REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 449 of 2000

RAHUL DLESH BID ……..…….....……..…..PLAINTIFF

VERSUS

CHARTERHOUSE BANK LIMITED ……..…….…..….. DEFENDANT

RULING

This application is made under section 3A of the Civil Procedure Act; O.XLIV rules 1(1) (a) and 2 of the Civil Procedure Rules, and other enabling provisions of the law. It is brought by a notice of motion dated 18th July, 2005, and seeks the following orders-

1. THAT pending the hearing and determination of this motion, the Honourable Court be pleased to order a temporary stay of execution of the decree and/or the consequential orders issued herein.

2. THAT pending the hearing and determination of this application, the court be pleased to review and /or set aside the decree issued herein and any other consequential orders.

3. THAT in the result the court be pleased to reinstate the defence and counterclaim for hearing and determination on merit.

4. THAT the costs of this motion be provided for.

The application is supported by the annexed affidavit of ***SANJAY SHAH***, the managing director of the defendant bank, and is primarily premised on the ground that there are sufficient reasons to review and/or

set aside the decree. Those reasons are set out in the application and I shall revert to them later in this ruling.

The application is opposed. On 21st July, 2005, the plaintiff/respondent swore and filed a replying affidavit. This affidavit was accompanied by grounds of opposition which were also dated and filed in court on the same date.

At the oral hearing of the application, Mr. Odera appeared for the applicant while Mr. Sehmi represented the respondent. Mr. Odera relied entirely on the affidavit of Sanjay Shah herein above referred to, and the further affidavit of Peter James Mwangi, the manager of the defendant herein. He then submitted that although the court has jurisdiction to strike out, it is a draconian jurisdiction to be exercised only in very clear circumstances where the pleadings before the court are incapable of amendment. He also invited the court to revisit its ruling on the ground that the presentation of the plaintiff as the holder of the deposit slip was done pursuant to a mistake of fact, the mistake being that the plaintiff never deposited any money with the defendant bank. Counsel further submitted that it was important to consider that any evidence as to the banker's books which would enable the court to determine whether any moneys were deposited with the defendants by the plaintiff can only be produced at the trial and cannot form part of interlocutory proceedings. He therefore submitted that there is no evidence that the Kshs.10 million in dispute was paid into the bank by the plaintiff as the latter has not exhibited a paying in slip or a cheque in respect of which the deposit was paid into the bank.

Mr. Odera also argued that a mistake of fact is a solid defence at law. He relied on ***STANDARD BANK*** v. ***AKELO*** [1979] KLR 89 and ***NDEI*** v. ***MATHIRA DAIRYMEN'S CO-OP SOC*** [1982] KLR 267 and submitted that the presentation of the plaintiff as the beneficiary was a mistake of fact which justified the court in reopening the matter and revisiting it. Counsel also contended that the court has a very wide jurisdiction to review a matter "***for any other sufficient reason***" and cited ***OFFICIAL RECEIVER AND LIQUIDATOR*** v. ***FREIGHT FORWARDERS KENYA LTD***, Civil Appeal No.235 of 1997. He further maintained that it can't be an issue that this is a matter which could have been raised earlier. He referred the court to ***BILHA KANYI GATHUNGU*** v. ***KABUCHWA GATHUNGU***, Civil Appeal No. 38 of 2000 and ***KIMITA*** v. ***WAKIBIRU*** [1985] KLR 317 and submitted that if the matter is not reviewed, the plaintiff will be unjustly enriched as a result of a mistake of fact. He urged the court to allow the review as it was well founded.

Responding to these submissions, Mr. Sehmi for the respondent submitted that this application was filed after the judgment had been given, decree extracted and payment effected unconditionally. There was after an unreasonable delay, he argued, and that the applicant's new counsel came on record without leave of the court under O.III rule 9A, consequent upon which all the papers filed herein were a nullity as the advocate lacked the requisite locus. Mr. Sehmi further submitted that the applicant brought this application after unconditional payment of the decretal sum and without any intimation that it was aggrieved by the court's ruling. He also argued that the applicant came to court after an unreasonable delay and that no explanation had been advanced for such delay. He then argued that the burden was on the applicant to prove strictly the grounds upon which the application was based, and relied on ***KITHOI*** v. ***KIOKO*** [1982] KLR 177.

As for the applicant's contention that the deposit receipt was issued on the basis of a mistake of fact, Mr. Sehmi maintained that no affidavit had been procured from the two signatories to say whether there was a mistake or that the receipt was wrongly issued. Finally, he submitted that the evidence adduced in the further affidavit of Peter James Mwangi was available at the time when the application for striking out was argued, and there was no explanation as to why it was not brought up at that time.

In his reply, Mr. Odera submitted that they were granted leave to come on record; that the effluxion of time between April and July does not constitute an unreasonable delay; that even though the decretal sum was paid to the respondent unconditionally, it was unjustly paid and this does not bar the court from reviewing the judgment and orders. In any event, the legal principle of mistake was not pleaded by the previous advocate, and there is no legal barrier to the plea being taken now. Mr. Odera finally submitted that the applicant had sufficiently discharged the burden of proof as there was no evidence of the

respondent having paid the amount of the deposit to the bank, and a court of equity should frown upon any unjust enrichment. He invited the court to allow the application.

I have considered the submissions of both counsel and the authorities to which they referred. From these submissions, it occurs to me that the main point of difference between the parties is the issue as to whether the respondent paid to the bank the sum of money in return for the Call Deposit Receipt. Collateral to this are the issues as to whether the applicant's advocates obtained leave of court to come on record; and whether there was unreasonable delay in the filing of the application.

Upon a careful perusal of the court record, I have no hesitation in confirming that leave for the applicant's counsel to come on record pursuant to O.III rule 9A was granted by the court on 15th July, 2005. That issue can be laid to rest at once.

The other subsidiary issue is whether there was unreasonable delay in the filing of the application. There is no formula for ascertaining with scholarly exactitude whether any delay is unreasonable in any given situation. Each case must therefore be considered in the context of its peculiar circumstances. I am in total concurrence with Justice Azangalala on that point as expounded by the learned Judge in ***SWEETBITE MANUFACTURERS LTD & 2 ORS*** v. ***FIDELITY COMMERCIAL BANK LTD***, HCCC (Milimani) No. 687 of 1999. The peculiar features of this matter are that the ruling and orders which are sought to be reviewed were made on 21st April, 2005. A decree was issued on 11th May, 2005, and a bill of costs filed on 19th May, 2005. It was taxed on 28th June, 2005. On 29th June, 2005, the then applicant's advocates on record wrote to the respondent's advocate enclosing a banker's cheque "***being payment of the full decretal amount in the above matter together with taxed costs***." The cheque was apparently received on 1st July, 2005 at 12.45 p.m. after execution had commenced that morning.

Two weeks later, on 14th July, 2005, the applicant's advocates now on record filed an application of the same date seeking leave under O.III rule 9A to come on record. The following day, the former advocates and the current advocates filed a consent order allowing the application. The present application for review was then filed in court on 18th July, 2005. That was about three months after the day of the ruling. A period of three months to take a certain course of action may be reasonable or unreasonable depending on the circumstances and the nature of the action contemplated to be taken. Taking into account the fact that the applicant had already paid the decretal sum, and that the said payment had been effected unconditionally, and further that it took the new advocate on record to file the application for review after nearly three months, I am not entirely persuaded that the application was made without unreasonable delay.

To come to the substance of the matter, the main ground upon which the application is premised is that there is sufficient reason to warrant a review, the reason being that there was a mistake of fact in the issue of the Call Deposit Receipt. The mistake itself was that the respondent did not actually deposit any money against that Receipt, and that the money was paid by one Sanjay Shah. I dealt with this point at length in my ruling and I stand by my observations therein. In a nutshell, there is on record a Call Deposit Receipt No.0085 issued on 14th July, 2000. It states the sum of Kshs.10,000,000.00 was received from Mr. Rahul Dilesh Bid as a deposit on call bearing interest at 12% per annum as per the bank's terms and conditions with respect to such deposits. On the same date, the bank wrote to the Chief Magistrate as follows-

"**Dear Sir,**

We wish to confirm that Mr. Rahul Dilesh Bid … has deposited with us the sum of Kshs.10,000,000.00 (Kenya Shillings Ten Million only) on July 14,2000, as per receipt number 0085 on Call Deposit bearing interest at 12% per annum …

We wish to state that the above mentioned Mr. Rahul Dilesh Bid is a right and fit person to stand surety … and this undertaking has been given at his request …"

A copy of the letter is annexed to the further affidavit of Peter James Mwangi. This letter, addressed to a judicial officer, is unequivocal that the respondent had deposited a sum of Kshs.10 million with the applicant bank. The applicant wants now to turn around and say that the respondent never deposited any money after all. What, then, would one make of the letter addressed to the Chief Magistrate? Was the bank lying to the court? Did the bank deliberately misrepresent to the court that the respondent was a man of means when the bank knew that he was a man of straw? If so, can the bank itself be trusted?

The first ground upon which the application is premised is that as a fact, the plaintiff never deposited the said sum of Kshs. 10 million with the defendant bank as alleged and that there has been no evidence annexed by the plaintiff to prove the fact of depositing the said money with the defendant bank. What better evidence would the bank wish for than its own Call Deposit Receipt which showed that the money had been received from the plaintiff? A letter confirming the transaction was on the same day addressed by the bank to the Chief Magistrate. I think that it is reprehensible for the bank now to turn around and allege that the plaintiff did not deposit any such money. Indeed, five months down the road, the bank wrote to the plaintiff on 20th December, 2000, reaffirming that their records indicated that at the close of business on 30th November, 2000, the balance(s) on the plaintiff's account(s) were Shs.10 million. Furthermore, after the ruling dated 21st April, 2005, the bank repaid the money to the plaintiff with interest as per their conditions with respect to such deposit. That was nearly five years after the issue of the call Deposit Receipt. If there had not been any deposit by the plaintiff from the very beginning, I don't see that the bank would have waited until they had paid out the money to the plaintiff to claim that the plaintiff had not deposited any such money, and this is being alleged nearly five years after the event.

The bank's conduct in this matter clearly smacks of an afterthought. I see in it nothing more than an attempt to relitigate the matter through, for want of a better expression, the back door. I don't see that there was a mistake of fact as alleged or at all.

In the case of ***NDEI*** v. ***MATHIRA DAIRYMEN'S CO-OPERATIVE SOCIETY LTD*** [1982] KLR, 266, it was held that where a voluntary payment is made with knowledge of all the facts, the money cannot be recovered as it is like a gift and the transaction cannot be reopened. The defendant had full knowledge of all the facts at all material times. The document on record shows that the defendant did deposit the money with the bank. If he did not, the bank knew about it all the time. There simply was no mistake.

Indeed, the issues brought up in this application ought to have been raised at the earlier hearing but that was not done. No reason is advanced as to why it was not done.

In sum, I am not satisfied that there is sufficient reason to review the court's ruling and consequent orders. The application for review accordingly fails and is dismissed with costs to the plaintiff/respondent.

Dated and delivered at Nairobi this 7th day of February 2006

L. NJAGI

JUDGE