**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**
**COMMERCIAL DIVISION, MILIMANI**

**Civil Case 1287 of 1999**

**KUGURU FOOD COMPLEX LTD……PLAINTIFF**

**VERSUS**

**MASHREQ BANK P.S.C……DEFENDANT**

**R U L I N G**

The suit herein was part-heard before the late Hewett, J. at the time of his demise. The Plaintiff had called three witnesses. On 25th September 2001 Mbaluto, J. ordered that the trial do start ***de novo***. The Plaintiff, **KUGURU FOOD COMPLEX LTD**., has applied by notice of motion dated 9th June, 2005 for orders that the said order (erroneously stated in the application as dated 25th September, 2000) be reviewed or set aside and the court do proceed with the trial from where it had reached before the late Hewett, J. The application is stated to be brought under sections 3 and 3A of the Civil Procedure Act, Cap. 21 and also under Orders 17, Rule 10 and 44, Rule 1(b) of the Civil Procedure Rules and "all other enabling statutes". The grounds for the application are that the matter was substantially part-heard before the late Hewett, J; that the Plaintiff's witness, one DINESH CHANDRA BHATTESA (who testified before Hewett, J. as PW1) cannot be found as he is already out of jurisdiction of this court; that the Defendant will not suffer prejudice as the veracity of the said witness was subjected to cross-examination by the Defendant's counsel; that the proceedings before Hewett, J. have been typed and are clear; that when the order of 29.09.2001 was made it was not within the Plaintiff's knowledge that the aforesaid witness was outside the court's jurisdiction; and that the application has been made with due diligence, good faith and sufficient reason. In the first supporting affidavit sworn by the managing director of the Plaintiff it is deponed that the evidence of the aforesaid witness is very crucial for the determination of this suit. It is further deponed that the witness, having left the country, cannot now be traced and if he were traced it would be very expensive to bring him back to Kenya to testify. It is also deponed that when the order of 25th September 2001 was made the Plaintiff and its advocates were not aware that the witness had long left the country, otherwise it could not have conceded to the making of the order for the suit to be heard ***de novo***. It is therefore not possible for the witness to testify a fresh. It is thus in the interest of justice, it is further deponed, that the order of 25th September, 2001 be set aside to enable hearing of the suit to proceed from where it had reached before the late Hewett, J. It is argued for the Plaintiff that this will not prejudice the Defendant in any way at all as the witness in question had been fully cross-examined by the Defendant when he testified before the late Hewett, J. The second supporting affidavit is sworn by the Plaintiff's advocate and it depones to the proceedings leading to the order of Mbaluto, J. of 25th September, 2001.

The Defendant has opposed the application. It has filed a statement of grounds of opposition dated 14th June, 2005. Grounds 1 and 2 thereof were disposed off in a preliminary objection raised by the Defendant in ruling delivered by Azangalala, J. on 15th June, 2005. The remaining grounds of objection are that the application has been made after a "miserable" delay; that the Plaintiff has not demonstrated that it had exercised due diligence to discover the whereabouts of the witness in question or secure his attendance before this court; that the Plaintiff has not provided strict proof of the allegations contained in his application, thereby offending the provisions of Rule 3 of Order 44 of the Civil Procedure Rules; that the Defendant will suffer prejudice and injustice if the application is granted in that it will be forced to defend

the suit without the trial judge having the benefit of observing the demeanor of the witnesses in cross-examination, particularly that of the witness in question whose evidence is essentially that of character; that a trial judge ought to have the opportunity to observe first-hand in open court the demeanor of witnesses in cross-examination in order to properly assess the witnesses' testimony, and typed proceedings of testimony recorded by another judge is a poor substitute; and that there is no basis in law for granting the orders sought, the application being misconceived, frivolous, vexatious and an abuse of the process of the court. The replying affidavit which is sworn by the Defendant's advocate having conduct of this suit is largely argument of the above grounds. In a supplementary affidavit sworn by the managing director of the Plaintiff it is deponed that the Plaintiff through the deponent had exercised all due diligence in trying to trace the witness in question after failing to get him at the end of April 2005 when he went to inform him that the suit was fixed for hearing on 15th June, 2005. It is further deponed that that was when he learnt that the witness had long left the country and therefore gave instructions for the filing of the present application.

I have considered the submissions of the learned counsels. Two cases were cited by the Defendant's counsel. The first one is **TANJAL INVESTMENTS LIMITED VS EL NASR EXPORT AND IMPORT COMPANY (2004) eKLR.** It is authority for the proposition that a party seeking review must do so without unreasonable delay. The second case is **BACHU VS WAINAINA (1982) eKLR.** It lends support to the proviso to sub-rule (2) of Rule 3 of Order 44 of the Civil Procedure Rules to the effect that no application for review shall be granted on the ground of discovery of a new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

Under Rule 10 sub-rule (1) of Order 17, where a judge is prevented by death, e.t.c, from concluding a trial of a suit or the hearing of any application, his successor may deal with any evidence taken down by him or under his direction and may proceed with the suit or application from the stage at which his successor left it. In my understanding the term "successor" must mean the judge actually seized of the matter. That means, therefore, that I have the necessary discretion under the aforesaid sub-rule notwithstanding the order of Mbaluto, J. of 25th September, 2001 as I am the successor of the late Hewett, J. for the purposes of the sub-rule. I am thus entitled to dispose of the present application by exercise only of that discretion. If I should decide to proceed otherwise than ordered by Mbaluto, J. in the aforesaid order, then, of necessity, I shall have to set aside the said order without considering the application as brought under Order 44 Rule 1(b) of the Civil Procedure Rules. However, as that particular aspect of the application was argued I shall consider it. But first, let me consider how I will exercise my discretion under sub-rule (1) of Rule 10 of Order 17.

Hewett, J. took the evidence of three (3) witnesses for the Plaintiff over three days of hearing. They were all fairly lengthy witnesses. Their testimonies run to about forty (40) typed pages. All of them were cross-examined at length. It is apparent from the affidavits sworn in support of the application that the Plaintiff is now unable to secure the attendance of its main witnesses, Dinesh Chandra Bhattesa (who testified before Hewett, J. as PW2). I find no prejudice at all that may be occasioned to the Defendant if the trial were to proceed from where the late Hewett, J. left it for the simple reason that the Defendant fully cross-examined the witnesses that have already testified. I note that much of the testimony recorded by Hewett, J. was in the form of specific question and answer. No doubt any notes that he may have made with regard to the demeanor of any witness will appear in the record. On the other hand, insisting that the trial do start ***de novo*** as ordered by Mbaluto, J. when the Plaintiff is no longer able to secure the attendance of its main witnesses will occasion injustice to the Plaintiff.

Let us now turn to the application as brought under Order 44, Rule 1(b). The objection to this aspect of the application is that there has been undue delay in bringing the application; that the Plaintiff has not demonstrated that it exercised due diligence to discover the whereabouts of its witness in question or secure his attendance; and that the Plaintiff has not provided strict

proof of the allegations contained in its application. Regarding delay, it is deponed in the supplementary affidavit of Peter Kuguru, the managing director of the Plaintiff, that he learnt at the end of April 2005 that witness in question had long left the country when he went to inform him at his place of business in Nairobi that the suit was fixed for hearing on 15th June, 2005. The present application was filed on 9th June, 2005. I find no unreasonable delay in bringing the application. It is reasonable to expect that the managing director of the Plaintiff would contact the witness to inform him of the hearing date and not for any other reason. It is unreasonable to expect that the said managing director would have learnt earlier that the witness had left the country. A litigant cannot be expected to constantly monitor the whereabouts of his witnesses. That would be an invasion of their privacy.

It has been argued for the Defendant that the Plaintiff has not strictly proved that the witness in question is no longer in the country and cannot be secured to attend court. Strict proof is required by the proviso to sub- rule (2) of Rule 3 of Order 44, where an application for review is made on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the order was passed or made. The order in question was made on the 25th September, 2001. The learned counsels for the parties were then before Mbaluto, J. for directions on how to proceed with the suit following the death of Hewett, J. It is unreasonable to expect that

the parties would have first ascertained the availability of their witnesses before seeking those directions. Normally a litigant will be

concerned about witnesses after the suit is fixed for hearing. I am satisfied that the Plaintiff has strictly proved that the witness in question is no longer in the country, cannot be found and cannot be secured to attend court. It has not been averred by the Defendant that the witness is still within the country or otherwise available to attend court. So I would allow the application as made under Order 44, Rule 1(b).

In the event therefore, I will allow the Plaintiff's application, set aside the order of 25th September, 2001 and direct that hearing of this suit do proceed from where the late Hewett, J. left it. In the circumstances of this application it is only just that the Defendant gets the costs of the application. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2005.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS……DAY OF NOVEMBER, 2005.**