REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 318 OF 2010

FINA BANK LTD……...……...……PLAINTIFF

VERSUS

FRANCIS GITAU KOMU T/A BOMAS MOTOR MART…….....DEFENDANT

RULING

Review; Lifting of warrants of arrest; and leave to amend defence

[1] This is an application by the Defendant dated 4th April 2014 and it seeks the following significant orders:-

1. ***That the court to lift the warrants of arrest issuedagainst the Applicant.***
2. ***That the court to set aside and/or review the ruling dated 19th September 2012 and 27th March 2013.***
3. ***That the court to grant leave to amend the statement of defence in terms of the draft amended defence annexed to the supporting affidavit and the same be duly filed and served.***

[2] The application was brought under Order 45 of the Civil Procedure Rules and Sections 3, 3A and 80 of the Civil Procedure Act. The application was premised upon the grounds that the Defendant was aggrieved by the ruling. He stated thatthe ruling offended the provisions of the Hire-Purchase agreement, and more particularly Clause 4 thereof. And, therefore, failure by the judge to consider one of the provisions of the agreement constitutes an error apparent on the face of the record. Further, it was averred that the Defendant would suffer irreparable damage if the two (2) rulings and consequential orders are not removed and/or lifted.

[3] The application was further supported by the affidavit of the Defendant sworn on 4th April 2014. It was deposed that, even though the agreement was terminated pursuant to the provisions of Clause 6(iii), 7.1 and 7.2, the ruling nonetheless did not take into consideration nor address itself to the clear and proper provisions of the agreement. It was also deposed that the advocate on record for the Defendant acted improperly and without due care and diligence, and failed to attend the hearing of an application by the Plaintiff dated 13th October 2011, and that by the said advocates conduct, the defence rendered was weak and consequently detrimental and prejudicial to the Defendant. The judge did not consider that there was conflict of interest as the advocate representing the Defendant had previously been engaged with the firm representing the Plaintiff.

[4] The Plaintiff opposed the application and filed a Replying Affidavit sworn on 16th January 2015. They submitted that the application had not laid any basis to warrant the court to exercise its discretion and issue the orders sought by the Defendant. They also said that the application is a mere afterthought, has no any legal or probative value, and has been brought belatedly. No explanation of the inordinate delay in filing the application has been offered. It was deposed to that the Defendant failed to demonstrate that the Judge misdirected himself in the matter and arrived at a wrong decision. The decision is admitted to be well reasoned and the court was aware of the entire provisions of the Hire-Purchase agreement when rendering the decision. The Respondent see this application as an attempt to mislead the court especially in stating that there was a conflict of interest from the advocate representing him on the basis of previous employment in the firm representing the Plaintiff.

[5] They did not spare the application for leave to amend the statement of defence, which they contended did not raise any new triable issues that had not previously been dealt with. To them, the proposed amendment is a smokescreen to have the warrants of arrest against him lifted, and cause prejudice to the Plaintiff. In its submissions dated and filed on 20th February 2015, the Plaintiff stated that, warrants of arrest issued against the Defendant cannot be lifted as no cause had been shown that there was either an error or improper service of the same. They relied on the cases of **Prime Bank Ltd v VipinMaganlal Shah & 2 Others (2014) eKLR**and **Amrik Singh Kalsi (suing as the administrator of the estate of the Ram Singh Kalsi (deceased)) v Bhupinder Singh Kalsi (2014) eKLR**. The Respondent submitted that the application for review was not timeously made, and that it was not appropriate for a peer Judge to review orders of another. Therefore, this application derogates from this provision. On the delay in applying they cited the case of **Mohamed Ali Mursal v Saadia Mohammed & 2 Others (2013) eKLR** and **Nuh Nassir Abdi v Ali Warion& 2 Others (2013) eKLR EP. No 6 of 2013** by MutukuJ and Odunga, J respectively. The learned judges in their respective decisions reiterated that undue and inordinate delay should not be entertained. See the decision of Shah, JA (as he then was) in **Joseph Ochieng & 2 Others v First National Bank of Chicago C.A No 149 of 1991** and in the case of **Eastern Bakery v Castelino (1958) EA 461**.

DETERMINATION

Issues

[6] I have carefully considered the application, the affidavits filed in support and opposition of the application as well as the submissions made by the parties. I see the following three (3) issues to be for determination by the court i.e.

> ***a) Whether the warrants of arrest were properly issued and therefore enforceable;***
>
> ***2) Whether leave to amend should be granted after the determination of the suit; and***
>
> ***3) Whether there are sufficient grounds to allow for the review of the ruling by Odunga,J dated 27th March 2013.***

I will, however, invert the above list of issues and begin with the last one for obvious reasons. the result of the application for review will have direct implication on the request to amend the defence. I will so proceed.

REVIEW APPLICATION

As a legal remedy

[7] Review as a legal remedy of court orders within civil litigation is provided in Section 80 of the Civil Procedure Act, as read together with Order 45 of the Civil Procedure Rules. An objection has been raised on review of orders of peer judges. My short answer is this. This court can entertain this application for review because of two reasons. First, the major grounds set forth in the application are existence of an error apparent on the face of the record and discovery of new matter or evidence. And second, Odunga J is no longer attached to this division. Accordingly, under rule 2 of Order 45 of the Civil Procedure Rules, I can entertain this application. I will now examine the grounds set forth in the application for review.

Discovery of new matter or evidence

[8] The ground of discovery of new matter or evidence is a strict one and must be strictly proved. Great caution has been sounded in all judicial and literary works I have encountered that where review is sought on discovery of new matter or evidence, the court must be satisfied that the evidence sought to be produced was not within his knowledge, or could not be adduced by him when the decree or order was passed or made. See the proviso toOrder 45 Rule 3 (2) of the Civil Procedure Rules which states that;

> ***Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.***

The discovery must, therefore, be in real terms of the word. There are ample judicial decisions by the Court of Appeal that the onus is on the applicant to discharge the burden that, even after the exercise of due diligence, the new matter or evidence was not within his knowledge or could not have been adduced or produced before the court at the time the decree was passed. Therefore, mere discovery of evidence is not sufficient reason for review. The Defendant argued that there was conflict of interest on the part of his counsel as the subject matter herein was also the subject matter in a different matter being HCCC No 113 of 2010. With due respect, this is not a new matter or evidence in the sense of the law which would warrant a review of the order of the court. in any event, inadequate or insufficient representation by counsel appointed by the Defendant is not a ground for review. Matters of HCCC No 113 of 2010 were within the knowledge of and could have been brought up by the Defendant. Thus, these are not new matter or evidence. It is not even shown how the conflict of interest affected the decision of the court. I reject the ground.

Error apparent on the record

[9] The Defendant also alleges that there was an error apparent on the face of the record in that the court failed to consider some provisions of the agreement. I will refer to the wise word in the decision of the Supreme Court of India in the case of **P. N. EswaraIyer v The Registrar 1980 AIR 808; 1980 SCR (2) 889**, that;

> ***"A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and over- ruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient."***

A party relying on the ground of existence of an error apparent on the face of the record must, therefore, be prepared to be subjected to the stringent test of this ground which I will re-cast as follows;

> ***An error apparent on the face of the record is an error consisting in a glaring omission or commission, or a patent mistake or grave error which has crept in the proceedings out of utter judicial fallibility. The error must be readily discernible without much probing or consideration of copious explanations or facts.Such error must be soglaring***

andsubstantial that failure to correct it would infringe a party's due process rights and damage the integrity of the judicial process. However, it isnot an error in the sense of order 45 to say that the judge reached a wrong or erroneous conclusion of law or facts or would have reached a different decision had he considered the factor being claimed to be an error; as such error would only be correctable on appeal upon re-evaluation of the facts of the case and the law applicable and not on an application for review under Order 45 of the Civil Procedure Rules.

See ***Black's Law Dictionary Ninth Edition*** at pg. 662 that:

> *…**an error that is so apparent and prejudicial that an appellant court should address it despite the parties' failure to raise a proper objection at trial. A plain error is often said to be so obvious and substantial that failure to correct it would infringe a party's due process rights and damage the integrity of the judicial process…***

[10] The complaint by the Defendant is that contended that the court did not consider the merits of the agreement, and subsequently the ruling offended the provisions of the said agreement. In particular, the Defendant submitted that the learned Judge failed to consider the provisions of Clauses 3.3, 5, 6 (iii), 7.1, 7.2, 8.1 and 8.2 of the agreement, as well as Clause 4 thereof. If I attempt, even for a moment to consider this argument, I will be sitting on appeal of the Judgment entered on 27th March 2012. This is a temptation to commit serious judicial sin. I swore not to commit such sins which I have the power and wit to flee from. Even if the judge was wrong or reached an erroneous conclusion of the law or facts, such is not a ground for review under Order 45 of the Civil Procedure Rules. On this see the case **Francis Origo& Another v Jacob KumaliMunagala [2005] eKLR** where the Court stated;

> ***"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction."***

Accordingly, in light of the foregoing, the request for review lacks merit and is dismissed.

General Power to Amend

[11] Now that the review of the orders of the court herein has not been successful, it is easier to deal with the request for amendment of the defence herein. Order 8 Rule 5 gives the Court the general power to amend or allow amendment of any document filed in court. Under sub-rule (1) thereof, it is provided that;

> ***For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.***

[12] And courts have taken a generous and wider view of amendment of pleadings as long as the amendment will enable the court to adjudicate and determine the real issues in controversy effectually and completely. Amendments are normally freely allowed. See Gicheru JA. in the **Central Kenya Limited vs. Trust Bank Limited and 5 Others, Civil Appeal NO. 222 OF 1998**:-

> ***"…that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side".***

[13] But, the question is; does this case fit the legal threshold? The peculiar circumstances of this case are as follow. The Defendant's Defence filed on 15th July 2010was struck out by the ruling of Odunga, J on 27th March 2012 which is also subject of a review application herein. The learned Judge in striking out the defence rendered himself *inter alia*;

> ***"What is the defendant's explanation? In the Replying affidavit sworn by Francis GitauKomu herein on 22nd December 2011, no explanation at all was given as to why the defence was not filed within time. Whereas it is true that the court has wide discretion in the matter especially with regard to the provision of Section 1A and 1B of the Civil Procedure Act, discretion must be exercised judicially. It must be exercised on reason and not upon whim or caprice. It can only be exercised based on the facts presented before the court and it is upon the party wishing the court to exercise its discretion in his favour to place before the court sufficient material to enable the court make a decision in the matter…The replying affidavit does not attempt to offer any explanation at all as to how the defendant found itself in the position in which it had to file its defence outside the stipulated period. In the absence of an explanation given, there is no material placed before me upon which I can be expected to exercise my discretion favourably to the defendant. Where a party fails to comply with the rules of procedure the court is entitled to stop abuse of its process by striking out documents filed in contravention of the rules."***

[14] The defence filed on 16th July 2010 was struck out. Is there any other defence, therefore, that is capable of amendment? ***Black's Law Dictionary***, **Ninth Edition** at pg. 1559 defines the term "strike out" as;

"To expunge, as from a record."

Therefore, the defence was expunged from the record. It is legally impossible for the court to pretend to exercise discretion on a request for amendment of such pleading which is not part of record. Any such attempt to amend a pleading which has been expunged from the record will be an exercise in futility and extravagant exercise of judicial power. In any case, the law on amendment, the way I perceive it is that, amendment of pleading is not possible after judgment has been rendered. Therefore, the request for amendment of the defence is an abuse of the process of the court and a waste of judicial time by the Defendant. I reject it in toto. I am left with the request to lift warrants of arrest herein.

Warrants of arrest

[15] Before the warrants of arrest were issued, the Plaintiff applied on 25th June 2013 for the attachment and sale of the Defendant's moveable property in satisfaction of the decree. The Defendant failed to satisfy the decree and the Plaintiff thereafter filed a further Notice to Show Cause dated 8th November 2013 for the personal arrest and committal to civil jail in execution of the decree. The Notice was served on 28th November 2013 and Affidavit of Service thereof sworn by Gerald Mbuthia on 20th December 2013 was filed in court. Accordingly, the Defendant was properly served with the Notices to Show Cause but of his own volition, or for reasons known to him, he decided to ignore and/or refuse to respond to the Notices, hence, warrants of arrest were issued. Warrants of arrest are permitted means of enforcing compliance with of court orders or executing a decree of the court. See a work of the court in the case of **AmrikSingh Kalsi (suing as the administrator of the estate of Ram Singh Kalsi (deceased) v Bhupinder Singh Kalsi** (supra) that;

> ***"…that should not be construed to mean that warrants of arrest cannot be issued in a civil process. They are permitted in law to compel the obedience of court orders including execution orders as long as the due process provided in the law is strictly observed."***

Further, see the case of **Prime Bank Ltd v VipinMaganlal Shah & 2 others**(supra) where the court stated that;

> ***"I admit that the principal purpose of a warrant issued under Order 22 Rule 31(2) is to procure the attendance of the judgment debtor before court to show cause why he should not be committed to civil jail for the outstanding debt. It is not at all an automatic committal to civil jail as it has been misconceived by many."***

[16] It was the duty of the Defendant to attend to court in obedience to the Notice to show-cause why he should not be arrested and committed to civil jail. He failed to attend the hearing of the notice that was to be heard on 21st January 2014, and warrants of arrest were properly issued. By refusing, ignoring and/or absconding the hearing of the notice, the Defendant exhibited contempt and flagrant abuse of the process of the court. The disobedience has not been purged through any or reasonable explanation. For those reasons, there can be no reasonable justification for the court to exercise its discretion and lift such warrants which were properly issued against the Defendant. I refuse to lift the warrants of arrest herein.

The upshot

[17] The upshot is that the application dated 4th April 2014 is hereby dismissed with costs to the Respondent. It is so ordered.

Dated, signed and delivered in court at Nairobi this 25th day of May 2015.

F. GIKONYO

JUDGE