REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1483 of 2000

VELEO (K) LIMITED……..……...…….……..…PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED…….....…..…DEFENDANT

R U L I N G

The application is the Notice of Motion dated 7th November, 2007. There are three pertinent prayers in the application.

(a) THAT, the ruling by this Honourable Court dated 6th day of December, 2006 be reviewed.

(b) THAT, the order of the court that the defendant's defence, set-off and counterclaim be struck off, be discharged.

(c) THAT, the interlocutory judgment entered on the 27th day of February, 2007 be set aside.

The application is brought under Order XLIV rule 1 and Order L rule 1 of the Civil Procedure Rules. It is based on five grounds namely:

(a) THAT, this Honourable Court had no power in law to strike out the set-off and counterclaim in the circumstances of the matter.

(b) THAT, the Plaintiff's claim, the defence, the set-off and counterclaim were so intertwined as to be indivisible.

(c) THAT, the Defendant's claim that Plaintiff is indebted to it cannot be determined without hearing the suit on its merits.

(d) THAT, there are errors on the face of the record which should be corrected by reviewing the ruling aforesaid.

(e) THAT, the interlocutory judgment is irregular and should be set aside as a matter of right.

The application is supported by the affidavit of FAITH MAJIWA, the Corporate Recoveries Officer of the Defendant dated 7th October, 2007. Ms. Majiwa sets out the facts of the case and the circumstances surrounding the striking off of the Defendant's defence, set-off and counterclaim. I have considered the content of the affidavit together with the annexed documents.

The Application is vehemently opposed. The Respondent has filed grounds of opposition dated 7th

January, 2008. The key grounds of opposing the application are:

1. The application is incompetent misconceived and does not lie in law.

2. That the Defendants has consented to have case fixed for hearing and assessment of damages on two occasions since the ruling of 6th December, 2006 now sought to be reviewed and cannot therefore turn around to challenge the ruling.

3. The application lacks in merit.

4. The application does not disclose why interlocutory judgment was irregular.

5. The application does not specify why the court has no power to strike out the set-off and counterclaim in the circumstances of the case.

6. No sufficient reasons are disclosed to warrant review sought.

7. The application is an abuse of court process and is meant to impede the finalization of suit.

The brief facts of the case are that this court made an order for discovery on the 3rd March, 2004. On the 21st June, 2006 the parties in this suit entered a consent order before Ochieng, J. on the following terms:

"***That the application dated 5th June, 2006 is marked as settled on the understanding that the Defendant/Respondent shall file and serve its list of documents within the next 7 days."***

When the Defendant failed to file the documents within the period agreed upon in the consent order, the Plaintiff filed an application under Order X rule 20 of the Civil Procedure Rules dated 11th September, 2006 to strike out the Defendant's statement of defence, set-off and counterclaim and to have liberty to set down its claim for assessment of damages. That application was heard before Azangalala, J. who ruled in favour of the Plaintiff and struck out the Defendant's statement of defence, set-off and counterclaim dated 17th October, 2000 and filed on 18th October, 2000, with costs to the Plaintiff. The court also ordered that the Plaintiff was at liberty to set down its claim for hearing and assessment of damages.

Subsequently, the Plaintiff filed a request for judgment which was placed before the Deputy Registrar of this court on the 26th February, 2007. An interlocutory judgment was entered for the Plaintiff against the Defendant as prayed for in the plaint on the basis that the Defendant had failed to file appearance and the defence within the prescribed period.

The instant application has been brought by the Defendant under Order XLIV rule 1 of the Civil Procedure Rules, for a review of Azangalala, J.'s order striking out the defence, set-off and counterclaim, and also for setting aside the interlocutory judgment entered by the Deputy Registrar of this court.

I have considered the submissions by Mr. Ougo for the Defendant/Applicant and Mr. Kinyanjui for the Plaintiff/Respondent.

I will first consider the application in regard to the interlocutory judgment entered by the Deputy Registrar. Mr. Kinyanjui had raised a technical point stating that the application is not properly before this court because the Applicant did not file an exparte application for an order nisi and notice thereon so that the Applicant could apply to be granted leave to file the application for review. He relies on order XLIV rule 6 of the Civil Procedure Rules.

Mr. Ougo on his part submitted that the order for review was made under Order XLIV rule 1 which did not provide for a party to apply for leave to file the application for review. I do agree that Order XLIV rule 1 does not provide that leave must be sought before an application for review is made. That is a

procedure that is foreign to our jurisdiction and therefore Mr. Kinyanjui's submission to that effect is untenable.

As far as the interlocutory judgment is concerned I agree with the submission of Mr. Ougo, that the learned Deputy Registrar made an error apparent on the face of the record when he entered the interlocutory judgment in the matter. In my view the reason why I find that the Deputy Registrar made an error on the face of the record by entering the interlocutory judgment is for a reason different from the one argued by Mr. Ougo, even though I also agree with his argument. My reason of ruling in the way I have in regard to the interlocutory judgment is because Azangalala, J. in his ruling dated 6th December, 2006 (under review) made a very clear order allowing the Plaintiff to set down its claim for hearing of assessment of damages. His ruling was made in response to the chamber summons application dated 11th September, 2006 in which the following prayers were made.

1. The Defendant's statement of defence, set-off and counterclaim dated 17th October, 2000 and filed in court on 18th October, 2000 be struck out.

2. That the Plaintiff/Applicant do have the costs of the set-off and counterclaim filed herein.

3. That the Plaintiff be at liberty to set down its claim for hearing and assessment of damages.

4. The costs of this application be awarded to the Plaintiff in any event.

The Hon. Judge having directed the Plaintiff to set down its claim for formal proof, it was not open in my view, for the Plaintiff to apply for an interlocutory judgment before the Deputy Registrar. After the learned judge had ruled that the matter should go for formal proof for assessment of damages, the Deputy Registrar no longer had any jurisdiction in the matter.

Even if I may be wrong on that point, the interlocutory judgment can still not stand since the Plaintiff's claim was not a liquidated claim. It is a claim that lay in contract for the taking of accounts, for payment of monies to be assessed, for specific performance, general damages, injunction and other such orders. It was not proper for any interlocutory judgment to be entered in the matter. In any event, the request for judgment did not fall within the provisions of Order IXA of the Civil Procedure Rules since the Defendant had filed a Memorandum of Appearance and Defence before that request was made. Even though the said Defence was struck out by the court, that would not have attracted the application of Order IXA to the case to give jurisdiction to the Deputy Registrar to enter an interlocutory judgment for the Plaintiff in the circumstances.

For that reason, I am persuaded that the interlocutory judgment entered in favour of the Plaintiff against the Defendant by the Deputy Registrar of this court, was entered in error and should be set aside *ex dibito justitiae*

The second part of the application seeks to review the order of Azangalala, J. to strike out the defence, set-off and counterclaim. The Plaintiff has raised a preliminary point which is whether the application is properly before this court as a review and whether in fact the Defendant should have filed an appeal before the Court of Appeal.

Mr. Ougo premised the application on three grounds. One, that the court had no power to strike out the set-off and the counterclaim in the circumstances of the matter. Two, that the Plaintiff's claim, the defence, the set-off and counterclaim, were so intertwined as to be indivisible. Mr. Ougo submitted that both parties claim that they are owed money by the other and have pleaded set-offs against each other. Counsel submitted that those claims are so indivisible and inseparable that they should be heard together otherwise, the eventual judgment in the case may well come out to be perverse as was observed by the Court of Appeal, in the case of **Kenya Railways corporation vs. National Cereals and Produce Board CA No. 62 of 1998**. I agree with the principal enunciated in that case but the issue before the Court of Appeal was different in that in the cited case, the Plaintiff had inadvertently failed to enter a defence to

the counterclaim.

Mr. Ougo urged the court to find that even though the Defendant made a blunder in failing to comply with the order of discovery, it has been explained why it was not able to comply with the order and that therefore the Defendant should not be shut out forever from defending its position in this case which position is certainly not frivolous. Mr. Ougo submitted that the Defendant was ready, able and willing to compensate the Plaintiff for reasonable cause it has incurred in the matter. He relies on the case of **Tree shades Motors vs. D.T. Dobie CA No. 38 of 1998** where the Court of Appeal stated:

"***As we have already said, in this case, the second defendant annexed a draft defence to the affidavit in support of the application to set aside, the gist of which is that it purchased the motor vehicle from the first defendant as a purchaser for value without notice. The effect of this defence, if it prevails, is that the plaintiff would have to seek redress from the person with whom he had left his vehicle and who sold it to the second defendant. That is a defence which the second defendant should be allowed to raise although it has been less than candid on the issue of service. The Plaintiff has been prejudiced, and his inconvenience can be redressed by an appropriate order for costs."***

The third ground upon which this application is premised is that there are errors apparent on the face of the record which should be corrected by reviewing the ruling aforesaid.

Mr. Kinyanjui for the Plaintiff submitted that the fact that Justice Azangalala had or had no power in law to strike out the set-off and counterclaim in the circumstance of the matter is not an error apparent on the face of the record. Mr. Kinyanjui relied on the Court of Appeal decision of **National Bank (K) Limited vs. Njau [1995-99] 2 EA 249** where a unanimous decision of the Court of Appeal held as follows:

"***A review may be granted whether the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.***

In the instant case, the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters on controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of the law, it could be a good ground for appeal but not review."

He also relied on the court of appeal decision of **Nyamogo & Nyamogo vs. Kogo [2001] EA 170** where the court held:

"***We have carefully considered the submissions made to us by the advocates of the parties to this appeal. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error apparent on the face of the record would be made out. An error which has to be established by along drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for appeal."***

Mr. Kinyanjui submitted that the Defendant's agreement that the defence, the set-off and counterclaim were so intertwined as to be indivisible, did not constitute an error on the face of the record. Mr. Kinyanjui also submitted that the fact that the 1st Defendant claims that the Plaintiff was indebted to it

and that the issue cannot be determined without hearing the suit on merit, does not amount to an error on the face of the record.

Mr. Ougo in response to the submissions by Mr. Kinyanjui stated that it was an error on the face of the record where a court operates under a mistaken belief that it had a power to take a certain action. Mr. Ougo continued to submit that Azangalala J. had a belief that he could strike out the defence together with the set-off and counterclaim, when in fact he had no such power. Mr. Ougo argued that the case of **National Bank of Kenya vs. Njau**, supra, confirms that the order issued by the learned judge should be set aside on the grounds that the order was irregular.

I have considered the rival arguments of the counsels in this matter. It is clear from the submissions that whether the prayer to review and set aside the order of the learned Azangalala, J. will be granted will depend on whether this court will be satisfied that there is an error on the face of the record as urged by the Applicant. If this court finds that the exercise of the learned judge's power to strike out the defence, set-off and counterclaim was made in error apparent on the face of the record as urged by the Applicant's Advocate, then the order will be set aside. However, if this court finds that indeed what has been demonstrated by the Applicant is that the learned Judge decided the matter on a foundation of incorrect procedure or that his decision revealed a misapprehension of the law or that he exercised his discretion wrongly in the case, then the application to set aside the order will not be allowed.

Mr. Ougo's argument is that whereas the learned judge had power to strike out the defence under the provisions of Order X rule 20 of the Civil Procedure Rules he had no such power to strike out the set-off and the counterclaim. Order X rule 20 stipulates:

"***Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, if a Plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect and an order may be made accordingly."***

Mr. Ougo argued that the correct interpretation of that rule was that where the Defendant failed to comply with an order for discovery, it is only his defence which shall be liable to be struck out and that the court could not properly strike out any other pleading filed by the Defendant except the defence. Counsel argued that the court did not have the power in law to strike out the Defendant's pleading, that is the set-off and counterclaim, and that when the court stated that the *defence*, *set-off and counterclaim* are liable to be struck out, it was an error apparent on the face of the record as the set-off and counterclaim could not properly be struck out.

I have considered the ruling of the learned Judge and the submissions of both parties on the issue at hand. It is my view that the Applicant has brought this application challenging the exercise of jurisdiction by the learned Judge, on the grounds of misapprehension of the law and consequently, an erroneous conclusion that the court had the power to strike out the Defendant's pleadings, while in fact the court had no such power. As was stated in the case of **National Bank of Kenya Limited vs. Njau**, supra, "*a review may be granted where the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established*." It was the view of the Court of Appeal in the **Njau case**, that the ground that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law, or misconstrued a provision of the law cannot be a ground for review.

The Applicant has demonstrated that the learned judge misconstrued the provisions of Order X rule 20 and purported to exercise a jurisdiction he did not have or exceeded in the exercise of his discretion and made an order that the court could not do under those provisions of the law. It is very clear in my mind that what the Applicant has demonstrated is that in its view the learned Judge misapprehended the provisions of Order X rule 20, and struck out the set-off and the counterclaim, which he did not under that provision have the power to do. It is my view that what the learned judge did as alleged by the Applicant can only be corrected by the Court of Appeal. The proper way to correct a judge's misapprehension of the

law is to appeal to the Court of Appeal and is not to invoke the provisions of Order XLIV rule 1 of the Civil Procedure Rules. The proper procedure cannot be to review the learned Judge's order.

Having carefully considered the application on the prayer to review the learned Judge's decision, I do not find any error apparent on the face of the order of the learned Judge that could be the subject of review. I find no merit in the application to review the learned judge's order of 6th December, 2006.

In conclusion the Defendant's Notice of Motion dated 7th December, 2007 is determined by allowing it in part as follows:

1. The prayer to review or set aside this Honourable Court's ruling of 6th December, 2006 be and is hereby dismissed.

2. The interlocutory judgment entered on the 27th February, 2007 be and is hereby set aside.

3. Each party to bear the cost of this application.

Dated at Nairobi this 31st day of October, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mr. Ougo for the Defendant/Applicant

Mr. Kinyanjui for the Plaintiff/Respondent

LESIIT, J.

JUDGE