REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA

Civil Suit 52 of 1998

DR. JULIA AUMA OJIAMBO……..PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD……..DEFENDANT

R U L I N G

The application before me is a Notice of Motion dated 15.5.2008 and filed by the defendant herein. It seeks the following orders.

1. That this Honourable court do issue a final judgement and a decree in the suit herein pursuant to the preliminary judgement and decree issued by Mbito, J. on 5.5.1999.
2. That in the alternative to 1 above this court do review the judgement of Mbito, J. of 5.5.1999 in the case herein and the decree issued pursuant thereto on 31.10.2005.
3. That further to 2 above, this court do vary and/or add to the said judgement and decree so as to conclusively determine this matter and to provide for, inter alia:-

(a) The counter-claim as pleaded in the case.

(b) The costs of the counter claim.

(c) The costs of the suit.

The facts of the case as I understand them are as follows, simply put. The plaintiff Dr. Julia Ojiambo and her late husband, stood guarantor for one Action Research Centre to take a basic loan of Kshs. 250,000/= from the Defendant, the National Bank of Kenya in 1986. There was default in repaying the loan back and the Defendant began a process to realise its security which was the sale of suit land and calling upon the guarantor to honour the guarantee since the debtor had failed to meet its obligations. This led to the filing of this case by the guarantor who had asserted that the charge was invalid for the reasons given in the plaint. Mbito, J. as he then was, indeed ruled that the charge under which the funds were loaned and released to the tune of Kshs. 250,000/= was invalid.

Despite the above finding however, Mbito, J for-saw no basis upon which the debtor could keep and fail to return the said sum so received. He accordingly found that the guarantor, the plaintiff herein, should refund the sum so released to the debtor established to be Kshs. 250,000/=. It was his further decision that the sum should attract simple interest of 15% due and originally agreed between the parties. He was categorical that no other or further interest (s) was applicable under the invalid or void charge(s). He said on page J 8-9 of his judgement:-

> **"As regards the counter-claim, on the bank's own showing, it is clear that it did not include some acknowledged payments and included penal interest not provided for in the letter of offer of facilities as they were not offered to the 1st plaintiff prior to its being imposed. It is also clear that the amount may not be due in the light of the first plaintiff's assertions that the amount paid are far in excess of the facilities if unprovided for interests and charges … are excluded therefore. The only fair order would therefore be for accounts to be taken excluding illegal charges and interests."**

It will be noticed that the above quoted paragraph in Mbito, J's judgement was directed at the counter-claim by the bank intended to claim back the loan advanced to the plaintiffs and the interests and other charges arising, until the filing of the counter claim. In view however that the Honourable judge declared that the charges were invalid and void, it is my understanding and my finding therefore, that the judge saw little sense in the counter-claim, in so far as it was based on the substance of a charge which he had declared invalid. He, however

paid sharp attention to the fact that plaintiffs claimed that since taking the loan from the bank in 1986, they had jointly or severally paid some money towards the reduction of the sum released to them of Kshs. 250,000/= plus any accrued interest at the rate he allowed of 15% p.a. And so in my understanding, he gave each party a chance - plaintiffs to show from accounts how much they had since repaid in reduction, if at all , and defendant to show similarly what had been received and what, in either case, would be the final judgement figure.

It is not denied that both parties appeared before the Deputy Registrar, first on 3.8.2006. The purpose was clearly to produce each party's statement of account to the Deputy Registrar. Apparently both produced scanty documentation to that end, which did not help the Deputy Registrar to compile the report as ordered in the judgement. He is recorded as follows on page 3 of his ruling of 22.3.2006.

> **"I must say that I was disappointed by the submissions made by both counsel. They do not help at all in the taking of accounts herein. I would have wished that they produced records of payments and receipts which would have helped in determining the issue of accounts…In order to get out this impasse, I feel that it is necessary to order each of the parties to file a complete statement of accounts…"**

The Deputy Registrar then gave the parties a prescribed duration to assist themselves and in the issue before the court. The record confirms that the defendant bank complied and filed its accounts statement on 28.9.2006. The plaintiffs however, failed to do so although they were all along represented by an able and very senior counsel. The presumption this court or any court in the absence of any reasonable explanation would make, is that the plaintiffs were unable to help themselves or the court. Either they could not trace any document to prove what they may have paid to the bank since 1986 until the relevant time, before the Deputy Registrar, or they never indeed bothered to look for it.

Clearly the Deputy Registrar had to complete his assignment as ordered by Mbito, J. Having heard both parties accordingly, the Registrar in my view did what he thought he had been authorised to do. He took into account the defendant's accounts and completed compiling his report, coming out with actual figures of what he believed were outstanding sums still due and owing from the plaintiff to the Defendant. For the period between June 1986 to end of March, 2006 he found the following figures

(a) The borrowed sum……250,000.00

(b) The separate simple interest
from June 1986 to March 2006……. 5,170,794.38

(c) The separate compound interest
From June 1986 to March 2006……6,180,437.07

(d) The amount paid by the Centre
Action Research to Defendant……. 516,832.70

The record confirms that the Deputy Registrar then confirmed the above figures and then stated:-

> **"…I will hence declare them (figures) to be their accounts and therefore payable by the plaintiff."**

As I understand it, the defendant in this application asks that this court pronounces the figures proper and makes them final judgement amounts. If I do so the judgement from this old case will be settled and be left for settlement in whichever method that will be available in law.

Mr. Balongo for the plaintiff came out stating that what the defendant bank is entitled to is the guaranteed sum of Kshs. 250,000/= subject to sums repaid by the plaintiff (s) as at 5.5.1999 which was a date of judgement. He then pointed that Mbito, J. rejected the evidence of the bank in the counter-claims concerning the bank statement produced in court in relation thereto. He then attacked the Deputy Registrar's approach in asking the parties to file accounts which according to him necessitated introducing new evidence which he said, could only be produced at the order of Mbito, J. not the Deputy Registrar. He further said, that such new evidence could only be possible with the specific leave of the court. He also said that the judge could have ordered each party to file their statement of account which he would then himself examine. As it is, he added, the statement filed by the defendant as new account had not earlier been introduced in evidence and had not been cross-examined upon. That such introduced a departure from the authority originally granted to the Deputy Registrar to the detriment of plaintiff (s) since the amount finally arrived are figures not supported by any proof.

I have carefully considered the issues raised. I have no doubt in my mind that Mbito, J. actually referred the parties to the Deputy Registrar for the purpose only of producing each ones accounts. To repeat what he had said:-

> **"The only fair order would therefore be for accounts to be taken excluding illegal charges and interests**."

Accounts would not be taken unless figures were produced by the party alleging any. Figures would not be much proof unless documents like bank statements, pay-in slips, receipts etc were alleged and produced for proof. That the Deputy Registrar, by the authority given him by the judge asked them to produce such documents and gave the parties time to get them, would be clearly only incidental and unavoidable in carrying out the mandate. Indeed there was no other practical way for the Deputy Registrar to be in compliance.

That the documents produced before the Deputy Registrar were not cross-examined on, is not denied by the defendant. Mr. Balongo would appear to say that even if the party or parties wanted to do so, no specific witness was called to produce the documents and be cross-examined. Indeed when the defendants attempted to call a witness to **"assist the court"** Mr. Balongo had opposed stating that the Deputy Registrar in the circumstances had no power to administer such a process. He felt that such would likely interfere with Mbito, J.'s judgement as it stood.

I have given the issue a serious thought. I am aware that the Deputy Registrar exercises various High Court power by virtue of the various provisions of the Civil Procedure Act Rules. Whether any such provision authorises him to fully record and preside over High Court process, is doubtful unless specifically provided. I observe that Mr. Balongo opposed the proceedings seriously, even before the Deputy Registrar. I am not presently prepared to rule that he was wrong. May be what Mbito, J. meant was to use the Deputy Registrar administratively to gather the specific and relevant facts after which the Deputy Registrar would place the file before the judge to determine the actual final figures of the amount payable. Indeed, a careful perusal of the final order made by Mbito, J. (just quoted herein above), only makes the order "…**for accounts to be taken excluding illegal charges and interest"**. It does not authorise him to make any final determination which he did when he concluded:-

> **"I will hence declare them (figures) to be their (parties) accounts and therefore payable by the plaintiff."**

The conclusion I come to accordingly, is that the Deputy Registrar went overboard to finalise the judgement by finalising the figures and documents he had been empowered to gather for the Judge, who alone would put the finishing touches on his judgement. In the circumstances I rule that it is only the High Court Judge who will undertake the final task.

In view however that either party was given ample opportunity to file such material which must be on record, I will not repeat the process through the Deputy Registrar to request for same again, unless there is a justifiable reason to do so in the interest of justice. The judgement which this court will endeavour to bring into perfection is strictly that pronounced by Mbito, J. that is to say, the principal sum of KShs. 250,000/= plus simple interest of 15% p.a. from June 1986 to March 2006 and thereafter to date. Any sums received in payment by the Defendants in reduction of the advance amount, will appropriately be reduced from the sum due and payable. Orders accordingly.
Dated and delivered at Busia this 27 day of July, 2010.

D.A. ONYANCHA
J UD G E