REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.664 OF 2005

JEDA LIMITED…….1ST PLAINTIFF

KIKA CONSTRUCTION

COMPANY LIMITED…….. 2ND PLAINTIFF

VS.

EVANS M. NJIHIA……..1ST DEFENDANT

JAMES NJOROGE KABERERE…….2ND DEFENDANT

JACKSON WAINAINA K. (sued as chairman, secretary and finance director of

NEEMA WELFARE ASSOCIATION……..3RD DEFENDANT

NEEMA WELFARE ASSOCIATION LTD……..…….. 4TH DEFENDANT

R U L IN G

1. Before the court are two Notice of Motion applications as follows;

The first Notice of Motion is dated and filed in Court on 13th May 2014 by the 1st Plaintiff under Order 51 Rule 1, Order 45 Rule 1 of the Civil Procedure Rule, and Section 1A, and 3A of the Civil Procedure Act. The application seeks as the main prayer an Order that the court be pleased to review the Orders made on 11th March 2014, by correcting Order (c) thereof for the decretal amount to be shared between the 1st Plaintiff and the 2nd Plaintiff at a ratio of 75% to 25% in favour of the 1st Plaintiff.

2. The application is premised on the grounds *inter-alia* that there is an apparent mistake in the Orders made on 11th March 2014 in that the court ruled that there was assumption that the 1st Plaintiff company and the 2nd Plaintiff company were equal partners, which is not correct, and that the 1st and 2nd Plaintiff companies were partners in a Joint Venture Agreement dated 13th March 2000 in which they agreed to jointly construct the houses for the Defendants herein and share the net profit at the ratio of 75 : 25 in favour of the 1st Plaintiff.

3. The application is supported by Affidavit of **THUITA KIIRU** dated and filed in Court on 13th May 2014. The Affidavit merely expands on the grounds set out in the application. It is also supported by Affidavit of **DURON WEBER** dated 13th May 2014. The said Joint Venture Agreement is annexed to that of Doron Weber as annexture "**DW2"**.

4. The second Plaintiff has opposed the application through Notice of Preliminary Objection filed in Court on 10th June 2014, but has not filed any Affidavit to deny the existence of the alleged Joint Venture Agreement.

5. The Defendants have opposed the application vide a Replying Affidavit by the 1st Defendant **Mr. EVANSON MUTUOHORO NJIHIA** dated 20th May 2014 in which they urged for the dismissal of this application. Their counsel Mr. Sani, also orally submitted against the application.

6. I have carefully considered the application and submissions of the parties. It is submitted for the applicant that there existed a Joint Venture Agreement dated 26th February 2000, and that had the Court been aware of the existence of the same, the Court could have couched prayer C of the ruling under review to read that the Plaintiff shared profits and loss at the ratio of 75 : 25 in favour of the 1st Plaintiff. The Applicant further submitted that the issue at hand is purely between the Plaintiffs and that the Defendants have no locus in the matter and their views should be discarded.

7. On its part the 2nd Plaintiff does not deny the existence of the said Joint Venture Agreement, but states that the application offends provisions of Section 7 of the Civil Procedure Act as the same is resjudicate, and also that the application offends the mandatory provisions of Order 45 Rule 1 of the Civil Procedure, and should be struck out.

8. For the Defendants it was submitted that the application seeks to introduce new evidence which had hitherto not been known.

9. I have considered the applications and submissions of the parties. There is only one issue which I raise in order to dispose off the matter. That is, does the application offend Order 45 Rule 1 of the Civil Procedure Rule? That Order has set three conditions which must be met by an applicant for an Order of review ie. that there are new and important matters of evidence which despite due diligence could not be availed in court, secondly that there is an error or mistake on the face of the record, and lastly that the application is filed in court without undue delay. It is also submitted by the 2nd Plaintiff that the matter is resjudicate.

10. Firstly, I agree with the Applicant's counsel Mr. Jenga that the Defendants are not interested parties in this application, and accordingly, they are therefore locked out in these proceedings.

11. Now on the issues raised by the 2nd Plaintiff, resjudicate does not apply. This is because the matter is not being tried a new. The Plaintiffs came to Court jointly and judgment was given in their favour. The issue now is how the same should be executed. During the trial the 1st and 2nd Plaintiffs were deemed one entity and the issue of their shareholding rights was never tried, neither was its trial necessary. Judgement was given to them jointly. Any evidence at the execution process of their shareholding rights is necessary and cannot be deemed to have been determined at the trail.

12. As to the issues raised under Order 45 Rule 1 of Civil Procedure Rules, it must be heard in mind first the circumstances under which the Court made prayer (c) of the said ruling. The Court had earlier observed that there was the 2nd Plaintiff who appeared to have colluded with the Defendants to reject the execution of the judgment by the 1st Plaintiff. The 2nd Plaintiff had become a turn coat, and betrayed and frustrated the 1st Plaintiff. The Court then observed that if the 2nd Plaintiff was colluding with the Defendants, and was not apparently interested in the fruit of the judgment, the Defendants could then pay to the 1st Plaintiff 50% of the decretal sum. The court stated 50% on the assumption that the Plaintiffs came to Court as equal partners. When the court used the word "assumption", it is clear that the Court

did not know the absolute ratio in which the parties contracted, and that if the court had that kind of knowledge the court could still have stated the proper ratio. In this regard, and in terms of Order 45 aforesaid, there was a new and important evidence which was not before the court, and which led the court to make an error in computing the ratio in which the Plaintiffs shared profits and losses. It is also true that the 1st Plaintiff upon realizing that error, brought it to the attention of the court through this application and annexing important record to enable the court to rectify the Order. It is noted that to-date the Order has not been executed, and that this is good time to make any correction thereon.

13. I have looked at the said Joint Venture Agreement dated 26th February 2000 between the 1st and 2nd Plaintiffs and I am satisfied that it establishes the correct ratio of profit and liability sharing between the Plaintiffs.

14. The upshot of the above is that the application herein is allowed and prayer No (c) of the Orders made and delivered herein on 11th March 2014 is corrected to the extent that the decretal amount herein shall be shared between the 1st Plaintiff and the 2nd Plaintiff at the ratio of 75% to 25% in favour of the 1st Plaintiff and so line seven (7) of the said prayer (c) after "***1st Plaintiff"*** shall read "***Seventy Five (75%) per cent"*** and the words "***half (1/2)"*** shall accordingly be deleted.

15. The 2nd application is dated 28th April 2014 filed by the Defendants/Judgement debtors. The application's only remaining substantive prayer is;

> "*That the Defendants/Judgement debtors herein be allowed by this court to deposit part of the decretal sum of Kshs.5,378,029/= in court immediately and also be granted 30 days to deposit a further Kshs.1,000,000/= in court"*.

16. The application is premised on the grounds set out therein and supported by Affidavit of their counsel **LIVINGSTONE SIMEL SANE** dated 28th April, 2014 and a Supplementary Affidavit by **EVANSON MUTUOHORO NJIHIA** dated 20th May 2014.

17. The main substratum of the application is to seek time to allow the Defendants to secure the funds to satisfy the decree, while at the same time depositing what they already have with the court. This is so because the 1st Plaintiff has apparently refused to accept the money on the basis that it is not the entire decretal sum, and the possibility that the 1st Plaintiff may execute the decree.

18. The application is opposed by the 1st Plaintiff who submitted that the Defendants have failed to comply with the Order of the court which required them to pay the decretal sum within 30 days. The 1st Plaintiff further submitted that they have not commenced the execution process and so there is no basis for the Defendants' fear that the Order may be executed.

19. I have considered the 2nd application. The application was filed on 28th April 2014. That was more than one month after the Defendants had failed to comply with my ruling of 11th March 2014. The Plaintiff did not take any steps to execute the decree because the Plaintiff also had the 1st application pending for review. It is now more than 6 months after my aforesaid ruling. The Defendants have had more than the 30 days they required to satisfy the decree. This application, I believe, is overtaken by events.

20. In the Upshot, I direct the Defendants to fully comply with the Orders of this court issued on 11th March 2014 as amended by the ruling delivered today on the 1st application herein. The period within which the Defendants shall comply with those Orders is 15 days from the date of this ruling. The cost of these two applications shall be in the cause.

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 26th Day of September 2014

E.K.O OGOLA

JUDGE

PRESENT:

Mariga holding brief Kiiru for 1st Plaintiff

Sitati holding brief Sane for Defendant

Teresia – Court clerk