REPUBLIC OF KENYA

HIGH COURT OF KENYA NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 400 OF 2011

JOHN MAINA GITHAIGA

PAUL KIBUNYI MUTIRO T/A ORIENT TRANSJOPA SAFARIS……...… PLAINTIFF

VS

CFC STANBIC BANK LIMITED.....……. DEFENDANT

RULING

1. The application before me is dated 16th March 2012 and is brought by the Defendant/Applicant under Article 159 of the Constitution of Kenya, Sections 3A, 1A and 1B of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules as well as other enabling provisions of the law. The application seeks orders of this court to review and set aside its order of 1st March 2012 and substitute the same with an order setting aside the ex parte judgment. The application is based on grounds set out in the face of the application and is supported by the affidavit of Ken Kanyarati, the Head of Legal and Compliance with the Defendant Bank.

2. The application is opposed through a replying affidavit sworn jointly by John Maina Githaiga and Paul Kibunyi Mutiro the plaintiffs in this matter.

3. The Applicant's case is that the ruling and orders of the court made on 1st March 2012 contained serious errors on apparent on the record, namely,

1) The finding of the court that ownership of the funds had been determined by two courts of competent jurisdiction;

2) The finding of the court that interest must naturally flow without regard to what rate should be applied; and

3) The test for setting aside default judgment is to examine if whether the intended defence is arguable.

4. The finding regarding ownership of the money is faulted on the grounds that a Magistrates' court exercising criminal jurisdiction has no jurisdiction to determine a dispute over ownership of a sum of Kshs. 18 million where the same is in dispute. The Applicant argues that under Section 9 of the Law Reform Act and Order 53 of the Civil procedure Rules, only the High Court has power to determine if an applicant is entitled to prerogative orders of mandamus, prohibition and certiorari. It further argues that if the matter has been determined by courts of competent jurisdiction, then the suit itself must be declared

res judiciata and the ex parte decree discharged and nullified unconditionally. In any event, the Applicant argues that a matter is only *res judicata* if it is litigated upon by the same parties. In the Magistrates Court, the parties were the state and the plaintiffs. In the High Court matter, the parties were the defendant in this matter, the Chief Magistrates Court and the Plaintiffs. Pursuant to Article 159 of the Constitution, the issues in this suit should only be determined after all parties are given an opportunity to be heard.

5. On the alleged error in the finding regarding the applicable interest rates, the argument by the applicant is that under Section 26 of the Civil Procedure Act, the court has the power to award reasonable interest and reasonable interest can only be determined through evidence placed before the court by the parties. Counsel for the Applicant relied on the cases of **Trade wings Limited vs. KNTC[2004] eKLR; Shah vs. Guilders International Bank Limited [2003]KLR and Highway Furniture Mart vs. PS Office of the President [2006] eKLR** for the proposition that interest is a question of substantial law that cannot be determined summary procedure.

6. The error alleged in connection with the test that the court ought to have applied to set aside the default judgment was not elaborated either in the supporting affidavit or in the submissions by counsel for the applicant.

7. In opposition to the application, the Respondent states that the alleged errors apparent forming the basis of the application are points of law which cannot be raised by way of an application for review but should be raised in an appeal. The present application essentially asks this court to sit in its own appeal of its decision made on 1st March 2012.The Applicant having filed and served a Notice of Appeal cannot subsequently file an application for review. The Respondent further argues that the present application seeks the same orders that the Applicant sought in its application of 21st November 2011 and which resulted in the ruling of 1st March 2012.

8. Counsel for the Respondent submitted that errors apparent must be obvious and self-evident and must not be issues that must be canvassed in an appeal. He relied on the case of Njoroge & 104 others vs. Savings & Loan Kenya Limited & Another [1990] KLR 78 where Tanui J (as he then was) held that an error ought to be so clear that as to be without dispute and where the very existence of an error was disputed, that was a matter to be canvassed in an appeal. He also relied on the case of Origo & Another vs. Mungala [2005]2 KLR 307 where it was held that an erroneous conclusion of law was not a ground for review, but may be a good ground for appeal. He submitted that in the present matter, the court had allowed the applicant seven days within which to apply for stay of execution but the applicant had failed to do so and had only reacted after garnishee proceedings had been commenced. The defendant/applicant was therefore abusing the court process in the circumstances and was frustrating the plaintiffs from enjoying the fruits of their judgment. He submitted that the award of interest was at the discretion of the court and that the matter had been addressed by the court and a determination made.

9. I have carefully considered the application, the court record and the arguments put forth by both parties.

10. Order 45 Rule 1(a) of the Civil Procedure Rules allows a person aggrieved with a decree or order from which an appeal is allowed but from which no appeal has been preferred to apply for review in the following instances:

i. Where there is 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 at the time the decree was passed;

ii. Where there is a mistake or error apparent on the face of the record; and,

iii. For any other sufficient reason.

11. In the present application, the quest for review is based on the assertion by the applicant that there are

errors apparent on the face of the record in respect of the ruling delivered by this court on 1st March 2012. The areas afflicted by the alleged errors are set out in paragraph 3 of this ruling.

12. What constitutes an error apparent has been variously addressed by the courts. In **Timber Manufacturers and Dealers Limited vs. Nairobi Golf Limited HCCC NO. 5250 of 1992**, it was held as follows:

"For it to be said there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established".

Similarly, in **Laxmanbhai M. Patel and Others vs. Nolake Investments Limited Kisumu HCCC No. 264 of 1997**, the court held as follows:

"An error on the face of the record should be obvious and capable of being seen by one who runs and reads, that is an obvious mistake and not something that can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions"

Similarly, in **Nyamogo & Nyamogo Advocates vs. Moses Kipkolum (Civil Appeal No. 322 of 2000)** it was held that an error which has to be established by a long process of reasoning or on points where there may be conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

13. With the above understanding, I may now venture into determining if a basis for review exists in each of the three areas identified by the Applicant.

14. On the finding of the court that ownership of the money in issue had already been determined by courts of competent jurisdiction, the applicant's position is that the Magistrate's court lacked jurisdiction to make a determination of ownership of a sum of Kshs. 18 Million. Further, if indeed the issue of ownership of the said funds had been determined, then the question was already res judicata and this court ought not to have considered the same. My take on this contention is two-fold: Firstly, I concur with the Applicant that the Magistrate's court would have no jurisdiction to determine ownership of a sum of Kshs. 18 Million. However, I hasten to add that in Criminal Case No. 3038 of 2003, the finding of the court was limited to an evidential determination that the funds emanated from Standard Chartered Bank Limited and not from CFC Stanbic Bank Limited. This determination was made in the course of exercise of the court's criminal jurisdiction and not civil jurisdiction. The court never decided on ownership of the money although the acquittal of the accused persons on the basis that they had not defrauded the defendant connoted that the money in question did not belong to the defendant. This is discernible from the following excerpts of the Magistrate's analysis of the evidence tendered:

"On 29th October 2003, a sum of Kshs. 15,000,000/- was transferred to the account of Orient Trasjopa Safaris (vide exhibit 9 and 6). A scrutiny of Exhibit 6 the statement of account for Orient Trajopa Safaris shows the Kshs. 15,000,000/- credited in the account was a transfer from SCB".

The court then added:

"The prosecution had a duty of proving that the funds were transferred from the Kingfisher Properties Limited account as opposed to Standard Chartered Bank. No such evidence was led".

15. In the ruling of the court under review, the above findings were replicated to guide this court in its consideration of whether or not the funds in dispute were converted from the coffers of the defendant bank. The revelation from the record of the criminal proceedings of that the funds were from Standard Chartered Bank Limited and that they had not converted from the defendant bank cannot be vitiated on jurisdictional grounds. The question of jurisdiction would only come into play if indeed the said court purported to declare that ownership of funds belonged to the plaintiffs. Secondly, even if I were to fully shut out the proceedings of the Magistrate's court so as to allay the Applicant's concern that the said court lacked jurisdiction, the subsequent review made by the High Court through Misc. Application No. 991 of 2007 and in which the same question of ownership of the funds was considered puts to rest any doubt as

to whether the issue was determined by a court of competent jurisdiction. In the premises, I still hold that it would be *res judicata* for this court to re-open the issue in view of that determination.

16. Learned counsel for the Applicant raised an interesting argument that if this court's finding was that the previous review by the High Court aforesaid rendered the present proceedings *res judicata*, this court should the principle both ways by finding that it had no jurisdiction to deal with the application from which the ruling of 1st March 2012 arose. My view on this well thought out argument is that the ruling of the court of 1st March 2012 was indeed predicated upon the same line of thinking. The plaint filed on 19th October 2011 was framed around the plaintiffs' assertion that they had been denied access to their funds even after they had been acquitted of criminal charges in Criminal Case No. 3038 of 2003 for lack of evidence and even after the defendant's challenge to that acquittal through the judicial review application in Misc. Application No. 991 was also dismissed with costs which the defendant duly paid. This court was therefore justified to find that the application to set aside the default judgment based on matters that the court had already determined would in effect be in breach of Section 7 of the Civil Procedure Act. By declining to set aside the default judgment, the court was answering to the plaint in so far as it sought access to the funds by the plaintiffs, which itself was not an issue previously dealt with by the court as to amount to *res judicata.* The plaint in this matter was seeking orders that were necessary to enable the plaintiffs access funds that the court had determined did not belong to the defendant. It was not revisiting the issue of ownership of the funds. The ensuing default judgment cannot therefore amount to *res judicata* as the same essentially compels the defendant to allow the plaintiffs access to their account and to the funds. I do not therefore think that the ruling of 1st March 2012 should be disturbed by way of review as there was no error apparent based on the issue of ownership of the funds.

17. In the end, I see no error apparent on the face of the record in my findings to the effect that the issue of ownership of the funds had been previously determined by a court of competent jurisdiction. The only error on the record was the impression created that the Magistrates court had determined the issue, which error would still not change the position in any material way. However, if the Applicant still feels I may have erred, that would be a matter for the appeal court, and not for review. In **Njoroge & 104 others vs. Savings & Loan Kenya Limited & Another [1990] KLR,** it was held that a point which may be a good ground of appeal may not be a good ground for an application for review.

18. On the contention that the court erred in its finding that interest was payable on the funds held in the plaintiffs' account given that the Bank had been trading with the money, the Applicant's case is that determination of interest payable requires proof and cannot be determined through summary procedure. The submissions by counsel for the Respondent did not address the issue.

19. I have perused the plaint in this matter and noted that the plaintiffs had calculated interest payable using what they claim to be "Average Bank Interest Rate". The rates applied fluctuate from 13% to 15% per annum. Interest is then computed for the period 1st November 2003 to 1st January 2011. I have perused the draft defence that the defendant sought to file in this matter and noted that paragraph 5 thereof merely indicates that the interest claimed has no basis.

20. I have further perused the authorities relied upon by the defendant in relation to the rate of interest applicable and how the courts have dealt with claims of interest. In the case of **Jane Wanjiru Gitau vs. Kenya Power & Lighting Company Limited [2006] eKLR** the court held that the law relating to the grant of interest and to the setting of effective dates thereof was clearly stated in Sections 26 and 27 of the Civil Procedure Act; and the crucial element therein is that the Court has a wide discretion to grant interest and to determine the effective dates of payment of such interests. In **Trade Wings Limited vs. Kenya National Trading Corporation Limited**, where the parties had not placed before the court any evidence as would have guided the court in its exercise of its discretion under Section 26 of the Civil Procedure Act, **Kihara Kariuki J** (as he then was) ordered that interest on the principal sum be paid by the defendant to the Plaintiff at the court rate of fourteen per centum (14%) per annum. In **Shah vs. Guilders International Bank Limited [2003]KLR,** the Court of Appeal held that where banks fail to stipulate particular rates of interest, they ran the risk that courts would fall back on Section 26(1) of the Civil Procedure Act and exercise discretion in awarding interest. In effect therefore, this court has discretion to fix the rate of interest applicable in circumstances where the interest claimed may not be

reasonable, where the rates of interest applied by the plaintiffs are not pegged to any known basis and where the defendant itself does not proffer any alternative interest rates.

21. However, within the context of an application for review such as the present, the position that the courts have taken is that the issue of interest cannot be regarded as an error apparent on the face of the record. In **Pius Kinuthia Njuguna vs. John Musembi & Another Nairobi HCCC No. 1616 of 1992 (unreported)**, the court while recognizing that the award of interest under Section 26 of the Civil Procedure Act is discretionary and would usually be awarded as a matter of practice clearly underlined that failure to provide for such interest did not constitute an error apparent on the face of the record.

22. Similarly, Halbury's Laws of England (4th Edition) Volume 37 paragraph 549 addresses the subject as follows:

"There is no such thing as a correct or proper or ordinary rate of interest. The award should be realistic, and there is no distinction in principle between the interest awarded on a limitation fund in an admiralty action and that awarded on damages for personal injuries. On the other hand, the realistic rate of interest which should be awarded in in commercial cases is that at which the plaintiffs in general could borrow money at the relevant time, and the court should not follow the analogy of the rate of interest awarded in personal injury claims".

23. The ruling of this court of 1st March 2012 took the position that as the bank was trading with the money that had been shown to belong to the plaintiffs, payment of interest followed as a matter of course. The rate of interest to be applied then would naturally be the commercial rate at which the plaintiffs could have borrowed the money, which position tallies with the law as enunciated in Halbury's Laws of England above. As to the reasonableness of the interest claimed in the plaint, the rates applied average about 14% per annum which is equivalent to the court rate. There cannot therefore have been an error apparent on the face of the record in allowing interest as prayed for in the plaint, especially when the proposed defence itself did not propose any alternative rates as would have required the court to fix a different rate.

24. On the final contention that there was an error apparent on the face of the record in the test that the court applied in examining if the intended defence raised arguable issues, the Applicant did not in its submissions address the court on what test ought to have been applied. I am therefore unable to delve further on that contention as the error I am required to examine was not explained to the court.

25. Finally, I find it worthwhile to observe that the present application seeks review over substantive findings of this court and which I doubt can be classified as "obvious and self-evident" errors. The Applicant in effect seeks to re-visit the court's findings rather than to point out to the court what can truly be termed as errors apparent on the face of the court. In the case of **A.J. Limited & Another vs. Catering Levy Trustees and 3 others HCCC NO. 1488 OF 2000** the court observed as follows:

"So this is a most typical example of a case properly heard on the merits, in the presence of counsel who made their submissions both ingeniously and industriously. From that fact alone, as a matter of law, is not a case for review by the judge who gave the ruling… what counsel for the plaintiffs was seeking was, in effect, a re-hearing on merits and then a setting aside of the decision of 22nd April 2005".

I draw similarities in the present case in view of the matters I am requested to review. These matters in my view may form plausible grounds of appeal but not review.

26. For the above reasons, the Defendant/Applicant's Notice of Motion dated 16th March 2012 fails and is hereby dismissed with costs.

IT IS SO ORDERED.

DATED, SIGNED and DELIVERED in Nairobi this 24th day of April 2012.

J. M. MUTAVA

JUDGE