REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 43 OF 2015

KAY CONSTRUCTION COMPANY LIMITED..……….................….1ST PLAINTIFF

Versus

ECO BANK KENYA LTD…………...…..........………..…………….1ST DEFENDANT

JAMES KARIUKI…………………..…….......………...…………2ND DEFENDANT

DAVID NDUNGU NGANGA……..…..…..……........…...……........…3RD DEFENDANT

SUSAN MACHARIA……………..……….......…...……........…...………4TH DEFENDANT

KAY CONSTRUCTION CO. LTD………..……..……........………5TH DEFENDANT

KENYA RURAL ROADS AUTHORITY……….….......……......6TH DEFENDANT

ATTORNEY GENERAL………………..………..…..…...……..7TH DEFENDANT

RULING

1. On 25th August, 2015 Justice F. Gikonyo made the following ultimate Order in respect to the question whether the 1st Defendant herein was entitled to costs,

> "*Accordingly, the result of the entire litigation is that the interpleader Bank was put to costs by the suit for which recompense is in Order. It is entitled to costs upon the withdrawn of that suit for having been taken through this litigation. The upshot is that I award the interpleader costs of the suit. It is so ordered*".

2. The Plaintiff is aggrieved by that decision and has through a Notice of Motion dated 13th November, 2015 sought that this Court be pleased to review/set aside the Ruling and the consequential Orders emanating from the Ruling. Supporting that Application, the Plaintiff has set out various Grounds on the face of the Motion and in the Affidavit by one of its Directors, Mr. Hasmita Patel, sworn on the same date.

3. It is the case of the Plaintiff that the Ruling was made on account of an error and premised on fundamental mistakes which are apparent on the face of the record. Each of the alleged mistakes shall be considered fully later in this decision and they need not be set out at this stage.

4. The Plaintiff sees other sufficient reasons to justify the Review of the Order. The Plaintiff states that;

i That the Plaintiff is being condemned to pay costs to the 1st Defendant in the absence of any fault or wrongdoing whatsoever on their part.

ii. That the Plaintiff is being condemned to pay costs despite of the fact that the step taken by the Plaintiff to institute this suit was a positive step from which all other parties hereto other than the fraudsters (the 2nd, 3rd, 4th and 5th Defendants) benefited. In these circumstances, the appropriate order would have been that each party to bear its own costs.

iii. That the Plaintiff herein had shouldered not only the costs of filing this suit and other related costs. Besides the Plaintiff had shouldered all the costs of advertisement in the Daily Newspaper yet they had not done anything wrong to create the circumstances that led to the filing of this suit.

iv That the 1st Defendant who alone could have saved the parties herein from incurring the legal and other expenses by simply closing the said account and returning the said amount where it came from is ironically the one being rewarded with huge costs.

5. In opposing the Application the 1st Defendant filed Grounds of Opposition dated 27th November, 2015. The Grounds raise the following substantive issues:-

(i) The Application does not disclose any ground to merit the grant of the Orders.

(ii) The Order sought to be set aside/or reviewed has already been substantively executed in favour of the Plaintiff.

(iii)There is no error on the face of the record.

(iv) There has been unreasonable and undue delay in filing of the Application.

(v) The Orders sought are informed by ulterior motives.

6. The background to this matter has been set out in the Affidavit of Mr. Hasmita Patel. His account of things has not been controverted. It is said that the Plaintiffs executed works for amongst other Clients, the Ministry of Education of the Government of Kenya, and payment was due to it from these Clients.

7. It is alleged that the 2nd, 3rd and 4th Defendants contrived a scheme to defraud the Plaintiff and registered the 5th Defendant as a Limited Liability Company. The name of the 5th Defendant is similar to that of the Plaintiff and was meant to pass off as the Plaintiff. The Plaintiff is Kay Construction Company Ltd while the 5th Defendant is Kay Construction co. Ltd. A Bank Account was opened with the 1st Defendant bearing the name of the 5th Defendant.

8. The Plaintiff was alerted by the Ministry of Education about the new Bank Account as there had been a request to pay the monies owed to the Plaintiff into this new Account. Acting on this revelation, the Plaintiff wrote a letter on 9th January 2015 to the 1st Defendant informing it that Account No.0230015023988701 opened in the name of the 5th Defendant was fraudulent and further requested the 1st Defendant to close the Account.

9. In response to this letter, the 1st Defendant wrote on 29th January, 2015;

29th January, 2015

Rachier & Amollo Advocates

Mayfair Centre

5th Floor

P.O. Box 55645-00200

NAIROBI

Dear Sirs,

RE: KAY CONSTRUCTION LIMITED - 0230015023986701

We refer to your letter dated 9th January 2015 on the above mentioned and confirm that we hold the account in our books and have put a hold on the account until the matter mentioned therein is resolved.

Yours faithfully

Mercy Shayo

CUSTOMER SERVICES MANAGER

VALLEY ARCADE BRANCH

Apprehensive of the possibility of fraud, the Plaintiff commenced these proceedings.

10. Shortly after the Plaintiff filed suit, another of the Plaintiffs Creditor deposited a sum of Ksh.287,769,500/= into the said Account. This necessitated the Amendment of Pleadings. That it was in regard with this Amended Plaint of 23rd February 2015 that the 1st Defendant agreed to refund the monies to the Payer (the 6th Defendant). Parties then agreed by consent to release the 1st Defendant from this suit.

11. It is the averment of the Plaintiff that there is no evidence that the impugned Account has been closed and there still remains a real risk of the 2nd, 3rd, 4th and 5th Defendants defrauding the Plaintiff.

12. I understand the Plaintiff to be arguing that given the set of facts Justice Gikonyo should not have ordered the Plaintiff to pay costs of the suit to the 1st Defendant.

13. The Application before Court is premised on two Grounds. That there is an error apparent on the face of the record and there is other sufficient reason to review the Order. This Court accepts that the approach to take in considering these two grounds has been set out as follows;

a) In **Michael Mungai Vs. Ford Kenya Elections & Nominations Board & others 2013**eKLR where the Court quoted with approval the case of NYamogo and Nyamogo V. Kogo [2001] EA 174 that;

"this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out.

An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us".

b) "Any other sufficient reason" need not be analogous with other grounds set out in Order 45 Rule 1(1).

I bear the above in mind as I consider and determine the matter at hand.

14. In the wisdom of the Plaintiff's Counsel, they have scheduled the errors and "other sufficient reasons" why the Ruling of the Learned Judge needs to be reviewed. This Court has found the schedule helpful in considering each of the grievance raised by the Plaintiff.

15. The Decision of the Judge was assailed by the Plaintiff for being premised on same false assumption that no Demand letter was issued to the 1st Defendant. The Plaintiff argues that the Order of the Judge was premised on a false assumption that no demand was given to the 1st Defendant by the Plaintiff. The Plaintiff pointed out that not only was a Demand given on 9th January 2015 (and responded to vide a letter of 25th January 2015) but also that in its Pleadings, the 1st Defendant did not deny the Demand.

16. On the issue of the Demand, Judge Gikonyo observed as follows:

'As I stated earlier, I have not also been shown any demand to the bank to close the account as was alleged. The initial demand would have served useful purposes; (1) to bring to the attention of the bank of the fraud and (20 to ask for remedial action before legal action is taken. This was not done".

The Learned Judge held that no Demand was shown to him. The issue of the Demand was raised by the 1st Defendant in its submissions of 30th June, 2015 made to the learned Judge. That invited the Learned Judge to determine the matter and he did so. Whether or not the Learned Judge made a correct decision is not for me, a Court of concurrent jurisdiction, to decide. The Plaintiff is arguing that the Learned Judge reached an erroneous decision on the Demand Letter. But I have found that the Judge explained himself. He noted that no Demand was shown to him. Even if there is merit in the Plaintiffs contention that the demand was not denied it would not be appropriate for this Court to revisit the decision by way of Review. That would be to sit in Appeal over that decision. That is not my call.

17. The Plaintiff further argues that the Decision of the Judge was premised on a fallacious assumption that the suit was instituted to recover ksh.278,769,500/= . Related to this was the Judge made an incorrect assumption that upon the payment of the said sum to the 6th Defendant, and without closing the Account, the risk to which the Plaintiff was exposed had gone and the suit was no longer necessary.

18. In paragraph 8 of his Decision, Judge Gikonyo gives a short explanation as his understanding of the matter between the Plaintiff and the 1st Defendant. With respect to the Plaintiff nowhere in that paragraph or elsewhere in that Decision does the judge make an assumption that the suit was instituted to recover Ksh.287,669,500/= from the 1st Defendant Bank. It is not therefore surprising that the Plaintiff did not point out which portion of the Decision the Learned Judge made this purportedly fallacious assumption.

19. This Court has no difficulty accepting the argument by the Plaintiff that for as long as the impugned Account remains operational the risk of fraud to which the Plaintiff was exposed to at the commencement of the suit remains. This is an argument by the Plaintiff that the suit was necessary then and remains necessary for as long as the Account has not been closed. There can be no quarrel about that and the wording of the Consent of 1st June 2015 seems to have anticipated this. The Consent read;

> "*By Consent of parties the 1st Defendant is removed from these proceedings as a substantive party* <u>*except it remains as the Interpleader".*</u>**(**my emphasis**)**
>
> The Learned Judge was fully aware that the issue before him was the question of costs upon the removal of the party as a substantive party. After an analysis of the circumstances in which the substantive suit was withdrawn against the 1st Defendant, the Judge found that the 1st Defendant deserved recompense by way of costs.

20. And the Judge made this Decision even on the face of the 1st Plaintiff's submissions that:-

> 'From the matrix of facts, it is the 1st Defendant that precipitated the institution of the suit at hand. First, it refused to freeze and or close the account which had been opened by the 5th Defendant as a conduit to fraudulently siphon money from the Plaintiff. Indeed the Plaintiff had to apply to court for exparte order which were non consensual and which orders helped to freeze the account in question.. Then, once money was deposited by the 6th Defendant wrongly, the 1st Defendant rejected a request from the 6th Defendant and its bank to refund the money. It is only in the course of the proceedings that the 1st Defendant conceded and accepted to give back the money to the 6th Defendant. These events therefore warrants the 1st Defendant to bear the costs of the suit since had it been more cooperative and diligent, the current proceedings would have been avoided".

21. This Court is unable to agree with the Plaintiff that the correctness or otherwise of the Decision of the Judge needs to be examined through the lens of a Review. That is the province of an Appeal process. The same can be said about the argument that the Decision of the Judge was erroneous because;

> (i) The circumstances of the case did not warrant that the Plaintiff be condemned to pay costs.
>
> (ii)The Judge fallaciously assumed that the suit was unnecessary in the first place.
>
> (iii) The Judge failed to consider that the Plaintiff had shouldered the costs of filing the suit and related Legal costs which included the costs of Advertising substituted service.

22. In arguing its contention that it was the 1st Defendant who should bear the costs on the withdrawn suit, the Plaintiff had given reasons in its submissions of 6th July 2015 filed on its behalf by Counsel. Many of those arguments have been repeated in support of the current Application. It seems clear to me that the Plaintiff was aggrieved by the manner in which the Learned Judge apprehended the facts and its arguments. It was unhappy about the Decision eventually reached by the Judge. What the Plaintiff has failed to demonstrate is that the Decision of the Judge was not a conceivable or possible outcome. The recourse to that grievance would not be to reargue the matters in an Application for Review but to take them up in an Appeal.

23. The Order of the Learned Judge is further assailed for not being clear. It is submitted that the Order is

unclear on whether the Costs relate to the main suit or the interpleader Proceedings. That, if it were to relate to the main suit, it is unclear as to whether the costs are based on the original Plaint or the current Plaint. These submissions, in my estimation, were the more attractive ones.But do they have any merit?

24. For The Decision to be fully understood one needs to read it in its completeness and not just the final Orders granted. If the Applicant had read and interpreted the impugned Decision of 25th August 2015 in its entirety, then no difficulty should have arisen as to whether the Order of costs was on the main suit or on the interpleader proceedings. In the opening paragraph of that Decision the Judge observed;-

> *"Similarly, on the same day, by consent of the parties, the 1st Defendant was effectively removed as a substantive party in the suit and remained only as interpleader. Parties could not agree on costs".*

It was clear that the question that was determined by that Decision was the costs of the main suit.

25. If that needed confirmation then it is to be found in the Consent Order itself. The consent of 10th June, 2015 reads;-

> "*By consent of parties the 1st Defendant is removed from these proceedings as a substantive party except it remain in the interpleader".*

It is as clear as can be that what was withdrawn was the main suit or call it substantive suit. The Decision, now under criticism, demonstrates that this was just as clear to the Learned Judge and the body of that Decision and the final Orders do not brook any ambiguity. See for instance where the Judge states;

> *"Accordingly, the result of the entire litigation is that the interpleader Bank was put to costs by the suit for which recompense is in order it is entitled to costs upon the withdrawn of the suit for having been taken through this litigation*.

There is nothing to clarify!.

26. A related issue was that the Judge's decision was indefinite as whether the costs were based on the original Plaint or the Amended Plaint. The Amended Plaint was filed on 23rd February 2015. The withdrawal of the suit against the 1st Defendant was on 10th June 2015. The suit that was withdrawn was embodied in the Amended Plaint. At the time of withdrawal of the suit the original Plaint had been replaced by the Amended Plaint and, logically the withdrawn suit was in respect to the existing Pleadings.

27. In my assessment the Plaintiffs real concern was not that the Order was unclear but the quantum of costs that the withdrawal would attract. This concern is revealed in the Plaintiffs Supplementary submissions that;

> "*This lack of clarity prompted the 1st Defendant to draw a Bill of Costs basing on the Ksh.300,000,000/=.*

This Court resists any attempt to be drawn into a debate on the Bill of Costs which is a matter properly before the Taxing Officer. If it is the position of the Plaintiff that the amendment influenced or compelled the 1st Defendant to refund Ksh.287,769,500/= to the 5th Defendant and could therefore be construed as a victory for the Plaintiff, then it should make that argument before the Deputy Registrar.

28. This Court is not satisfied that the Notice of Motion of 13th November 2015 reveals any reasons why the ruling of 25th August 2015 should be revisited by way of Review. The Application lacks merit and is hereby dismissed with costs to the 1st Defendant.

READ, DELIVERED AND DATED AT NAIROBI THIS 21st DAY OF JULY, 2016.

F. TUIYOTT

<u>JUDGE</u>

<u>PRESENT:</u>

Odoyo holding brief for Luseno for 1st Defendant

Wakwaya holding brief for Arwa for Plaintiff

Alex - Court Clerk