REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1494 of 2000

GUARDIAN BANK LIMITED..... PLAINTIFF

VERSUS

JETHA AND SONS LIMITED..... 1st DEFENDANT

DINESHKUMAR L. JETHA..... 2nd DEFENDANT

RASHMIKANT Z. JETHA..... 3rd DEFENDANT

RAJESHKUMAR JETHA..... 4™ DEFENDANT

RULING

The application dated 13th January 2004 is seeking essentially two orders. First that there be a temporary stay of execution pending the inter-partes hearing of this application. The second, and the major concern of this ruling is that this court be pleased to review its judgment and decree dated 16th April, 2002. I referred to this second leg of the application as major because the first legal was sought during the court's vacation, and was not heard and thus remains a minor part of this ruling.

The application for stay is purported to be brought under Order XXI Rule 22 of the Civil Procedure Rule whereas on the face of it is expressed to be a Notice of Motion. Application under this Order XXI2 rule 22 are required to be brought by a Chamber Summons under Order XXI Rule 91 and is thus incompetent in the manner it has been instituted and is struck out.

On the substantive motion under XLIV Rules (1) and (2) of the Civil Procedure Rules, the Applicant who is the 2nd Defendant in these proceedings seeks this court to review the judgment and decree dated 16th April 2002. Order XLIV Rules (1) and (2) provides as follows:

(1) Any person considering himself aggrieved -

(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced to him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for

any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable day." I have underlined the phrase, "without unreasonable delay" as these words were only added by Legal Notice No. 5 of 1996, and are thus of recent origin.

As the Applicant has also made reference in his application to Rule (2), I also set out the said rule.

"(2) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a denial or arithmetical mistake or error apparent on the face of the decree shall be made only to the judge who passed the decree or made the order sought to be reviewed."

As I am not the Judge who passed the decree or made the order sought to be reviewed I need to set out the enabling rule which empowers me to be seized of this application. It is Rule 4 (1) of the said Order XLIV. It is in these terms:-

"4.(1) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to the court at the time the application comes for hearing."

Having thus established my legitimacy, I may now proceed to pronounce on this application.

At the hearing of this application Mr. Maobe for the 2nd Defendant plunged into the merits or otherwise of the 2nd Defendant's application without first establishing the basics under Order XLIV, Rule 1. These basics are well paraphrased by Mbaluto J. in the case OF UHURU DEVELOPMENTS LTD VS. CENTRAL BANK OF KENYA AND 2 OTHERS (H.C.C.C. NO. 29 OF 1995). These are that the applicant must be a person who considers himself aggrieved by:

"(a) a decree or order from which an appeal is allowed but from which no appeal has been preferred or

(b) a decree or order from which no appeal is hereby allowed; and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, may apply for review of the judgment to the court which passed the decree or made the order."

Maobe informed the court that the 2nd Defendant, the applicant contends that the sum of Ksh. 6,122,819/15 was entered in error, that the correct sum ought to have been shs. 3,598,968/59 and that the sum due as at 16th April 2002 (the date of the judgment) was Kshs. 5,539,453.57, and that according to the Applicant's calculation, the sum due as at 18th November 2003 was Ksh. 8,180,179.38. These figures are also to be found in paragraphs 11 - 13 of the Affidavit of Dinesh Kumar Jetha sworn on 13th January 2004. This may well indeed be so. The Applicant has however great difficult in answering the argument of the Plaintiff's Counsel, Kemunto. In her Grounds of Opposition dated 19th January 2004 she lists 6 grounds why this application should not succeed. These again are that :-

(1) The application is bad in law, incompetent, misconceived and should be dismissed with costs.

(2) Without prejudice to the foregoing the Second Defendant has not shown any valid grounds in law to warrant an order for review of the decree of the honourable court,

(3) The application is fatally and incurably defective and has totally ignored the applicable law as laid down in Section 80 of the Civil Procedure Act, Chapter 21, Laws of Kenya, and Order XLIV of the Civil Procedure Rules,

(4)The application to review the decree of this court is in fact an appeal disguised as an application for

review.

(5)The affidavit is not only lacking in substance but also fatally and incurably defective for want of compliance with Order XXVIII Rules 3 and 6 of the Civil Procedure Rules,

(6) The application as drawn lacks merit by virtue of the matters on record, or at all, and ought to be dismissed with costs. The Plaintiff/Respondent says that there is no new evidence discovered by the 2nd Defendant who has always had the statement of account. The judgment herein was passed on 6th April 2002. The rules provide that the application for review shall be done without undue delay. The Applicant has taken over 18 months to bring its application. The Applicant had been represented in court when judgment was passed and ought to have immediately raised their grievances then or shortly thereafter. The Plaintiff has formed the view that the application had been filed purely to frustrate the Plaintiff from realising the fruits of its judgment by execution under the Notice to Show Cause issued by this court on 18th November 2003.

Even if the above were all true and correct, the most fatal aspect of the application is however that the 2nd Defendant has not attempted to extract and attach the decree of court on to his application in terms of Section 80 of the Civil Procedure Act, Section 80 provides that any person who considers himself aggrieved:-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such orders thereon as it thinks fit.

There is no decree drawn up and attached to the application. It is not clear, as it ought to be, what grieves the Applicant. There has to be a decree attached to the application for review in discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the Applicant; and could not be produced by him at the time the decree or order was made. It is not for the court to look for or attached it.

In GULAMHUSSEIN M. JIVANJI vs EBRAHIM JIVANJI & ANOTHER [1929 -30] K.L.R. Vol. 12, p. 41 Pikcering C.J. said:-"But, in my opinion, however aggrieved a person may be at the various expressions contained in a judgment or even at the various rulings embodied therein, unless the person is aggrieved at the formal decree or formal order based upon the judgment as a whole that person cannot ..... appear the judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable. The ratio decidendi expressed in a judgment cannot be called in question in review unless the resultant decree is a source of a legitimate grievances to a party to the suit."

This case was cited and followed by Nyarangi J. as he then was in BERNAD GITHI on behalf of MUTATHINI FARMERS CO. LTD. vs KIHUTO FARMERS CO. LTD (H.C.C.C. No. 32 of 1974 - unreported). Similar sentiments were expressed with approval, by Oyango Otieno J. in PEREZ MALANDE OLINDO and CATHERINE KALIMA OLINDO vs DIAMOND TRUST BANK OF KENYA LTD (H.C.C.CNo. 1230 of 1999).

Even if this were not sufficient ground upon which to rely in rejecting the Application herein, in NATIONAL BANK OF KENYA LTD vs. NDUNGU NJAU (Civil Appeal No. 211 of 1996) which was cited with approval by Ringera J. in the EASTERN AND SOUTHERN AFRICAN DEVELOPMENT BANK vs AFRICAN GREENFIELD LTD NASKO LTD and RASHID MOHAMED KHAMIS [H.C.C.C. No. 1189 of 2000], the Court of Appeal comprising Kwach, Akiwumi and Pall JJA had this to say:-

"A review may be granted whenever 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 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 in 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. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he reached a wrong conclusion of law, it could be a good ground for appeal but not a review."

Having thus considered the relevant provisions of the law together with judicial precedent in the matter, and considering further that under the application itself there is an admission of liability in the sum of Ksh. 8,199,179.30 as at 15th November 2003 this court is of the firm view that the learned judge came to the correct decision and this application is bad in law, incompetent, misconceived, and should be dismissed with costs.

There shall be orders accordingly.

Dated and delivered at Nairobi this 12th day of February 2004.

In the presence of

..... for Plaintiff

..... for Defendant

M.J. ANYARA EMUKULE

JUDGE