claim on mesne profits which is prayed at paragraphs (a) in the prayers in the plaint. A sum of Kshs. 6,095,538.80 is sought. At paragraph 12 of the plaint the plaintiff claims the said sum which is set out at paragraph 10 and 11. At paragraph 11 the plaintiff claims from the defendant jointly and severally in the sum of Kshs. 2,100,000.00 as mesne profits and Kshs 1,569,032.90 being the service charge for the period 1st September 1999 to 31st March 2000. In my judgment the court argued that the plaintiff had struck off the prayer for mesne profit. The re-amended plaint does seek the mesne profit at prayer (a). I find that it was an error or mistake on the part of this court to find that their prayer for mesne profit had been cancelled and therefore the plaintiff was not entitled to mesne profit and service charge.

Prayer (a) is clear and the particulars of mesne profit and service charge at paragraphs 11 and 12 are noted. The plaintiff was entitled to mesne profit as claimed for the period indicated as it become clear that they had to move to court to have the defendants vacate the premises. PW4's evidence was that the term of lease was 6 years from 1st September 1993 and the initial rent was Kshs. 300,000/-. The defendants failed to adduce any evidence to contradict the same. In my view the plaintiff's application has merit and I therefore enter judgment for the plaintiff against the defendant in the sum of **Kshs. 3,669, 032.90** with interest at 19% from the date of this ruling until payment in full. The plaintiff is also awarded costs of the application. The defendants application is dismissed with costs . It is so ordered.

Dated, signed and delivered this 29th day of June 2016.

R. E. OUGO

JUDGE

In the presence of:

Ms. Charity Court Clerk