



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
HIGH COURT CASE NO. 4026 OF 1994

CREDIT & COMMERCE FINANCE LIMITED ::: PLAINTIFF

- VERSUS -

LAVINGTON HOLDINGS LIMITED ::: 1ST DEFENDANT

DR. SHASHI PATEL ::: 2ND DEFENDANT

ABBA LIMITED ::: 3RD DEFENDANT

R U L I N G

1. Before the court is the application by way of Notice of Motion dated **18th May 2010** filed by the 2nd Defendant. The application seeks orders that:-

1. ***Spent.***

2. ***The consent judgment which was recorded herein on 13th October 2008 be reviewed.***

3. ***Execution herein be stayed.***

2. The said Notice of Motion was amended on 21st June 2010 and two payers were added as follows:-

4. ***Further and/or in the alternative, the said, Judgement be discharged.***

5. ***The costs of this application be provided for.***

3. The application is premised on the grounds that at the time the said consent Judgement was recorded, the Plaintiff had long ceased to exist and this suit had by reason thereof abated. It is said that the said Judgement was recorded by mistake and if the 2nd Defendant and the court had been seized of that fact the said Judgement could not have been recorded.

4. The application is also supported by the affidavit of **DOCTOR SHASHIKANT CHHOTABHAI PATEL** dated **18th May 2010** with annexures thereof and a supplementary affidavit of **JOHN MBAU MBURU** dated **15th June 2010** filed in support also of the aforesaid amendment of the Notice of Motion.

5. On 19th March 2013 Mr. Gomba for the 2nd Defendant and Mr. Hira for the Plaintiff appeared before me for directions and informed the court that they had both filed submissions in respect of the application. I then directed that those submissions be highlighted on an appropriate date. Mr. Hira fixed *ex-parte* the application for hearing on 5th December 2013. He served the Notice of Hearing upon M/s J. M. Mburu and Company Advocates on 29th October 2013 and also filed an affidavit of service on 4th November 2013 to confirm service. On 5th December 2013 when the matter came for hearing only Mr. Hira for the Plaintiff attended to the matter. As there was proof of service, I allowed Mr. Hira to proceed with the application. Since it was not his application Mr. Hira informed the court that there were submissions on file. He said that he filed his submissions on 4th July 2010 while the Applicant filed theirs on 29th June 2010 and further amended submission on 2nd October 2010. Mr. Hira submitted that he relied fully on his submission and urged the court to dismiss the application by the 2nd Defendant.
6. I have carefully perused the court file. I am unable to find any submissions for either of the parties herein in relation to this application. I am only able to find the 2nd Defendant's supplementary list of authorities dated and filed in court on 21st June 2010. Be that as it may all the affidavits are on record, and I am prepared to deliver this Ruling based on the application and the supporting or opposing affidavits and the authorities.
7. The brief background of the application is that on 13th October 2008 the 2nd Defendant and the Plaintiff herein entered into a consent Judgement as follows:-
 1. ***That Judgement be entered in favour of the Plaintiff against the 2nd Defendant in the sum Kshs.6,000,000/= inclusive of all costs and interests.***
 2. ***That the said Defendant to liquidate the decretal sum by monthly installments of Kshs.400,000/= commencing from 18th January 2009, and thereafter on the 18th day of each consecutive calendar month until payment in full.***
 3. ***That in the event of default of payment by the 2nd Defendant of any one installment on its due date, the whole of the total outstanding decretal amount will become due and payable forthwith and the Plaintiff shall be permitted to immediately execute the decree thereon.***
8. The said consent Judgement was entered when all the parties were represented. Subsequently however, the 2nd Defendant vide its Notice of Motion application dated 21st January 2009 sought to have the said consent order set aside on grounds stated in that application among them that the 2nd Defendant's advocates then on record did not have the instructions to record the said consent. It is worth noting that the 2nd Defendant's aforesaid application to set aside the consent was dismissed with costs on 16th October 2009. In that regard, to the extent that the current application appears to canvas the same issues, I agree with the Plaintiff that most of the issues in the current application are *res-judicata* to the extent that they raise issues which have been adjudicated upon in the application dated 21st January 2009. This means that paragraphs 2 to 19 of the supporting affidavit of Doctor Shashikant Chhotalbhai Patel cannot be dealt with in this application.
9. Further, it is averred in the affidavit of TILAS MURINGI that the Applicant herein has filed a Notice of Appeal against the Ruling given in the application dated 21st January 2009. I, however have not seen that Notice of Appeal on the file. But if the allegation is correct then the remedy of review cannot be available to the Applicant now.
10. The only remaining issue for consideration by this court is the allegation that the Plaintiff had ceased to legally exist since 1996 many years before the said consent was entered into. If this allegation is correct, then the Applicant can argue that important information has emerged which would require this court to review the said Judgement. The main allegation is that the Plaintiff Company ceased to exist in 1996, and that being so, it could not have issued instructions to its advocates authorizing the advocates to enter Judgement by consent to its advocate. It is also

avered that neither the current nor the previous Plaintiffs' advocates were aware of this fact, and that since it is now known that the Plaintiff indeed does not exist, the Judgement that was entered by consent on 13th October 2008 cannot stand. This sounds a reasonable argument. The issue for this court to determine is whether or not the Plaintiff ceased to exist as alleged.

11. To do this I refer to various correspondences between the Plaintiff's advocates M/s J. M. Mburu and the Central Bank of Kenya on the one hand, and between the said advocates and the Registrar of Companies on the other hand. The Plaintiff as banking entity cannot be in business without the knowledge or consent of the Central Bank of Kenya, and so J. M. Mburu & Company Advocates vide their letter of 30th April 2010 addressed to the Central Bank of Kenya enquired, to know of the status of the Plaintiff Company.

In their reply dated 5th May 2010, the bank informed the advocates as follows:-

1. ***"In 1996, Credit & Commerce Finance Limited converted into a Commercial Bank and changed its name to Commerce Bank Limited.***
2. ***In 1998, Commerce Bank Limited merged with Giro Bank Limited and the resultant bank renamed Giro Commercial Bank Limited.***
3. ***In this regard, please contact Giro Commercial Bank Limited for any clarification on your concerns."***

12. Upon inquiry, and in response to the Plaintiff's advocate letter dated 19th May 2010, Central Bank of Kenya reiterated the contents of their letter of 5th May 2010. In that letter, the Central Bank stated *inter-a-alia*,

"... Technically, the Company merely changed to Commercial Bank Limited and was thereafter licenced to conduct banking business. The personality of the said company did not change or cease merely because it became a bank.

In 1998, Commerce Bank Limited merged with Giro Bank Limited and the resultant bank renamed Giro Commercial Bank. Mergers are provided for under Section 9 of the Banking Act. Rights and obligations of the parties concerned with the merger are also provided for thereunder. Mergers are not affected by Section 6 (1) of the (banking Act)."

13. J. M. Mburu & Company Advocates did not stop there, but went also to the Registrar of Companies to try to establish the existence of the Plaintiff. They found that the shareholder of the Plaintiff sold their shares in the bank to Giro Bank Limited in October 1998. Thereafter, Giro Bank Limited changed its name to Giro Commercial Bank Limited. The advocates then concluded that Commercial Bank Limited ceased to exist when the shareholders or directors sold their equity to Giro Bank Limited which later became Giro Commercial Bank Limited.

14. In my view, Central Bank is the regulator of all banking institutions in Kenya. Therefore once the Central Bank wrote the above two letters to the Plaintiff's advocate indicating that there was a merger between the Plaintiff and another bank, and that Section 9 of the Banking Act applied, the said advocates ought to have advised their client the 2nd Defendant appropriately. Section 9 of the Banking Act deals with amalgamations and transfers and liabilities and assets of the merging companies. All that the Central Bank was telling the said advocates was a merger does not kill a company, and that any liabilities or assets of such merging companies are determined in a legally viable way enabling those companies' deals with their assets and liabilities. The personality of the merged companies did not change. Any change would come as provided under the said Section 9.

15. Also the fact that the said advocates could not locate the Plaintiff's file in the companies registry cannot be a conclusive evidence that the Plaintiff had ceased to exist. The allegations that the Plaintiff Company ceased to exist in 1996 is legally unsound, ill informed and arises out of willful ignorance on the part of the 2nd Defendant. Just in the same way a death of a person, if contested, is proved by a valid death certificate, the death or deregistration or cessation of business by a

company, if contested, must be proved by some cogent evidence capable of verification. In this matter the Plaintiff is engaged in a whirlwind whose directions cannot be determined. A rumour cannot be the basis of an application such as this.

16. In the upshot I dismiss with costs to the Plaintiff the 2nd Defendant's Notice of Motion dated 18th May 2010. I dare add that after the Central Bank gave the said information contained in its aforesaid two letters to the 2nd Defendant's advocates as we have seen, there was no further need to push this application. This is an application which ought never to have been filed.

DATED, READ AND DELIVERED AT NAIROBI

THIS 30TH DAY OF JANUARY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Were for Plaintiff

J. M. Mburu for Defendants

Teresia – Court Clerk