



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO 199 OF 2010**

**MUITA AND COMPANY LIMITED.....1<sup>ST</sup> PLAINTIFF**

**EVANS MUKUNGA MUITA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK..... DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated 27<sup>th</sup> August 2013 and filed on 29<sup>th</sup> August 2013 was filed under the provisions of Section 3A, Section 80 and Section 95 of the Civil Procedure Act and Order 45 Rule 1 (1), Order 45 Rule 2(2), Order 45 Rule 3(2) of the Civil Procedure Rules Cap 21 Laws of Kenya. Prayer (a) is spent. It sought the following remaining orders:-
  - a. Spent
  - b. That the Ruling the Honourable Mr Justice Leonard Njagi made on the 24<sup>th</sup> November 2012 dismissing the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Applicant's prayer for an Interlocutory Injunction with costs be reviewed, varied and/or set aside.
  - c. That there was need to preserve the suit properties Komothai/IGI/T.160 and Gatamaiyu/Nyanduma/881 respectively, pending the disposal of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Applicants' main suit since it is subject matter to this suit and similarly forms part of the family property.
  - d. That the dismissal of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Applicants' application at an interlocutory stage had the effect of dismissing the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Applicants a chance to adduce evidence in support of the application for an injunction which was a mistake or an error apparent on the face of the record hence the need to Review the Ruling.
  - e. That it was in the interest of justice that an injunction do issue to enable the 2<sup>nd</sup> Plaintiff/Applicant to prosecute his case in view of the new and important evidence which the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff/Applicants had availed through the Auditor's Report.
  - f. That the costs of this application be provided for.
2. The grounds under which the said application was premised were generally as shown hereunder:-

- a. **THAT the Plaintiff made an application seeking injunctive orders by way of a Chamber Summons application dated 30<sup>th</sup> March 2010 and that by the time the ruling was given by the Honourable Njagi J, on 24<sup>th</sup> November 2012 the Plaintiffs had not engaged the services of an Auditor.**
- b. **THAT had the learned judge been aware of the said Auditor's Report, he would not have dismissed the said application. There was therefore need to review his ruling as the said report was a good and sufficient cause for review of the said Ruling.**
- c. **THAT Statutory Notices had already been served upon the Plaintiffs giving the Defendant's intention to dispose of Komothai/Igi/T.160 and Gatamaiyu/Nyanduma/881 (hereinafter referred to as "the subject properties").**
- d. **THAT the application herein was made without unreasonable or undue delay and it was therefore in the interest of justice that the same be allowed because, if it was not granted, the Plaintiffs would suffer irreparable damage that could not be compensated by way of damages.**

### AFFIDAVIT EVIDENCE

3. The Plaintiffs' application was supported by the affidavit of Evans MukungaMuita, the 2<sup>nd</sup> Plaintiff herein. It was sworn on 27<sup>th</sup> August 2013. It basically contained the same issues the Plaintiffs had raised in their affidavit of 30<sup>th</sup> March 2010 in support of their Chamber Summons application dated and filed on 30<sup>th</sup> March 2010.
4. The only substantial issue the deponent added in his present affidavit was that he engaged the services of professional auditors namely, D.G. Njoroge & Co Advocates with a view to determining whether it was the Plaintiffs who owed the Defendant monies or if it was the Defendant who owed them monies in accordance with the prayers they had sought in the Plaint herein, which they maintained was the correct position.
5. It was his averment that the disposition of the subject properties through public auction would dispossess him of his property which could not be compensated as the said subject properties were family land.
6. He stated that the Plaintiffs had demonstrated very strong grounds for review of the ruling delivered by the learned judge on 24<sup>th</sup> November 2012 as could be seen from the evidence of its key witness, who was a Certified Auditor.
7. He contended that he had made the present application timeously as the audit report took a long time to be completed and that he had been unable to engage the services of a Certified Auditor when he first filed the matter in court.
8. He also averred that the 1<sup>st</sup> Plaintiff had demonstrated a *prima facie* case against the Defendant capable of succeeding as it had shown that the proceeds of the Fixed Deposit Account Number 0151061226 seen in Exhibit marked as "EMM3" were never paid to him and further because the Defendant had admitted owing the Plaintiffs money.
9. The Defendant's Replying Affidavit was sworn by Isaac K Njoroge on 24<sup>th</sup> September 2013. He stated that he was the Defendant's Legal Manager and termed the Plaintiffs' application herein, frivolous, unmerited and a waste of the court's time.
10. He stated that the principal amount invested in Fixed Deposit Account No 91/980 plus the accrued interest was credited to the 1<sup>st</sup> Plaintiff's account on 25<sup>th</sup> April 1992 to reduce the outstanding overdraft at Kshs 1,281,524.90.
11. The said deponent went to great lengths to explain how the outstanding amount accrued and indicated that the 1<sup>st</sup> Plaintiff had defaulted in repayment of the loan and was truly indebted to the Defendant. He stated that the facts in the Auditor's Report had been within the Plaintiffs' knowledge and that they were using the court processes to avoid settling its liabilities.
12. The Plaintiffs filed a Supplementary Affidavit on 22<sup>nd</sup> October 2013. The same was sworn on 15<sup>th</sup> October 2013 by the 2<sup>nd</sup> Plaintiff. The said affidavit was merely reiterating the Plaintiffs' position that they did not owe the Defendants any monies. The 2<sup>nd</sup> Plaintiff proposed that all parties should agree to the appointment of an independent auditor to go through the loan account. It denied that the Auditor's Report was false and incorrect and contended that the Defendant had not provided

any evidence to the contrary.

### **LEGAL SUBMISSIONS BY THE PLAINTIFF**

13. In their written submissions dated and filed on 2<sup>nd</sup> December 2013, the Plaintiffs submitted that the learned judge declined to grant injunctive orders sought in their application dated 27<sup>th</sup> August 2013 and filed on 30<sup>th</sup> March 2010 “arguing, among other things that” the Respondent in this matter would rise to the occasion and meet any amount of damages awarded to them.
14. It was their argument that the dismissal of the said application had the effect of dismissing their case without them being heard and it was a mistake or an error apparent on the face of the record hence the need to review the ruling herein. They averred that the Auditor’s Report amounted to new and important matters.
15. They maintained that they had settled all the loan accounts with the Defendant and that it was actually the Defendant who owed them money. It was their contention that the interest rates that were reviewed by the Defendant were way beyond what they had agreed upon with it and that it had arbitrarily increased the interest rates resulting in the breach of contractual obligations between them.
16. It was their case that the matter in issue was not whether or not the Defendant charged illegal and inflated interest rates but rather whether it was true that they had overpaid the loan and if so, the amount by which they had overpaid the said loan. They averred that they were only disputing the issue of interest that had accrued on the principal amount and whether the amount had been correctly calculated and hence the need for an independent auditor.
17. They submitted that this court had inherent power under Section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice to be met and to prevent the abuse of the court process.
18. They referred the court to the case of **Captain J N Wafubwa vs Housing Finance of Kenya Ltd (2012) eKLR** and **Muturi Investments Ltd vs National Bank of Kenya (2007) eKLR** where in the latter case, the court granted an injunction pending the hearing and disposal of the suit. They therefore urged this court to review the ruling of 12<sup>th</sup> November 2012 by the learned judge and grant an injunction restraining the Defendants from disposing of the subject properties pending the hearing of the suit.

### **LEGAL SUBMISSIONS BY THE DEFENDANT**

19. The Defendant’s written submissions were dated 11<sup>th</sup> December 2013 and filed on 16<sup>th</sup> December 2013. It pointed out that a close scrutiny of the prayers sought by the Plaintiffs showed that only prayer (b) of their application could qualify as a prayer from this court and that order (c), (d) and (e) were more of grounds than prayers.
20. It was its contention that the said application was *res judicata* as it had sought the same prayers that were contained in the Plaintiff’s Chamber Summons application dated 27<sup>th</sup> March 2010 and filed on 30<sup>th</sup> March 2010 and that in fact, the Supporting Affidavit to that application was word for word as the affidavit in support of the application herein.
21. It further stated that the matter of accounts was directly in issue before the learned judge who addressed his mind to the same. It relied on the case of **In the matter of Mwariki Farmers Co Limited (2007) 2 EA 185** where Ochieng J held that it was not open to a party to re-agitate the same issues once a court had made a finding on the same.
22. It argued that the four (4) grounds to justify a review of decree were:-
  - a. **Discovery of new and important matter which was not brought to the knowledge of the court at the time the order or decree was passed.**
  - b. **A mistake or error on the face of record.**
  - c. **Any sufficient reason.**
  - d. **Where ends of justice so demand.**
23. It was its case that the Plaintiffs had not been able to establish any of the aforementioned grounds

- to warrant the court to review the ruling of the learned judge. It argued that the Auditor's Report was prepared nine (9) months after the said ruling. It said that that was evidence that was in the Plaintiffs' knowledge because it had supplied them with bank statements long before they filed the suit herein.
24. Further, it was the Defendant's averment that there was inordinate and unreasonable delay as the Plaintiffs filed their application nine (9) months after the ruling. It referred the court to the case of **In the matter of George Kyuna Gaturuho** where Kimaru J had stated that it was a requirement that an application for review be filed without delay.
25. It was therefore, the Defendant's submission that the Plaintiffs' present application was an appeal through the back door and that this court could not reconsider the same facts a court of equal jurisdiction had dealt with.

### **LEGAL ANALYSIS**

26. This court has carefully considered the Plaintiffs' application dated 27<sup>th</sup> August 2013 and notes that the same is supported by an affidavit having similar facts as those contained in the Affidavit of Evans Mukunga Muita sworn on 30<sup>th</sup> March 2010 in support of the Plaintiffs' Chamber Summons application dated and filed on 30<sup>th</sup> March 2014.
27. In their Complaint, the Plaintiffs pointed out that they had overpaid the loan but that the Defendant's records had continued to show that they had an outstanding amount with it. They contended that they did not owe the Defendant any money but that it was the Defendant who actually owed them money. These are the same facts that were set out in the Supporting Affidavit of Evans Mukunga Muita sworn on 21<sup>st</sup> August 2013. The documents in support of the two (2) applications, save for the Auditor's Report, are on all fours.
28. Before delving into the substantive issues that have been placed herein for determination, this court wishes to point out that it has been held in previous cases that an application that has no order or ruling which a party intends to review attached to it, is fatally defective and ought to be dismissed right at the outset.
29. This is what was held in the cases of **Obonyo vs Were & 5 others [2004] 1 KLR** and **HCCC No 1938 of 2001 Dickson Mbugua & 3 Others vs Stewart L. Henderson & 3 Others** (unreported) amongst many other cases dealing with this issue. Citing the case of **HCCC No 29 of 1995 Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others**, (unreported) Mbaluto J stated thus:-

**“The most fatal aspect of this application is however, the fact that the Plaintiff has not even attempted to comply with Section 80 of the Civil Procedure Act with respect to the extraction of the relevant order ..... the failure by the applicant to extract a formal decree was fatal to the application and it should, on that ground fail”.**

30. Evidently, the Plaintiffs did not annex a copy of the ruling they intended this court to rely. Prior to the promulgation of the Constitution of Kenya, 2010, this would have led to automatic dismissal of the application herein. However, in view of Article 159 (2) (d) of the Constitution of Kenya, 2010 which mandates the court to hear and determine matters without undue technicalities, this court will go into the court record to establish what exactly the learned judge said with a view to expeditiously disposing the business of the court as has been stipulated in Section 1B (1) (b) of the Civil Procedure Rules, 2010.
31. It would be a waste of judicial time for this court to dismiss this application and for the Plaintiffs to bring back the same application with the attached ruling for this court to make a determination which it would have made in the first instance.
32. The ruling by the learned judge shows that the Plaintiff's application had sought injunctive orders restraining the Defendants from disposing of the subject property in any way pending the hearing and determination of the suit.
33. He came to the conclusion that there was a dispute as to accounts as the 2<sup>nd</sup> Plaintiff had contended that the monies had been paid while the Defendant had stated that its monies had not been paid. He observed that the existence of a dispute as to the amounts due was not a bar to the

- sale of security offered to the lender.
34. He made reference to **the Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol 32 at Paragraph 725** and the case **Lavuna & Ors vs Civil Servants Housing Co Ltd [1995] KLR 366 (CAK)** in this regard and also made a finding that the Respondent would be able to meet any financial award that any court would make in this matter. He therefore dismissed the application therein.
35. Having considered the Plaintiffs' said application, and the case of **Giella vs Cassman Brown & Co Ltd (1973) EA 358** which sets out the criteria for the grant of an interlocutory injunction, the learned judge found that the Plaintiffs did not satisfy the conditions therein *inter alia* that the Plaintiffs had not demonstrated that they had a *prima facie* case with a probability of success, that they would suffer irreparable damage that would not be compensated by way of damages, if the injunction was not granted or that the court could grant an interlocutory injunction on a balance of convenience.
36. In the present application, the Plaintiffs and the Defendant have submitted the same issues that the learned judge dealt with in his ruling of 24<sup>th</sup> November 2012. This court does to a great extent agree with counsel for the Defendant that the matter herein is *res judicata*. However, there was an additional and fresh ground that of discovery of new and important matter or evidence which was not placed before the said learned judge and which if the same was placed before him, they submitted, he would have granted them the injunctive orders.
37. This court notes that the Plaintiffs were still adamant that they had paid all the outstanding monies while the Defendants were also still contending that the Plaintiffs owed it money. The dispute rages on with the Plaintiff contending that he was not able to submit the Auditor's Report at the time he initially sought the injunctive orders while the Defendant further averred that nine (9) months was an inordinately long period before the Plaintiffs filed the present application.
38. This court finds that the dispute of the figures in question was decided by a court of equal and competent jurisdiction which means that this court cannot re-open the case to hear the facts herein afresh as it is not sitting on appeal. The learned judge considered the issue in respect of the dispute of the outstanding amount. This court's hands are therefore tied. The Auditor's Report was merely documentary evidence by the Plaintiffs to show that they had paid the loan. The bottom line at the end of the day was a dispute regarding the monies owed or not owed to the Defendant and which party owed the other monies.
39. This court has had due regard to the case of **Jackson Gatere vs Mount Kenya Bottlers Limited [1997] eKLR** where the Court of Appeal found that there was nothing on record that showed when the appellant therein instructed his accountant to prepare the analysis or report. It said that it was not persuaded that the appellant therein could not have had his accounts ready if he had acted with diligence and therefore refused to interfere with the exercise of discretion by the superior court.
40. After a careful analysis of this matter, the parties' pleadings, oral and written submissions and the case law, this court has come to the conclusion that the Auditor's Report could not be deemed to have been new or important fact or evidence, which after the exercise of due diligence, was not within the Plaintiffs knowledge or could not be produced by them at the time when the learned judge delivered his ruling on 24<sup>th</sup> November 2012.
41. Accordingly, this court hereby accepts the submissions by the Defendant and rejects those of the Plaintiffs for the reasons that this is not a proper case for a review of the ruling in question.

### **DISPOSITION**

42. The upshot of this court's ruling, therefore, is that the Plaintiff's Notice of Motion application dated 27<sup>th</sup> August 2013 and filed on 29<sup>th</sup> August 2013 is not merited and the same is hereby dismissed with costs to the Defendant.
43. It is so ordered.

**DATED SIGNED and DELIVERED at NAIROBI this 24th day of March 2014**

**J. KAMAU**

**JUDGE**