



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT 987 OF 2001

ZABLON OWIGO OLANG
T/A HOMELAND SERVICES.....APP/APPLICANT
-VERSUS-
STEPHEN NYAGE KARIRI.....RESP/RESPONDENT
RULING

The applicant and another were jointly successfully sued by the respondent in the SRM Court at HomaBay for wrongful attachment and sale of the respondent's 4 heads of cattle and were ordered to pay Ksh.80,000/= in damages, together with costs and interest. The applicant preferred an appeal which is awaiting hearing and determination. In the meantime, he asks for stay of execution in an application brought under *Order 41 rule 4(1) of the Civil Procedure Rules*. The respondent filed Grounds of Opposition and Replying Affidavit in response to the application. The application was argued before me by Mr. Okoth for the applicant and Mr. Mbicha for the respondent.

In appealing, the applicant is exercising his undoubted right and care should be taken that the appeal is not rendered nugatory. The competing issue is that the respondent has a hard-won judgment which he is entitled to execute, and without delay.

The discretion of the court to grant stay of execution is fettered by conditions set out in *Order 41 rule 4*. The court must be satisfied that substantial loss will be occasioned if stay is not granted; secondly the application has to be brought without unreasonable delay; and, thirdly, the applicant must furnish security for the due performance of the decree as may ultimately be binding upon him. (See *Carter and Sons Ltd .V. Deposit Protection Fund Board And Others, Civil Appeal No. 291 Of 1997*).

The judgment complained about was rendered on 28/1/2009. The appeal was filed on 28/2/2009, and the application on 18/3/2009. There is no complaint that the application was not brought on time.

This is a money decree whose execution is sought to be stayed. The amount is not substantial. It was not deponed in support of the application that the respondent is not a man of sufficient means who would not be able to refund the decretal sum if the appeal ultimately succeeds. I say this because it is not normal for the court to grant stay of execution in monetary decrees unless it can be shown the amount involved is substantial and that the respondent has no known assets within the jurisdiction from which the applicant can recoup in the event that his appeal is successful. (See *Singh .V. Runda Estates Lt d [1960] EA 263*).

Regarding security, the applicant says he is willing to deposit a log book or title deed into court. None of them was exhibited. In court, the applicant's advocate indicated they could deposit into court the decretal sum. Whichever may be the security, no substantial loss was demonstrated.

The result is that the application cannot be granted. The same is dismissed with costs.

Dated, signed and delivered at Kisii this 20th day of January 2010.

A.O.MUCHELULE
JUDGE

20/1/2010
Before A.O.Muchelule-J
Court clerk-Bibu
Mrs.Opanga for Appellant/Applicant

Court: Ruling in open Court.

A.O.MUCHELULE
JUDGE
20/1/2010

BOOKPOINT LIMITED. PLAINTIFF
VERSUS
GUILDERS INTERNATIONAL BANK LTD..... 1ST DEFENDANT

GUARDIAN BANK LIMITED. 2ND DEFENDANT
RULING

The application before the Court is a Notice of Motion dated 7th December, 2005. In it the plaintiff sought that this court do review its orders in the judgment entered on 9th July, 2003 and enter judgment against the 2nd Defendant as prayed in the plaint. It also sought costs.

The application is based on the grounds on the face of the application and on various annexed affidavits. However, the main grounds are that the Plaintiff has discovered a new and important matter in the form of an Agreement for sale dated 13th October, 1999 between the 1st Defendant and 2nd Defendant which, despite due diligence on the Plaintiff's part, was not within its knowledge at the time of the hearing. That the provisions of the said discovered agreement are such that had it been brought before the court during the hearing, it would most likely have altered the direction and result of the court's ruling and/or judgment of Ransley, J dated 9th July, 2003.

To understand the events leading to the abovementioned Ruling and Judgment, it is necessary to give a summary of the relevant facts as this court understands them based on the court file's record:-

The first Defendant and the Plaintiff entered into a written 10 year lease dated 1st April 1996 which they agreed to take effect on 1st March, 1996 on the rent thereunder provided. There was a variation of the said lease dated 12th October, 1999, reducing the monthly rent and service charge as therein provided.

The 1st Defendant was later to be purchased by the 2nd Defendant under the discovered Agreement of Sale of Business, an event not denied by either Defendant. By a letter written to the Plaintiff by the 2nd Defendant dated 21st January, 2000, the 2nd Defendant informed the Plaintiff that it had merged with the 1st Defendant. It undertook to honour the terms of the lease between the Plaintiff and the 1st Defendant aforementioned. The 2nd Defendant, in the same letter meanwhile requested that name of the Lessee be changed to the new name of the merger which in effect, was that the 2nd Defendant for the purpose of honouring the terms of the said lease. In response the Plaintiff wrote to the 2nd Defendant informing it that it had now instructed its advocates to prepare a variation of the lease, provided certain issues are confirmed by the 2nd Defendant. The 2nd Defendant then by a letter dated 31st January, 2000 confirmed the said issues raised by the Plaintiff, subject only to approval by its Headquarters.

To assist a smooth takeover the Plaintiff wrote to the 2nd Defendant suggesting ways of implementing the takeover of the lease obligations and transfer of the same by the 2nd Defendant. The 2nd Defendant, who already had physically taken over possession of the lease premises as a result of the amalgamation or takeover, did fail to respond to the Plaintiff's last letter. Apparently neither the 1st nor the 2nd Defendant was in the meantime paying the relevant rents under the lease. The material on the record however, show that the 1st Defendant who was a bank, had ceased carrying on its banking and other business completely and had practically handed over the leased business premises to the 2nd Defendant under the Sale and Transfer of business aforementioned. The said sale and transfer of business apparently is the one referred to in the letter dated 21st January, 2000 by the 2nd Defendant to the Plaintiff earlier mentioned herein. The records also show that the merger or takeover aforesaid, was pronounced to the public in the Daily Nation of 28th April, 2000 which also announced the cessation of business of the 1st Defendant with effect from 15th May, 2000.

On takeover of the suit premises by the 2nd Defendant as a result of the merger, there is evidence that the rents for the same were paid until June 2000. There is argument as to who paid the said rent to June as between the 1st and 2nd Defendants. 1st Defendant asserted that it knowingly paid the rents to May 2000 on behalf of the 2nd Defendants while the 2nd Defendant paid the June 2000 rent.

Whatever the case is, neither party paid the future rents after that June.

The record further shows that the Plaintiff/Applicant filed this suit against both the 1st and 2nd Defendants to recover the unpaid rents and service charges from July, 2000, secured in the Lease Agreement aforesaid, amounting to approximately Ksh.9,552,714/- with the therein provided interests.

The Defendant's each entered an independent defence. The 1st Defendant averred that although it indeed signed the lease between it and the Plaintiff, the lease was determined as against it when the 2nd Defendant took possession of the leased premises with the consent and/or acquiescence of the Plaintiff upon representation of the 2nd Defendant to honour and comply with the terms of the said Lease, pending legal formalization thereof. The 1st Defendant also had pleaded that the 2nd Defendant by the said arrangement, had not only discharged the 1st Defendant's obligations under the said lease terms, but as importantly, had entered into a lessor-lessee relationship with the Plaintiff on the main terms and conditions of the lease aforementioned. The 1st Defendant further averred that having relied on and having been induced by the said express representations by the 2nd Defendant and the agreement thereto by the Plaintiff it accordingly altered its position to its detriment. In the circumstances the Plaintiff was estopped from laying the claim for rent against it. It denied liability as well as stating that on those averments the suit against it was misconceived and was against the equitable rule of approbation and reprobation.

The 2nd Defendant in its defence averred that the plaint disclosed no reasonable cause of action against it as there was no privity of contract between it and the Plaintiff which alone would form the basis of the suit. Consequently there was to be no basis for Plaintiff's claim against it.

The 2nd Defendant also averred that the alleged lease between the Plaintiff and the 1st Defendant dated 1st April, 1996 was never transferred and/or assigned by the 1st Defendant to it, 2nd Defendant. That although the 2nd Defendant took occupation of the suit premises, it never at any material time agreed or undertook to honour the said Lease Agreement terms which it cannot therefore be now subjected. That it took possession of the premises on the basis of the representation by the Plaintiff that a new lease would be negotiated between it and the 2nd Defendant on fresh terms which were never agreed. That in those circumstances, the 2nd Defendant became a statutory tenant under Section 106 of Transfer of Property Act. In such capacity averred the 2nd Defendant its failure to pay rent occurred only when the Plaintiff demanded unreasonable, non-contractual and unjustified rents. The 2nd Defendant in the alternative, averred that if it owed the Plaintiff/Applicant any rent or service charge or interest thereon in respect of the suit premises at all, then such rent would be less than the unreasonable, illegal, oppressive and/or the unconscionable sum claimed by the Plaintiff.

It is upon the above circumstances and facts, that the Plaintiff/applicant decided to file an application by Notice of Motion dated 23th January, 2003, seeking the striking out of the defences of the Defendants by the court which would thereafter enter judgment against each of them. Each Defendant on being served, filed only a statement of grounds of opposition.

By a ruling dated 9th July, 2003 Ransley, J who heard the said application for striking out the defences, did strike out the defences filed by each Defendant and proceeded to enter judgment, not against both as pleaded in the plaint but against only the 1st Defendant. The court on that issue, stated that the 1st Defendant was still liable to pay the rents under the lease terms since the lease was never terminated as

between the 1st Defendant and the Plaintiff. The court on the other hand ruled, that there was no evidence of transfer or assignment of the lease from the 1st Defendant to the 2nd Defendant to establish privity of contract between them. The court also stated in addition, that there cannot arise any estoppels as against the 2nd Defendant unless there was an allegation that the Plaintiff by its action or conduct, had indeed induced the 1st Defendant to alter its position to its detriment.

For the above reasons Ransley, J also ruled that the 2nd Defendant's defence was to be struck out because it showed or raised no evidence that it was in actual possession of the suit premises nor did the fact of wholly purchasing the 1st Defendant nor merging with it ipso facto give the possession to it. As to the fact that the 2nd Defendant was a statutory tenant under Section 106 of the Transfer of Property Act, the court decided not to accept such averment in the 2nd Defendant's defence and proceeded to strike it out.

This application as earlier mentioned was then filed on 7th December, 2005 seeking a review of Ransley, J's above mentioned ruling dated 9th July, 2003.

The application for review is brought under Order 44 rule 1(i) which states as follows: -

“1.(i) 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.”

The applicant bases this application on two grounds: -

I. That after the order or judgment was made, it discovered a new and important matter or evidence which, after the exercise of due diligence, was not within its knowledge or could not be produced by it at the time the order or judgment was passed, and/or

II. That there are other sufficient reasons to review the order or judgment.

The applicant/Plaintiff proceeded to explain that after the defences had been struck out and the judgment entered against the 1st Defendant only on 9th July, 2003, it discovered the existence of a Memorandum of Understanding (MOU) dated 13th October, 1999 between the 1st and the 2nd Defendants in this suit. That it also discovered an Agreement of Sale of the Assets and Business of Guilders Bank Ltd to Guardian Bank Limited (GSA) dated 31st December, 1995 on 30th October, 2005. That and became apparent to the Applicant/Plaintiff that the said Memorandum of Understanding was a forerunner and first stage of a merger of the 1st and 2nd Defendants which became consummated in the Agreement of Sale (GSA) aforementioned, whereby all the shares, assets and business of the 1st Defendant were purchased by the 2nd Defendant. That both the said Memorandum of Understanding and the said Agreement of Sale, showed that the 2nd Defendant took over the management of and inter alia, the business and assets of the 1st Defendants upon the execution of the Memorandum of Understanding on 13th October, 1999. That, included in the business and assets, were the suit premises of the applicant situate at Moi Avenue, Nairobi.

To stress the importance of the Memorandum of Understanding to this suit and how it has potency to alter the direction of the case, the applicant quotes from it the following provisions between the two Defendants who are the parties to the Memorandum of Understanding:-

(i) Purpose of Memorandum of Understanding: -

To reach an agreement for the sale and purchase of total shares of Guilders International Bank Limited.

Clause 3.3.2(xii): The purchasers or its appointed agent shall upon the signing of this MOU take the charge of all the assets, documents, securities and the management of the Bank immediately. The sellers shall complete necessary forms to advise changes in authorized signatories in the accounts.....

Clause 17: This Memorandum will remain in force and binding upon the parties and shall become a forming part to the final sale agreement.

Clause 18: The following annexes referred herein-in-before in this Memorandum of Understanding are enclosed with this Memorandum of Understanding and are forming part of this Memorandum of Understanding.....

Annex 3: Original Lease Agreement of rented premises.

Schedule I Part A: Details of Leases of Premises used by IBL: Name of Lessor: Book point Ltd, dated 1st April 1996 amended on 1st June, 1999 and expiring on 28th February, 2006.

The applicant/Plaintiff also stressed the earlier purpose, the following provisions from the Agreement of Sale of the Business (GSA) dated 31st December 1999: -

(2) Recital 'A' : the vendor is a wholly owned subsidiary of the Purchaser

Recital 'B': The vendor is the lessor of properties set out in the First

Schedule Leased from the landlords.....

Recital I : The purchaser wishes to purchase and to take over from the Vendor..... the business of the vendor, the assets, Loan Accounts set out in Part I AND subject to consent of the landlords (which consent the Vendor will assist in obtaining) take over the leases of the leased Premises.

Clause 1: The Vendor agrees to sell and the purchaser agrees to purchase for the consideration set out in clause 2 hereof, the assets, and to takeover the Business including..... the Credit Accounts, and the leases of the Leased Premises.

Clause 3(a) (i) Take over date shall be 31st December, 1999 and as of that date the Guardian shall be entitled to possession of the Assets, the Property and Business.... and on which date all risk and profit in the Assets and Business shall pass to it including the income and expenses of the Business.

Clause 3(a)(ii) All rents and other outgoings in respect of the Leased Premises shall as from the Takeover Date be borne by the Purchaser, the same to be apportioned on Take-over Date.

Clause 6(a) (Inter alia) that the parties acknowledge that Consent of the Central Bank of Kenya has been given vide its letter of 10th December, 1999 approving the merger between the Vendor and the Purchaser.

The First Schedule: the leases

Leased Premises Building erected on L.R. No. 209/12086 (Original Ref 209/570GL.)

The applicant asserted that the existence and content of the MOU and the GSA aforementioned have been admitted by the Defendants. That their contents prove the merger of the defendants long before Ransley, J decided to strike out the defendants' defences and

enter judgment against the 1st Defendant. The applicants further asserted that had the MOU and GSA been revealed and placed before the court, their contents would definitely have persuaded the court to enter judgment not against the 1st defendant alone but also against the 2nd Defendant jointly with the 1st Defendant. That therefore the discovery and revelation of the evidence in the MOU and the GSA is a discovery of new and important matter or evidence as envisaged under Order 44 aforesaid.

The Plaintiff/Applicant also referred to the 2nd Defendant's letter to Plaintiff dated 21st January 2000, and asserted that the 2nd Defendant's representations in it created a tenancy at Equity, more so when it is considered together with the MOU and GSA after the latter were discovered.

The applicant finally raised the issue of estoppel arising from the 2nd Defendant's said letter dated 21st January, 2000, as considered together with the 2nd Defendant's acts of taking up possession and paying rent therefor in the first instance before changing its mind and discontinuing to pay, which led to the filing of this suit.

In conclusion the applicant argued that had the MOU and the GSA been put in as evidence or candidly availed by the Defendants to the Plaintiff, even at the Plaintiff's request under the Notice to produce as required under the law, the conclusion reached by Ransley, J would have been different.

The Defendants on the other hand took a completely different position. They asserted that the contents of MOU and GSA, which they now existed, could not have changed Ransley, J's court's conclusions. They asserted that there was no privity of contract between the Plaintiff and the 2nd Defendant in relation to the Lease contract over the suit premises signed between the plaintiff and the 2nd Defendant who was not party to it. They urged that there was no transfer or assignment of the Lease contract aforesaid by the 1st Defendant to the 2nd Defendant. That the publication of the MOU and GSA contents particularly those concerning the merger between the Defendants in the Daily Nation of 28th April, 2000 and in the Gazette Notice to the public, did not transfer liability arising from the 1st to the 2nd Defendant. That the MOU and GSA contents which touched on the merger aforementioned did not raise any new issue before the court which Ransley, J did not consider and that any revisit to what he considered, particularly the merger, would be tantamount to sitting on appeal by this court on his decision.

I have carefully considered the issue of review as raised herein after a careful perusal of the material and argument from both sides.

I will start with the issue of jurisdiction raised by the Defendants. They in effect said little or indeed nothing to support their point that this court has no jurisdiction to revisit the Order or decree of Ransley, J, to review it under Order 44 aforementioned. In my view Ransley, J or in his absence, this court, has jurisdiction to review the said judgment or order upon the terms or provisions expressly stated under the said order 44.

The decree or order to be reviewed must be one in respect of which an appeal is allowed but from which no appeal has been preferred or one in respect of which no appeal is allowed. In this case the decree or order before me an appeal is allowed and one has indeed been filed by the Defendants.

However under order 44 rule 1(2), the applicant herein in my view and finding, would be entitled and would be allowed to apply for review notwithstanding the pendency of the defendants appeal. This is because the grounds of the Defendants appeal appear not to be common to those of the two appellants and because also the applicant would not during the intended appeal effectively or properly present his case based upon the grounds on which he applies for review. Put differently, in relation to this case, the applicant will in normal process, be unable to fully and effectively present his case concerning the contents of the MOU and GSA. This would be so because the same were not introduced in the proceedings before Ransley, J and do not therefore form part of appeal evidence.

I have further carefully considered the relevant contents of the MOU and the GSA. I am satisfied and hereby do find that the contents of the said MOU and GSA amount to new and important matter or evidence. It is in my finding new because the applicant/plaintiff was not aware of it nor from the evidence on record, was he properly and under reasonable circumstances, made aware of it by the two Defendants between whom the contracts were entered. Considering also the fact that some of the terms of the two documents, particularly those concerning the Plaintiff's leased premises, were being physically and effectively transferred or passed over to the 2nd Defendant by the 1st Defendant, the defendants ought to have notified and/or candidly disclosed to the plaintiff, the existence of the merger and the mergers implication upon the existing leased property.

The Applicant/Plaintiff, for the first time appears to have discovered the MOU and the GSA on 30th October, 2005, just over two years after the relevant decree was entered against it. The Defendants who knew of the documents existence and who despite being obliged under the law to produce or list them as directly relevant evidentiary documents, have not disputed these facts. They have neither argued that the Plaintiff would have known of the existence of the documents even if it used adequate amount of diligence. Indeed the applicant/plaintiff explained that the only reason it came across the documents in the custody of the 1st Defendant was because of a disagreement between the two defendants which induced the 1st Defendant to disclose the existence of the documents to the Plaintiff.

It seems to me therefore, and it is my finding, that no amount of diligence on the part of the Plaintiff would earlier have enabled it to know of the existence of the two documents. Even without such knowledge the Plaintiff appears to have served the necessary notices upon the Defendants through the court, seeking the availing of relevant documents but the Defendants do not appear to have disclosed these very relevant documents as they did not include them in their court documents lists. In conclusion on this point, it is fair and proper to find that the Plaintiff had indeed no knowledge of the documents and could not possibly produce them before Ransley, J.

I further accept the affidavit evidence of the applicant that it became aware of the documents on 30th October, 2005 and that within a month or so, it had filed this application for review. Considering the circumstances of discovery and the time taken to authenticate and study the documents, the time taken to file the application after the discovery, is in my view, timely and without showing any undue or unreasonable delay.

Touching on the issue of newness and importance of the contents of the MOU and the GSA, it is my view that the circumstances of their formation, discovery and nature make them new and important. To the applicant who did not know of their existence during the hearing of this case, they were indeed a new kind of evidence on discovery on 30th October, 2005.

The importance of the MOU and GSA however requires greater explanation. The main issue before Ransley, J's court was whether the 2nd Defendant was obligated and/or bound by the terms and conditions of the Lease Agreement signed between the Plaintiff and the 1st Defendant since the 2nd Defendant was not party or privy to it from the start.

The Plaintiff had pleaded in paragraph 8 of its plaint that the merger of the two Defendant banks, had led to the 2nd Defendant's taking over the assets, debts and other obligations of the 1st Defendant. It had further referred to the 2nd Defendant's letter to the Plaintiff dated 21st January, 2000 pointing to the merger and its approval by the Central Bank, and more importantly, the undertaking to honour the terms of the Lease of Tenancy that existed between the Plaintiff and the 1st Defendant in relation to the suit premises. In the said letter the 2nd Defendant

had requested the Plaintiff accordingly, to change the name of the tenant from that of the 1st Defendant's to that of 2nd Defendant and send it for execution and registration.

The record shows that by a letter of reply dated 31st January, 2000, the Plaintiff/Applicant expressed no objection to the change of tenancy suggested above and indeed advised its lawyers to draft a Variation of Lease upon confirmation of some issues then outstanding, with the suggested variation intended to start on 1st March, 2000. The 2nd Defendant appeared to have accepted the points in the Plaintiff/Applicant's reply subject only to all such terms being approved by its Head Office and it undertook to revert to the Plaintiff.

Having carefully studied the relevant provisions in the MOU and GSA, and also the contents of the 2nd Defendant's letter dated 21st January, 2000 aforesaid, I have cleared any doubt in mind that the 2nd Defendant's unconditional offer to take over and honour the lease and its terms, was directly related and based on the terms of the MOU and the GSA aforementioned. This is so although the Plaintiff, when accepting the firm offer by the 2nd Defendant, did not apparently know of the two document's existence.

The conclusion I come to therefore, is that the relevant evidence in the two documents, particularly that the 2nd Defendant's offer to take over and honour the terms of the Lease Agreement, was based on and arose from a contractual obligation in the two documents undertaken to be honoured by the 2nd Defendant, with first and foremost, the 1st Defendant. However when the 2nd Defendant gave an unconditional undertaking to honour the lease terms to the Plaintiff in the letter of 21st January, 2000 which was accepted, it created a contractual obligation with the Plaintiff.

It seems to me from the reading of the material before me, and I so find, that Ransley, J was denied evidence in the possession of the Defendants which would definitely confirm not only a merger between them, but also express evidence of the taking over of the Lease Agreement and the undertaking to honour the same as if the 2nd Defendant were the 1st Defendant. While it is not clear presently why particularly the 1st Defendant would be persuaded to enter into an apparent conspiracy to withhold that relevant evidence which might later work adversely to it, nevertheless, the act of refusing or neglecting to disclose the documents led to some injustice occurring. Not only did Ransley as a result conclude that the letter dated 21st January, 2000 by the 2nd Defendant to the Plaintiff was a fraud, but also on the same basis concluded that the 2nd Defendant was free to escape from paying lawful rent while unjustifiably and unfairly occupying the suit premises.

I do not have to be a genius to notice that the defences filed by the 1st and 2nd Defendants actually disgusted Ransley, J. He said on page 155 of his Ruling that ***"to say that the contentions of the two Defendants borders on dishonesty is perhaps an understatement."*** Then further observing that the defendants had decided not to defend the application to strike out the defences, he in the circumstances and in the absence of evidence to support the contents of the cited letter of 21st January, 2000 on merger, felt that the letter was an outright lie.

We of course now know that the letter was not an outright lie, thanks to the discovery of the MOU and the GSA. That is why and I hereby hold that the MOU and the GSA contents, amount to new and important matters and/or evidence which the Plaintiff had no knowledge of and could not produce at the time when Ransley, J's court struck out the defences and passed the decree against the 1st Defendant. Had this evidence been availed by the Defendants as it ought, that court in my view could and would have reached a different conclusion and probably entered a different judgment.

For the above reasons, I hold that the Plaintiff has satisfied this court on credible proof that it is justified under Order 44 Rule 1(i) and Rule 1 (2), to have the judgment or decree passed by Ransley J, on 9th July, 2003, reexamined, taking into account the new evidence contained in the MOU and GSA document aforesaid, with a view, if necessary, of reviewing it. To that end I now turn.

I had earlier come to the conclusion that the letter by the 2nd Defendant dated 21st January, 2000 to the Plaintiff was based on and was a result of the MOU and GSA afore explained. In them the 2nd Defendant as we now know, merged with the 1st Defendant. The 2nd Defendant purchased the whole business and assets and also took up other legal obligations to which the 1st Defendant was subject. In particular it stepped into the shoes of the 1st Defendant in very respect concerning the Lease Agreement, letting the lease of the suit premises registered as L.R. 622304/4 and dated 1st April, 1996. The 2nd Defendant further and as well contracted with the 1st Defendant that the former would honour the terms and conditions of the said lease, which became legally binding on execution.

There is therefore, no denying of the fact that this was a binding contract, at least between the 2nd and 1st Defendants. It seems to me therefore, that had the 1st Defendant decided to seek transfer of the liability in this suit to the 2nd Defendant when the service to enter appearance and file defence was made, it could have done so on the basis of the contents of the MOU and GSA under Order 1 rule 21 of the Civil Procedure Rules. The 1st Defendant, however, did not for unknown reasons, include this aspect of an available defence in its filed defence which Ransley, J, had later for good reasons strike out on the basis that it bordered on dishonesty.

I observe that the MOU, which effectively was precursory to the GSA, was signed between the 1st and the 2nd Defendants on 13th October, 1999. The GSA was signed on 31st December, 1999 and owned the MOU. In the GSA the 1st Defendant was the Vendor while the 2nd Defendant was the purchaser of the assets and the Business, including the Credit Accounts, and the Leases of the leased Premises, with effect from 31st December, 1999. The Purchasers would from the said date be entitled also to the possession of the leased premises erected on L.R. No. 209/12086 (Original 209/570 under GL), as included in the First Schedule. Under Clause 4© the Purchaser agreed that it had been afforded full opportunity to satisfy itself as to the condition of the Leased Premises and had inspected the lease documents. Under Clause 3(a) (ii) All rents and other outgoings in respect of the Leased Premises were imperatively to be borne by the Purchaser (2nd Defendant) with effect from the take over date, which was the 31st December, 1999.

The Plaintiff/applicant avers that by the provisions of the GSA, particularly those highlighted above, the 2nd Defendant who was party and privy to it, intended in law to be bound fully. The 2nd Defendant has not denied that position except to argue that the 1st Defendant has no method of enforcing the contract arising therefrom against the 2nd Defendant on the basis of privity of contract.

I have considered this argument. It is clear from the affidavit evidence before me that the 2nd Defendant in his letter to the 1st Defendant dated 21st January, 2000, made an offer based on the 2nd Defendant's obligations in the GSA. The 2nd Defendant offered to honour the terms and conditions of the lease existing between the Plaintiff and the 1st Defendant to the full. This was on the basis that the 1st Defendant who was bound to the Plaintiff by the terms of lease, had fully merged with the 2nd Defendant, thereby transferring all its business, assets, leases and other obligations to the 2nd Defendant. The 2nd Defendant had, vide the merger, therefore of necessity, taken possession of the suit premises. In these complicated circumstances, the 2nd Defendant had requested the Plaintiff to arrange change of name of the tenant from that of 1st Defendant to that of 2nd Defendant. Thereafter the corrected lease would go for execution and registration.

In my view and finding, the 2nd Defendant by its letter of 21st January, 2000, made a serious contractual offer to the 2nd Defendant. Indeed the nature of the offer was one that was complicated by the business merger which practically had passed possession of the lease

premises to the 2nd Defendant through the purchase. Failure to accept this offer by the Plaintiff would have created a tricky situation. Would the Plaintiff have ousted the 2nd Defendant from the suit premises after the take over and occupation of the premises, in these circumstances? I leave the answer to conjecture.

The Plaintiff fortunately, in my opinion, accepted the 2nd Defendant's offer by referring to the 2nd Defendant's letter and confirming that it had instructed its lawyers to prepare the variations in the lease sought by the 2nd Defendant and making it take effect from 1st March, 2000. This, the 2nd Defendant appears to have accepted together with other issues raised by the 1st Defendant for approval subject to usual final approval by headquarters. We now know as a fact that both Defendants failed to pursue the above arrangement to its final conclusion. This means that although the 2nd Defendant continued in possession of the suit premises on the terms existing in the first lease, no new lease was executed or registered between the Plaintiff and the 2nd Defendant. This gave the 2nd defendant the strength to argue that no enforceable lease resulted between the Plaintiff and the 2nd Defendant from the offer and acceptance of the continuation of the lease then existing, as between the Plaintiff and the 2nd Defendant.

I have considered this situation. The position I take is that where a tenant has taken possession of the lease premises under an unregistered agreement that is capable of specific performance, he holds under the agreement as if a lease had been granted and that the executor lease should be treated as an executed lease. I seek support of my decision in the several cases following.

In **Bains v Chogley** (1949)16 EACA 27, the court held that an unregistered instrument of lease was capable of creating a valid periodic tenancy under Section 106 of the Indian transfer of property Act (similar to our Transfer of Property Act "TPA"). In **Merali V Parker** (1956) 29 KLR 26 the issue was the effect of an unregistered sub-lease which the law required to be registered. It was held (Rudd, J) that **"..... evidence can be given to prove an agreement for a lease and the effect of that agreement completed with possession is to create a tenancy."**

In **Clerk V Sondhi** (1963) EA 107 the question was whether a tenant was liable to pay the balance of rent of an unregistered lease where the tenant relied on the grounds that there was no cause of action as the lease had not been registered in accordance with the provisions of RTA. The trial court held that the unregistered lease operated as simple contract between the parties under which the covenant to pay rent was valid and enforceable. The court in addition held that the tenant, in any event, was liable to pay an equivalent sum as the balance of rent for **"use and occupation"** of the premises in its possession. Confirming the decision on appeal, the appeal Court held inter alia, that the unregistered lease could operate as a contract inter partes, thus conferring on the intended lessee a right to enforce the contract specifically. The appeal Court also held that section 40 of RTA did not exclude the use of an unregistered lease to show the terms of the contract between the contestants.

The above as I understand it, means that whether the covenant to pay rent was regarded as a contractual stipulation in a document in respect of which specific performance could be obtained in equity, or a term of common law tenancy at will, the covenant was enforceable. In my view and finding, the covenant to pay rent is contractual obligation which has always been specifically enforceable in equity as stated by the Court of Appeal in **Souza Figueiredo & Co. Ltd V Moorings Hotel** (1960) EA 926 where it was, inter alia, stated: -

"Of course the agreement could not be given effect to as a contract if there was no consideration to support it; but there was a consideration. The appellant took possession under it and remained in occupation and enjoyment of the premises for a very considerable time."

In this case before me the 2nd Defendant in its letter of 21st January, 2000, gave a strong undertaking and thus agreed and offered to become the new tenant in the terms and conditions of the existing lease between the Plaintiff and the 1st Defendant. These included the payment of the rent which was then payable. It had by then taken possession and was occupying the lease premises. The Plaintiff, subject to confirmation of certain minor issues, accepted the offer and confirmed acceptance and instructed its lawyer to modify the lease to insert the 2nd Defendant as the new tenant with effect from 1st March, 2000 while letting the 2nd Defendant to be in occupation. Having accepted the MOU and GSA as new and important evidence in this case, I found no difficult in accepting the evidence that the 2nd Defendant's letter and offer above stated in the letter dated 21st January, 2000, was actually based in the 2nd Defendants legal obligation contained in the MOU and GSA. I accordingly find and hold that there was created an inter partes contract between the Plaintiff and the 2nd Defendant in any case and independently of any contract under the above circumstances. The consideration was the possession and occupation of the lease premises by the 2nd Defendant. The further part performance was its payment of rent for June 2000. There is indeed evidence on the record that Rents for January to May 2000 if not paid by the 2nd Defendant were paid on their behalf since handing over date was 31st December, 1999. It seems to me accordingly, that their agreement for payment of rent whether in equity or common law should be enforceable. It is my further finding that the 2nd Defendant in any case and independently of any contract, is under legal obligation to pay rent for the lease or tenancy premises for every month it occupies or occupied the premises for its exclusive use and occupation.

The issue of estoppels was also argued by the parties. The question was whether the 2nd Defendant is estopped from resiling from its representations to the Plaintiff in its letter dated 21st January, 2000 aforementioned. In the letter the 2nd Defendant had expressly and positively stated to the Plaintiff: -

"... we undertake to honour the agreement as per the terms of the lease of Tenancy that existed between you and Guilders International Bank for the said premises. We therefore request you to kindly arrange for the change of name of the tenant and send to us the modified Lease Agreement for our execution and registration. We shall quite appreciate your co-operation and assure you of our cordial relationship in the time to come."

It will be noted that the above letter had already stated that it had merged with the 1st Defendant, the Guilders International Bank; in respect of which the handing over date was 31st December, 1999, already passed. The effect of the merger was obviously that the resulting institution formed the merger which became the 2nd Defendant, which had practically taken possession of the business premises, hence the need, both practical and legal, to change the name of the Tenant. The Plaintiff's reaction to the letter appears to have been serious and practical. It accepted the resulting reality and relying on the ground on the 2nd Defendant's representation, instructed its lawyers to effect the changes in the lease to make it more relevant.

In my understanding of the above events, and I so find, the Plaintiff accepted and relied on the offer and undertakings of the 2nd Defendant in the above cited letter. It instructed its lawyers to modify the lease accordingly but for reasons not disclosed, but which are likely to be dishonest on the part of the 2nd Defendant, the arrangement was not pursued. I find that the Plaintiff's reliance on the 2nd Defendant's representation in the letter and its conduct in taking and keeping possession and occupation of the tenancy premises, eventually led to the Plaintiff's detriment. In my view the 2nd Defendant intended the Plaintiff to rely on its conduct or representation and that indeed, happened. It surely cannot under the principle of estoppel, be allowed now, to resile from the legal consequences of its conduct?

Estoppel was in the case of **Chase International Investment Corporation & Anor V Laxman Keshra & ors**, (1978) KLR 143,

described as embracing: -

“... written or verbal representation or a course of conduct even as to the future which led the Plaintiff to believe something even though the Defendant never intended it and this would affect the legal relations between the parties and a cause of action could be founded on it.”

On this case the conduct of the 2nd Defendant without doubt influenced, encouraged and created real expectation in the Plaintiff's part that the 2nd Defendant had taken up possession and occupation of the leased premises and would pay rents as undertaken or represented. Plaintiff accordingly accepted and agreed to create a lease in the name of 2nd Defendant but on the existing terms. The latter is hereby estopped from denying and/or refusing to pay the rents it under-took to pay.

Before I summarize my findings in this ruling, I wish to make the following additional comments.

The Plaintiff succeeded in introducing into evidence the two documents referred to as the MOU and the GSA as new and important evidence as prescribed under Order 44 rule 1 and 2 of the Civil Procedure Rules. Since this court is satisfied that the new and important evidence aforesaid is sufficient in enabling it to review the earlier court's judgment and orders, the court does not find it necessary to consider a review on the second ground i.e. **“..... any other sufficient reason.”**

Consideration of the relevant provisions in the MOU and the GSA in respect of the liability to pay the due rents for the business premises originally occupied by the 1st Defendant but taken over by the 2nd Defendant with effect from 1st January, 2000, clearly shifted from the former to the latter. As between the 1st Defendant and the 2nd Defendant, the shift took place under the MOU and the GSA provisions. Except only to assist the 2nd Defendant to commit a fraud to deny the Plaintiff of the due rents, it is not clear why the 1st Defendant failed to shift liability to pay rent due using the MOU and GSA, by entering a proper defence. Even under this application for review, the 1st Defendant who the court in error earlier ruled should alone pay the rents, did not bother or struggle to shift the liability under Order 1 rule 21 aforesaid. In the absence of a prayer for such relief, this court will have no business to interfere with the incidence of the declared liability.

The court observed inter alia, that the 2nd Defendant's affidavits in response to this application composed mainly of arguments in points of fact and law. They failed to supply answers of the fact in the party's stand in relation to the facts advanced by the plaintiff's supporting affidavits. The arguments in points of law in my view, would rather have been more suitably raised in submissions.

The following is the summary of this court's findings: -

- a) **The applicant/Plaintiff is entitled to seek review of this courts judgment, decree or order dated 9th July, 2003.**
- b) **The appeal filed and/or pending, filed by the Respondents/Defendants, does not bar the review sought because the grounds of the appeals filed are not common to the applicant and appellants and do not represent the applicants/plaintiff's case.**
- c) **The evidence in the documents herein referred to as the MOU and the GSA , is new and important evidence which was not within the knowledge of, the Plaintiff or which with the exercise of due diligence could have been produced by the applicant at the time when the decree or judgment or orders were passed.**
- d) **Had the new evidence now allowed to be produced, been produced before Ransley J's court, that court could and would most probably have arrived at a different conclusion in respect to liability to pay the rents due to the Plaintiff, by the 2nd Defendant.**
- e) **Even with the introduction and consideration of the new evidence aforesaid, this court finds that the defences of both defendants, disclosed no reasonable defences and were frivolous scandalous and an abuse of court process; they were therefore rightly liable to be struck out as indeed they were.**
- f) **In consideration of the evidence formerly on the record jointly with the new evidence in form of the MOU and the GSA aforesaid, this court reviews Ransley J's court's judgment and decree and declares and includes, total joint liability against the 2nd Defendant the Guardian Bank Limited, jointly and severally with the 1st Defendant, the Guilders International Bank Limited.**
- g) **Costs of this application are to the Plaintiff against the 2nd Respondent/2nd Defendant only.**
- h) **Orders do hereby issue in accordance with each finding above.**

Dated and delivered at Nairobi this 8th day of February 2010.

.....
D A ONYANCHA
JUDGE