REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 684 OF 2007

NATIONAL BANK OF KENYA LIMITED. ……..…… APPELLANT

VERSUS

JOHN MBURU IHUGU. ……..……..…….. 1ST RESPONDENT

HUNTERS SHIPCHANDLERS AND
GENERAL CONTRACTORS LIMITED. ….....…. 2ND RESPONDENT

J U D G M E N T

This appeal arises from decisions in Nairobi Chief Magistrate's (Milimani Commercial Courts) Civil Case Number 5661 of 1999. The appellant herein was the plaintiff and the respondents were the two defendants in the subordinate court.

The history of the matter is that on 19th May 2003 the subordinate court delivered its judgment. In the judgment, the learned magistrate concluded: -
"I therefore find that the plaintiff has proved its case on a balance of probabilities and judgment is entered for the plaintiff as prayed in the plaint dated 9th June 1999. The plaintiff is awarded interest as claimed and costs".

In the plaint, the plaintiff had sought for judgment for Ksh.62,746.55, interest thereon at 7 % per month from 1st October 1998 until payment in full, as well as costs. It, therefore, follows that all the above prayers in the plaint were granted without variation by the subordinate court.

After judgment was delivered as above, a Memorandum of Appeal was filed by the respondents on 10th June, 2003, challenging the decision of the subordinate court. However, at that time no stay of execution was granted. After sometime, execution proceedings were commenced. The amount of claim was extracted. As at 12th January, 2005 the Notice to Show Cause why the 1st respondent should not be committed to jail had an amount of Ksh.415,060.80. When execution proceedings were commenced, the respondents, obtained temporary stay of execution.

However, on the 30th June, 2005 the application of the respondents herein for stay of execution was substantively determined. That application, which was dated 10th March 2005, was dismissed with costs. The court also ordered the reissue of a Notice to Show Cause.

The reissued Notice to Show Cause was for an amount of Ksh.105,404/-. When the same was issued

and served, the respondents paid the amount indicated in the Notice to Show Cause into court. The respondents through their counsel, in depositing the amount in court wrote a letter. That letter stated that the payment was meant to be in full and final settlement of the claim. The appellants through their advocates communicated to court that they be paid the amount without indicating whether they were receiving it in full and final settlement. The amount was released by the Deputy Registrar to them.

Thereafter, the appellant through their advocate issued yet another Notice to Show Cause dated 28th April, 2006 seeking the amount of Ksh.330,316.50.

The respondents objected to the said Notice to Show Cause on various reasons. They claimed that the appellants did not satisfy the requirements for committal of the 1st respondent to civil jail under section 30 of the Civil Procedure Act (Cap 21). They argued that the decree holder did not show that the judgment debtor had intent of obstructing or delaying the cause of justice or was likely to leave or abscond from the court's jurisdiction. The appellant had not also shown that the judgment debtor had dishonestly concealed or removed any part of the property or committed any acts of bad faith in regard to his property. The appellant had also not shown that the judgment debtor had means to pay the debt or decree, but had refused or neglected to do so. They also argued that the appellant by their letter dated 26th January, 2006 had asked for payment of the amounts deposited in court per their Notice to Show Cause without stating that the payment was on account or part payment. The 1st respondent argued that the respondents had by their letter dated 23rd November, 2005 clearly stated that the amount deposited in court was in full and final settlement of the decree. Since the appellants did not make any attempt to rectify or change the situation, they had compromised their entitlement in the decretal amount because by the respondents paying Ksh.105,415, they believed that they were paying the entire amount due in the decree, the appeal filed by them notwithstanding.

The learned Magistrate J. Were RM after considering arguments on both sides, found that the Notice to Show Cause dated 28th April 2006 seeking Ksh.333,316.50 was improper and set it aside. The learned magistrate did this on 23rd February, 2007.

Following the above decision of the learned magistrate, the appellant filed an application for review of the magistrate's decision through a Notice of Motion dated 19th April 2007. The said application was brought under Order 44 rule 1 of the Civil Procedure Rules. The prayers in the application are as follows:-

1. The order made herein on 23rd February 2007 be reviewed.

2. The costs of this application be provided for.

The grounds in the application for review dated 19th April 2007 were as follows: -

a. The plaintiff never received the sum of Ksh.105,413.28 directly from the judgment debtor;

b. When the plaintiff learnt that the judgment debtor had paid the sum of Ksh.105,413.28 they wrote to the court indicating that the payment was not in full payment for the decretal sum.

c. The plaintiff never at any one time indicated to the judgment debtor that it was accepting the sum of Ksh.105,413.28 in full and final settlement of the decretal amount.

d. No comprise was shown;

e. The judgment debtor has always been aware that the decretal amount was in excess of Ksh.105,413.28."

This application was opposed. A ruling was delivered by the learned magistrate on 24th July, 2007. The learned magistrate J. Were (RM) dismissed the said application for review. The learned magistrate

considered that the grounds for review stated therein were grounds for appeal rather than grounds for review

The magistrate stated, inter alia, that: -

"A close scrutiny of the submissions does sound more like grounds of appeal rather than for review. To look at it otherwise would be to allow this court to sit on appeal on its own ruling. As to whether there was an error on the face of the Notice to show Cause on which the judgment debtor paid the decretal sum into court was an issue extensively dealt with at the hearing that led to the ruling of 23rd February 2007. It is the gist of this application. I here reiterate that to revisit the issue in detail would be tantamount to procedurally conducting an appeal."

The above dismissal of the application for review is what precipitated the filing of the present appeal.

The Memorandum of Appeal has several grounds, 8 in total. However, they were argued as if it was one ground. The grounds of appeal are as follows: -

1. ***The learned magistrate erred in law and fact in dismissing the application dated 19th April, 2007 seeking to review his orders of 23rd February, 2007.***

2. ***The learned magistrate erred in holding that the application for review amounted to conducting an appeal and further holding that the application was incapable of being granted.***

3. ***The learned magistrate erred in holding that no new ground had been raised in the application for review and in finding that the matters raised in the application for review had been argued on 26th January 2007, when what had come up for hearing on 26th January, 2007 was a Notice to Show Cause why the judgment debtor should not be arrested and committed to civil jail.***

4. ***The learned magistrate erred in failing to hold that there was an error apparent on the record, in the orders made at the hearing of a Notice to Show Cause, to the effect that the suit had been compromised when in fact there was no application made to compromise the suit, nor a consent filed by the parties to that effect.***

5. ***The learned magistrate erred in failing to find that the sums paid by the judgment debtor could only be in part payment of the decretal sum and that the decree holder was not esttoped from pursuing the balance of the decretal sum by reason of part payment.***

6. ***The learned magistrate erred in failing to review his order dated 23rd February 2007 wherein he set aside the Notice to Show Cause issued by the Magistrate Court for the balance of the decretal sum.***

7. ***The learned magistrate erred in failing to find that the mistake of the court in issuing a notice setting out an erroneous sum of money should not be visited upon the decree holder who had obtained judgment for the full sum after a full hearing and who was entitlement to the full decretal sum.***

8. ***The learned magistrate should have found:-***

a. There was no compromise shown in the matter and that the full decretal sum was due and payable by the judgment debtor.

b. That the sums already paid by the judgment debtor could only be in part payment of the decretal sum.

c. That there was an error apparent on the face of the record and sufficient reason to review the order of 23rd February, 2007.

d. That the application dated 19th April, 2007 ought to be allowed as prayed.

The parties herein filed written submissions to the appeal. The appellant's counsel filed theirs on 22nd November, 2010. The respondents' counsel filed their submissions on 4th April 2011.

The appellant's counsel gave the background to the present appeal. Counsel contended that the Magistrate erred in his decision dismissing the appellant's application seeking to review his orders of 23rd February, 2007. Counsel contended that the basis for the requested review had been demonstrated. It was wrong for the Magistrate to conclude that the request for review amounted to conducting an appeal. Reliance was placed on the case of **Sardar Mohammed Versus Charan Singh and Another [1959]EA 793** in which the court held that section 80 of the Civil Procedure Act (Cap 21) confers an unfettered right to apply for review and the court could make such order as it thinks fit.

It was contended that Order 44 of the Civil Procedure Rules had set out the considerations to be taken by the court in applications for review of decrees or orders. Firstly, the application had to be made without unreasonable delay. Secondly, the court would grant the order for review if it was satisfied that there was discovery of a new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made. Thirdly, a review would be granted on account of some mistake or error apparent on the face of the record. Lastly, a review would be granted if there was any other sufficient reason.

Reliance was placed on the case of **Orero versus Seko [1984] KLR 238**. It was contended that the application for review herein had met the primary conditions set out under Order 44 rule 1 of the Civil Procedure Rules. It was argued that a review might be granted whenever the court considered that it was necessary to correct an apparent error or omission on the part of the court. That error or omission must be self evident and should not require an elaborate argument to be established. Reliance was placed on the case **of National of Bank of Kenya Ltd Versus Njau [1995-98] 2EA 249.** Counsel argued that there was an error in issuing a Notice to Show Cause reflecting a much lower sum than the decretal amount. The court, therefore, should undo the mistake, otherwise it would cause great injustice to the appellant.

It was contended that the learned magistrate had erred in holding that no new ground had been raised in the application for review and in finding that the matter raised in the application for review had been argued on 26th January, 2007, while what had actually come up for hearing on that date was a Notice to Show Cause why the 1st respondent should not be committed to civil jail. In that Notice to Show Cause, the respondent was merely required to show cause why he should not be arrested and committed to civil jail. The court erred in entertaining submissions that the suit had been compromised when in fact there was no application to compromise the suit nor a consent filed by any party to that effect. Reliance was placed on the case of **Kanyabwera Versus Tumwebazi [2005] 2EA 86** in which the court held that for an error to be a ground for review, it had to be apparent on the face of the record and did not require any extraneous matter to show its correctness.

It was contended that the learned magistrate ought to have concluded that the sums paid by the respondents could only be in part payment of the decretal sum and that the appellant was therefore not estoped from pursuing the balance. Counsel contended that there was no bar to issuing another Notice to Show Cause if the first one had errors on it. It was argued that the learned magistrate's decision was manifestly unreasonable. Reliance was also placed on the case of **Nairobi City Council Versus Thabiti Enterprises Limited [1995-99] 2EA 231** where the Court of Appeal held that since there was a glaring inconsistency in the decree and the order for payment, there was an error on the face of the record. It was argued that in the circumstances of the present case, the learned magistrate was bound to come to the decision that the mistake of the court in issuing a notice setting out an erroneous sum of money should not be visited upon the appellant. Therefore, the learned magistrate order made on 24th July, 2007 should be set aside and substituted with an order allowing the applicant's application dated 19th April 2007 for review of the orders made on 23rd February, 2007, with costs.

The respondents, in their submissions, filed by their counsel gave the basis on which the figure Ksh.105,413.28 was upheld by the learned magistrate. It was contended that in an application dated 12th April 2005 the appellant asked for the decree and certificate of costs in the subordinate Court civil case 5561 of 1999. That the court issued the decree and certificate of costs on 12th May 2005 for the sum of Ksh.105,413.28. The appellant was in agreement with the amount in the decree and certificate of costs and they did not complain to the court over the amount indicated.

The appellant went further to serve the said decree and certificate of costs with the above sum indicated. It was contended, therefore, that at that point the suit was compromised as both parties were in agreement with the demand by the appellant to pay the decretal sum of Ksh.105,413.28. The respondent complied and paid the decretal sum indicated, and therefore, the judgment herein was satisfied and no further claims could be raised.

It was argued that the appellant in fact extracted and issued a Notice to Show Cause for the said amount. On 24th November, 2005 when the Notice to Show Cause came up for hearing the court pointed out to the appellant that the decretal amount had been satisfied in accordance with the Notice to Show Cause which had been served on the respondent. Counsel contended that it was only after payment was made, that the appellant changed their mind and sought to re-tabulate the decretal sum. Therefore, the subsequent Notice to Show Cause for Ksh.380,089.85 was unprocedural. It was further contended that the application for review made before the learned magistrate was misconceived. If the appellant was aggrieved by the court decision the proper avenue would to appeal rather than ask for review. Therefore, the subordinate court was correct in stating that it could not grant the review.

Lastly, it was argued that judgment herein had been entered on 19th May 2003. At the time judgment was entered there was in force the Central Bank of Kenya [Amendment] Act which came into force on 1st January, 2001. It was contended that Section 39 (1) of the said Act provides as follows: -

"The maximum interest chargeable under this section shall not exceed the principal sum loaned or advanced……"

It was contended therefore, that interest herein ought not to have exceeded the amount payable.

On the hearing date, Ms Kirimi appeared for the appellant/applicant. There was no appearance for the defendants/respondents, even though the date for hearing was fixed in the presence of Ms Kanyiri for the respondents. Counsel for appellant highlighted the submissions of the appellant

I have considered the appeal, documents filed and submissions on both sides. I have perused the record of the subordinate court. I have also considered the authorities cited herein.

This is an appeal from the decision of the learned magistrate, who disallowed an application for review. The learned magistrate concluded that the application for review did not fall within the limited scope for review provided for under Order 44 of the Civil Procedure Rules. The learned magistrate was of the view that the application for review was a disguised appeal and found that he could not sit on appeal in his own decision.

Applications for review are governed by the provisions of Order 44 of the Civil Procedure Rules, which also gives the parameters to be considered by the court in determining an application for review. I will reproduce the relevant provisions of Order 44 of the Civil Procedure Rules with regard to review. Rule 1 of Order 44 provides:-

(1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed.

And who from the 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 by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) any party who is not appealing from a decree or order may apply for a review of judgment not withstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when, being respondent he can present to the appellate court the case on which he applied for review."

On the 23rd February 2007 the learned magistrate considered the issuance of a Notice to Show Cause by the appellant seeking Ksh.333,316.50. This Notice to Show Cause was sought after another Notice to Show Cause was issued for the same appellant claiming payment of Ksh.105,413.28. The learned magistrate on 23rd February 2007 found that the Notice to Show Cause for Ksh.333,316.50 was unprocedural and set the same aside. The appellant asked for review of the above orders of the magistrate. On 27th July 2007 the subordinate court declined to grant the request for review.

The appellant now argues that the previous Notice to Show Cause for Ksh.105,413.28 was an error on the face of the record and therefore a review should have been allowed by the magistrate. In that regard, they made an application for review which was considered by the learned magistrate and a ruling delivered on 24th July, 2007 declining the request for review.

Having perused the subordinate court record, I find that the Notice to Show Cause for Ksh.105,413.28 was not solely issued erroneously by the court. It is not in dispute that the actual amount of decree together with costs and interest was much more than this figure. The appellant is however, being economical with words by putting the blame solely on the court. In my view, since the decretal amount was higher than the amount of Ksh. 105,413.28 in the Notice to Show Cause, there should have been no reason why the remaining amount of the decree could not be pursued later, if it had not been settled or where there was no compromise of the case. In my view, there was an error on the face of the record caused by both the appellant and the court. It could be corrected under the provisions of Order 44 rule 1, provided no prejudice is caused to the other side.

Since the other respondent does not say that the additional amount of the decree was paid, I find that they will not suffer any prejudice if the appellant asks for the unpaid amount in another Notice to Show Cause. The fact that the erroneous amount in another Notice to Show Cause has already been paid does not change the position.

I find and hold that the learned magistrate had jurisdiction to grant the review sought of the orders made on 23rd February, 2007. There was an error on the face of the record. That request for review was not tantamount to asking the subordinate court to sit on appeal on its earlier decision.

The second issue is whether the suit or decretal amount herein was compromised. It has been argued that because the appellant herein sent a Notice to Show Cause for a lesser amount and received payment for the same, then it should be taken that the suit had been compromised and that the full decretal amount has been settled.

Compromise of suits is governed by Order XXIV rule 6 of the Civil Procedure Rules, which provides: -

"6.1 Where it is proved to the satisfaction of the court, and the court after hearing the parties directs that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the

defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.

2. ***The court, on application of any party, may make any further orders necessary for the implementation and execution of the terms of decree."***

In my view, the compromise in a case, or with regard to a decretal amount should be done in a clear and unequivocal way. There should be no ambiguity. If the parties do not agree unequivocally, the court has to record or make a decision on whether a compromise has been made.

In the present case, none of the parties has stated that there was a discussion on the amount to be paid. Nor is there any agreement either written or verbal that the amount payable be reduced. Certainly, there is nothing that has been filed in court to show that the parties agreed to settlement through a reduced amount. In my view, the Notice to Show Cause issued on behalf of the appellant for a reduced amount, per see, does not amount to a compromise of the case or the decretal amount. The fact that the appellant was paid that amount or was paid the amount through the court did not amount to a compromise of the decretal amount or the case.

I find and hold that the decree was not compromised on the basis of the Notice to Show Cause which contained the lesser amount from that in the decree.

I now turn to interest. Counsel for the respondents has argued that the interest chargeable was governed by the Central Bank of Kenya Amendment Act of 2001 which came into force in January 2001. Reliance was placed on Section 39(1) which provides, inter alia, that:

"…. The maximum interest chargeable under this section shall not exceed the principal sum loaned or advanced……"

In my view, the above section, if applicable, is being brought into play too late in the day. It should have been brought up in the defence. It should have been dealt with before judgment was entered. In any event, that section would come into play from the date in which it became law from 2001. This suit was filed in 1999 before the coming into effect of the above section. The amount in question was an issue in contest before the above section came into effect. Therefore, the above section does not help the respondents at this stage. Besides, the interest awarded by the court has not been challenged through an appeal. It cannot be challenged during execution.

This matter is a matter where the appellant, because of his own mistake, is likely to charge interest against the respondent for a prolonged period and thus, in my view, make an unjust enrichment. Because of that, and in the interests of substantive justice, I will order that interest will not accrue between the date of the Notice to Show Cause for an amount of Ksh.105,413.28, to the date of this judgment.

Consequently, I allow the appeal. I set aside the learned magistrate's decision. I also allow the appellant to issue fresh Notice to Show Cause, for the unpaid amount, but for the period between 12th May 2005 when the Notice to Show Cause for Ksh.105,413.28 was issued up to the date of this judgment, no interest will accrue.

The respondents will pay the costs of the appeal.

It is so ordered.

Dated and delivered at Nairobi this 25th day of July 2011.

……..
GEORGE DULU
JUDGE

In the presence of

M.s Ochieng for the appellant
No appearance for respondents
C Muendo – court clerk