



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 398 OF 2005

TECHNOMATIC LIMITED T/A PROMOPACK COMPANY....PLAINTIFF

-VERSUS-

KENYA WINE AGENCIES LIMITED.....DEFENDANT

AND

JASWINDER S. OBHRAI.....PROPOSED INTERESTED PARTY

R U L I N G

INTRODUCTION

1. The Application before this Court is the Notice of Motion dated **11th August 2014** and filed in Court on **22nd August 2014**. It is expressed to be brought under **Sections 1A, 1B, 3A, 80 and 100** of the **Civil Procedure Act** as well as **Order 20 Rule 2** and **Order 45 Rule 1** of the **Civil Procedure Rules**. The Proposed Interested Party (herein the Applicant) seeks for orders of review or setting aside of the Ruling dated **26th June 2014** as delivered by Honourable Justice J.B Havelock.

2. The Application is based on the grounds stated in the application and is supported by the Affidavit of the Applicant sworn on **11th August 2014**.

3. The Applicant is aggrieved by the ruling dated **26th June 2014** hence the current application for review or setting aside. He avers that there is a mistake or error apparent on the face of the record. The Applicant avers that the Judge in ruling that his claim was interwoven with that of the Plaintiff, failed to appreciate that his claim for Kshs. 16,960,828/= was withdrawn via a Notice of withdrawal dated 3rd November 2011. The said sum had been claimed as the dishonoured promissory note as prayer a (ii) in a Further Amended Plaintiff.

THE APPLICANT'S CASE

4. It is therefore the Applicant's case that he has a separate claim as against the Defendant arising from the same facts. It is the Applicant's contention that if the fact of the withdrawal and the consequence of the same had been taken into consideration by the Judge then he would have more than likely reached a different conclusion.

5. It is also the Applicant's case that he has discovered evidence which if had been tendered in Court then, the Judge would have more likely reached a different conclusion. The new evidence is that the Promissory Note was indeed endorsed by both the Plaintiff t/a Promopack and by the Applicant himself. The Applicant then forwarded a copy of the same to the Defendant by a letter dated 5th December 2007.

6. The Applicant avers that unless the ruling is reviewed or set aside, he will be greatly prejudiced as he will have been denied an opportunity to pursue his claim as against the Defendant.

7. The Application is opposed. The Defendant filed a Replying affidavit sworn on **29th October 2014** by its Company Secretary and Legal Officer, DORIS M. THANGEI.

THE RESPONDENT'S CASE

8. It is the Defendant's position that there is no mistake or error apparent on the face of the record with regard to the Ruling made on 26th June 2014. The Company Secretary refutes the Applicant's averment that the Judge held that the Applicant's claim was interwoven with the Plaintiff's claim. She further avers that it is not correct for the Applicant to allege that the Judge failed to appreciate that his claim for Kshs. 16,960,828/= was withdrawn via a Notice of withdrawal dated 3rd November 2011. The Company secretary avers that even if that was the case, nothing turned on that point in the final findings of the Judge.

9. It is the Defendant's case that the Notice of withdrawal and the consequence of the same were on record before the Court. The deponent avers that it was incumbent upon the Applicant to agitate the same in his submissions and that his failure to have done so should not be interpreted to mean that the Court did not take into consideration the fact of the Notice of Withdrawal and its consequences.

10. It is also the Defendant's case that the Applicant had the Promissory note endorsed by the Plaintiff and himself at the time of filing the Chamber Summons dated 23rd May 2013 and two affidavits in support of the application. It is this application that culminated in the Ruling the applicant now seeks to review. It is averred for the Defendant that a copy of the endorsed Promissory note was forwarded to them as the Applicant relied on them in a winding up case filed by himself against the Defendant. It is therefore the Defendant's case that the Applicant cannot assert that there is discovery of new evidence or facts that could not have been tendered to the Court prior to the Ruling he seeks to set aside or review.

11. The Company Secretary concluded by asserting that the issues raised by the Applicant were suited for grounds of an appeal and not a review.

12. The Applicant filed his submissions on **8th December 2014** while the Defendant filed their reply on **23rd January 2015**.

ANALYSIS

13. I have considered the pleadings in this matter, the Applicant's and the Defendant's submissions as well as the authorities cited. I have also perused the Ruling dated 26th June 2014 that the Applicant seeks to set aside or review. Having done so, I take the following view of the matter.

14. This is an application for review seeing that the Applicant brought it under Order 45 of the Civil Procedure Rules. The principles upon which a Judgment or in this case a Ruling can be reviewed are well settled as provided for under **Order 45 Rule 1 of the Civil Procedure Rules**. It provides as follows:-

“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. Underlining supplied

15. It is the Applicant's case that the finding by the honourable Judge that his claim for the promissory note was interwoven with the Plaintiff's was erroneous. The Applicant maintains that the Judge failed to appreciate that his claim for Kshs. 16,960,828/= being the sum claimed as prayer a (ii) in the Further Amended Plaint, was withdrawn via the Notice of withdrawal.

16. I have perused the Applicant's pleadings culminating to the Ruling in question. In particular the Chamber Summons filed on 6th June 2013. The Applicant did not expressly mention the issue of withdrawal. In that case it is not clear how the Applicant expected the Judge to 'appreciate' the same. In addition, I cannot place my hands in the Ruling subject of review, where the Judge expressed that the Applicant's claim was interwoven with that of the Plaintiff. In summary, it cannot be said that there was an error apparent on the face of the record. Even if the fact of withdrawal was brought to the attention of the Judge and he arrived at the same decision, it cannot be said that there was an error apparent on the face of the record simply because he did not reach a decision anticipated by the Applicant.

17. It is also the Applicant's case that they discovered evidence and that if the same had been tendered in Court, the Judge would have reached a different conclusion. This evidence is that the Promissory note was indeed endorsed by both the Plaintiff and the Applicant. The Applicant avers that he forwarded a copy of the endorsed Promissory Note to the Defendant by a letter dated 5th December 2007. The application which resulted to the Ruling subject of review was filed on 6th June 2013. It is therefore obvious that at that time, the Applicant was aware of the evidence he says he has now discovered. Whether or not the Applicant brought this fact to the attention of the Court is of no consequence. The Applicant cannot claim to have 'discovered' a fact that was always within his knowledge. This does not fall within the realm of 'discovery of new and important matter' as envisaged under Order 45 of the Civil Procedure Rules. Otherwise, litigants would be giving facts and evidence in piecemeal.

18. The joining of an interested party to a suit is at the discretion of the Court subject to the relevant provisions of the law. (See *Order 1 of the Civil Procedure Rules*). The discretion of the Judge cannot be questioned at this point unless it was exercised arbitrarily. In finding that the Applicant was not a necessary party to this suit, it is not disputed that the Judge rightfully exercised his discretion taking all the facts presented before the Court into consideration.

19. If the Applicant believes that he has a separate claim and that indeed the claim is not part of the Plaintiff's then it is not clear to me why they have to be part of this suit.

DISPOSITION

20. Having made the above findings, it is evident that the Applicant has not satisfied the requirements for review as stated under **Order 45 Rule 1** of the **Civil Procedure Rules**.

21. In the upshot, the order that commends itself to this Court is to dismiss the Applicant's Notice of Motion dated **11th August 2014** and filed in Court on **22nd August 2014** with costs.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for the Plaintiff

M/s Owesi for the Defendants

Mr. Mare holding brief for Makasila for the Interested Party

Teresia – Court Clerk