



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI COMMERCIAL DIVISION –MILIMANI
CIVIL CASE NO.687 OF 1999
SWEETBITE MANUFACTURERS LIMITED.....1st PLAINTIFF
RAJENDRA K G GANATRA.....2nd DEFENDANT
DINESH G GANATRA.....3RD DEFENDANT
VERSUS
FIDELITY COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

The Notice of Motion dated 15th April, 2005 was brought by the Defendant under Order XXI Rule 22, Order XLIV Rule 1, Order L Rule 1 of the Civil Procedure Rules, Sections 3A, 63(e) and 80 of the Civil Procedure Act and all other enabling provisions of the Law. It is seeking one primary prayer that the decree dated 7th December, 2004 be reviewed and set aside and the Counterclaim be allowed and the Plaintiff be dismissed. In the alternative the Applicant seeks an order that the suit be reheard and the Counter claim be considered.

The principal grounds for the Application are that:-

- 1. The Plaintiffs are indebted to the Defendant on a bills discounting facility to an amount far in excess of the decretal amount herein.***
- 2. The Defendant seeks to present matter not previously before the Court relating to HCCC No.1765 of 1997 that is sufficient basis for a review of the judgment and decree.***
- 3. There is an error in the judgment and decree apparent after perusal of the former suit HCCC No. 1765 of 1997 which was withdrawn before the Counterclaim was filed.***
- 4. There is sufficient reason for review of the decree herein because the failure to, consider the Defendant's Counterclaim on the merits has driven the Defendant from the seat of judgment and it is in the interests of justice that the case herein be re-opened for the purposes of considering the Counterclaim and reconsidering the Plaintiff's claim.***
- 5. On account of the status of the former suit, the Plaintiff and the Defendant's defence of consolidation be reconsidered.***
- 6. The Defendant is entitled to a set off of any amount found due and owing to the Plaintiffs with***

the amounts the Plaintiffs owe on various facilities advanced by the Defendant.

7. The Defendant is entitled to a comprehensive taking of accounts inclusive of interest accrued on late payments.

8. This Application has been made without unreasonable delay after attempts to set off amounts owing out of court failed. The Application is supported by an affidavit sworn on the 12th April 2005 by one Philip Muoka the Defendant's Legal Officer.

The Application was opposed and there is a replying affidavit sworn by Dinesh G. Ganatra one of the Plaintiffs who is also the 1st Plaintiff's director. The application was canvassed before me on 28th April, 2005 and 11th May 2005 by Mr. Kanjama Learned Counsel for the Applicant and Mr. Nyaga learned Counsel for the Defendants. Counsel for the Applicant recited the averments in the supporting affidavit and submitted that on the facts disclosed in the said affidavit the Applicant was entitled to the review sought under Order XLIV Rule 1. Reliance was placed on several authorities which I have considered and need not cite them here. The Plaintiff's Counsel on his part also recited the averments in the replying affidavit aforesaid and was of the view that on the facts disclosed in the said replying affidavit no case for review had been shown.

I will consider the Application under the grounds set out in Order XLIV Rule 1 of the Civil Procedure Rules Seriatim: 1st the Applicant had to show that there has been discovery of new and important matter or evidence which after the exercise of due diligence was not within its knowledge and could not be produced at the time the decree was passed. Judgment against the Defendant was given on 7th December, 2005. The Defendant claims that it made a discovery through its present advocates on 10th March 2005 that HCCC No.1765 of 1997 had been withdrawn on March 2000 which was before the Defendant amended its defence and set up a counterclaim. In my view this cannot be a new discovery. HCCC No.1765 of 1997 was instituted by the Plaintiff.

Discontinuance of that suit could only be on the instructions of the Plaintiff who is now alleging that discovery of this fact was made in March 2005. The Defendant makes this allegations with knowledge that on 11th November, 2004, the Plaintiff's submissions to the Court contained allegations that the Defendant waived its right to consolidate accounts when it filed HCCC 1765 of 1997 in respect of the bill discounting facility. The Defendant did not respond to this submission. It cannot be true that the Defendant had no opportunity to respond. Clearly therefore there is no substance in the ground that the

Applicant has made a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within its knowledge or could not be produced at the time when the decree was passed. The second ground which the Applicant had to show is that there is some mistake or error apparent on the face of the record. The error alleged by the Applicant is that the Court wrongly considered the status of HCCC No.1765 of 1997 which suit was withdrawn before the Counterclaim was filed and in considering the status of HCCC No.1765 of 1997, the Court considered an issue which was not pleaded. With respect the existence of a previous suit in respect of the same cause of action cannot cease to be an issue because it was not pleaded.

The Plaintiff's Counsel submitted on the cause of action in the said suit and said it dealt with the Bills discounting account and could not again be the subject of fresh adjudication in this case. The Applicant in my view could not ignore this submission on the basis that it had not been framed as an issue. With respect, in my view the Applicant seeks to relitigate which is not the function of the review jurisdiction. In my judgment, I had stated that the Applicant in electing to institute HCCC No.1765 of 1997 in respect of sums allegedly owed to it by the 1st Respondent option to treat the three financial facilities separately.

I further observed that the Applicant could not have purported to consolidate the Bills Discounting facility with the Hire Purchase accounts without discontinuing HCCC No.1765 of 1997 and further that if the Applicant were to succeed in both the earlier case and in this suit the result would be two decrees in respect of the same claim. As the review jurisdiction of the Court has been invoked, I have looked at the matter afresh. I have noted that the Applicant purported to consolidate the accounts on 8th October, 1998

without withdrawing the said HCCC No.1765 of 1997. It is clear that the alleged Notice of discontinuance now raised as a basis for this Application is dated 23rd March, 2000.

This was long after the purported consolidation which is clear evidence that the discontinuance of the said suit had nothing to do with the consolidation of the accounts. I am still of the view that the Applicant in electing to institute HCCC No.1765 of 1997 lost its right to consolidate the accounts. A fresh look at the Applicant's Counterclaim shows that it treated the accounts in question as one. I have already held that it was not entitled to do so. In any event, regarding the Bills Discounting facility the Counterclaim is not separately particularized. It would therefore not be possible to make an award in favour of the Applicant.

The Applicant's claim would remain dismissed. I dismissed the Counterclaim on the material availed to me. I am still of the same view. The second last consideration of this Application is whether or not the Applicant has shown that it is entitled to review for any other sufficient reason. The submission is that the Applicant's Counterclaim was not considered on the mistaken view that the earlier suit i.e. HCCC No.1765 of 1997 was in existence. I have already considered the effect of HCCC No.1765 of 1997 and found that discontinuance at the time the notice to that effect was purportedly filed would have had no effect on my finding. On the material availed to the Court and notwithstanding the discontinuance of the earlier suit the Counterclaim would remain dismissed.

The second reason urged for review under this head is that the Plaintiff had prayed for an account and instead of ordering an account I reconciled the accounts. With respect this is not entirely correct. The Plaintiff inter alia prayed for refund of overpaid amounts and led evidence on this prayer. On the evidence adduced, I made a specific award in favour of the Plaintiff. In my view the Applicant's complaint in this regard does not constitute sufficient reason and the alleged want of jurisdiction is misconceived.

The last hurdle which the Applicant had to surmount was to show that it had sought review without unreasonable delay. I am alive to the fact that there is no set time limit for making the Application. Each case should therefore be determined on its own peculiar facts. The peculiar facts of this case are that judgment was delivered on 7th December, 2004 in the presence of the then Counsel for the Applicant. The Respondents' costs were allowed by consent on 2nd February, 2005 and the Court issued decree on 17th March 2005. It is only when execution commenced that the Applicant moved the Court for stay on 29th March 2005.

This application was filed on 15th April, 2005 and the reason given for the delay in moving the Court is that there were attempts to set off amounts owing out of Court. The record does not support this position. In the peculiar circumstances of this case I am not persuaded that this Application has been made without unreasonable delay. The upshot of the above consideration of the Application is that the same has no merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JUNE 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-