



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 835 of 1998

NATIONAL BANK OF KENYA LTD..... PLAINTIFF

VERSUS

SAMSON KARIUKI NJENGA.....1st DEFENDANT

RUAHA CONCRETE COMPANY LIMITED..... 2nd DEFENDANT

RULING

This is an application by the second Defendant, Ruaha Concrete Company Limited to review, set aside and/or vacate the Judgment and decree against it. The application was made under Order XLIV, Rule 1 and 2 and Order XX1 Rule 22 of the Civil Procedure Rules.

The application is supported by an affidavit sworn on 11th July, 2003 by one Manjit Singh Sethi who is the Managing Director of the Applicant company. The background of this matter is that the Plaintiff bank filed a suit against the first and second Defendants on 11th December, 1998 for K.shs 1,060,159.05 together with interest thereon at 7% a month from 1st September, 1998 until payment in full and costs. The claim was based on an agreement dated 17th May, 1996 in which the Plaintiff said that it agreed to give to the first Defendant and the first Defendant agreed to take a credit card and to pay for all transactions made by him on the card on receipt of receipt of the statement of transaction. That in consideration of the Plaintiff issuing the card in the name of the first Defendant, the second Defendant guaranteed the charges incurred by the first Defendant through the use of the card.

The 2nd Defendant separately but through the same advocates, Ramesh Manek advocates entered appearances and defences respectively. The Plaintiff on 6th January, 2000 filed an application for summary judgment. The Defendants opposed the application. They filed grounds of opposition and a replying affidavit sworn by the 1st Defendant. The application was heard on 23.1.2002 by Justice Mbaluto. Both the Plaintiff and Defendants were represented by counsels. The court on 6th February, 2002 delivered its ruling in which it found in favour of the Plaintiff and entered judgment in favour of the Plaintiff against the Defendants jointly and severally as prayed in the plaint. The second Defendant filed this application to review on 24.9.2003. It is founded on the grounds set out in the summons. The Applicant says the guarantee issued by him had a limit that this liability should not exceed K.shs 300,000/- which was the agreed amount. That the approved credit given to the 1st Defendant was only K.shs 300,000/- and even if the guarantee is held valid, the same was limited to the approved amount of K.shs 300,000/-. That the summary judgment entered by this court against the Applicant is a purported guarantor to the 1st Defendant for K.shs 4,436,412.40 and which amount was in excess of the amount that the Applicant

guaranteed to pay.

The Applicant says that the issues he is raising now were pleaded by his counsel then and did not argue the same before Justice Mbaluto. That during the aforesaid period he was indisposed over heart ailment and could not and did not brief the advocates on his defence in the matter when they filed the grounds of opposition. The Applicant annexed detailed medical report and his passport to demonstrate that he was indisposed and was out of the country around the time the summary judgment was entered.

The application is opposed by the Plaintiff which filed a replying affidavit and grounds of opposition. I have considered the application, supporting affidavits, replying affidavit, and the counsel's submissions.

The court's jurisdiction to review a decree or order emanate from section 80 of the Civil Procedure Act and Order XLIV of Rule 1 of the Civil Procedure Rules. The Applicant has invoked the said provisions. The said Rule reads as follows:-

"1 (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 by him at the time when the decree was passed or the order was 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay."

The Court of Appeal in the case of *KITHO -vs- KIOKO [1982] KLR 177*, gave a guidance of how this provision should operate. Justice of Appeal Miller at P.181 said:-

"The operation of Order XLIV in the execution of Section 80 above demands, inter alia, that an application for a review must be based on the discovery of new and important matter or evidence which after due exercise of due diligence, was not within at the time of the decree was passed or the order made or on account of some mistake or error or any other sufficient reason. The court to which the review application is made shall dismiss the application if satisfied that there is not sufficient of the grounds seeking review, except for mistake or error appearing on the face of the challenged record; and the Applicant must strictly prove the grounds for review (excepting mistake or error on the record) failing which the application will not be granted."

The requirement for strict proof can be founding our present Civil Procedure Rules in the proviso to Rule 3:-

"..... provided that no such application shall be granted 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 decree or order was passed or made without strict proof of such allegations".

Counsel for the Applicant submitted that there is an error on the face of the judgment in this case as the judge did not look and/or consider the guarantee document. He says that there was no contract which said that the 2nd Defendant agreed to pay interest at 7% per month until payment in full. That the interest of 7% is outside the contract and that the judge erred. He further added that where there is an error on the law, that's a proper ground for appeal not review. However, if there is an error on a factual point, then it is a ground for review and that there is a distinction between the 2 situations. That the judge did not appreciate the contract before him and as a result the second Defendant who guaranteed shs. 300,000/- is being asked to pay shs. 4.4. million, money which he did not take a cent of.

I have studied Justice Mbaluto's ruling and I find that the learned Judge did consider the guarantee

document and the question of interest at the rate of 7% per month. The Judge said as follows:-

"As to the 2nd Defendant, it claims in its defence that it was not aware that the 1st Defendant had agreed to pay interest at 7% per month. That claim is absurd. If one may ask a rhetorical question - what was the 2nd Defendant guaranteeing when its director signed the employees guarantee to pay:-

"the charges incurred by the 1st Defendant through the use of the card"

If it did not know what interest was being charged on the card. The answer is obvious. The 2nd Defendant should have read and understood the terms and conditions of the agreement between the Plaintiff and the 1st Defendant before agreeing to guarantee payment and signing the guarantee it signed.

In its defence the 2nd Defendant also claims that the guarantee it signed was vitiated by lapses, laches, and indulgence granted to the 1st Defendant without reference to the 2nd Defendant. Regarding that defence, however, no attempt was made either in the replying affidavits or otherwise to show what those averments mean or simply and in my opinion nothing turns on them and they raise no triable issues. The above points are the only matters in the defences of the 1st and 2nd Defendants which in my view warrant consideration in this application. As shown above all of them lack substance and are frivolous".

From the foregoing, it is clear and obvious that the judge did look at the guarantee document and applied his mind to it. He even quoted some parts of it. How then can it be said that he did not consider or look at the guaranteed document? I think that it is unfair to the Judge to that extent. Studying and interpreting the document he certainly did and there is no error on the face of the record about it. As to whether the interpretation and conclusions he made are correct or proper as a matter of law or fact, that is a completely different question. This would go to the correctness of the decision and merits thereof.

I was referred to the decision of *Nyamogo & Nyamogo Advocates vs- Moses Kipkolum Kogo, Civil Appeal No. 322 of 2000* in which the Court in a unanimous decision said:

"..... An error 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 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 options, a clear case of error would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error on the face of record. Again, if a review 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 is possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal".

Applying the above principles to the present case, I am satisfied that there were no errors apparent on the face of the record that would justify review.

I am further fortified by the decisions in *National Bank of Kenya Limited vs- Ndungu Niau, Civil Appeal No. 211 of 1996* in which the Court of Appeal said,

"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 for review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review."

Once again the said principles applied to this case demonstrate that the Applicant is aggrieved by the decision and reasoning of the Judge. The Judge did consider the guarantee and gave his reasons why it

was binding on the 2nd Defendant. The fact that the Managing director was away and quite indisposed to give effective instructions surely cannot be a ground for review. He had lawyers on record who had the right to seek adjournment from the court. The matter proceeded on affidavit evidence and the director was not required to be present in court. In today's age, with communications technology, it is not a handicap for businessmen and women or corporations to transact business across the globe. It is possible to instruct counsel while one is abroad. The question of indisposition was not brought to the court's attention. In any case it cannot be a ground for review. Any failure by the then counsel to articulate issues before the court is also not a good ground for review.

In the case of Kamlesh Pattni -vs.- Nasir Ibrahim Ali & others. Civil case No. 418 of 1998, when dealing with a similar application I said that:-

"I do not think that this envisages or contemplates matters that relate to the advocacy of counsel, thoroughness of research, or discovery of authorities which could have been cited in support of the arguments in the case".

In all, I am of the opinion that this is not a suitable case for review and I hold that the application has no merits and does not meet the requirements of Order XLIV. I therefore do hereby dismiss the application with costs to the Plaintiff.

DATED and DELIVERED at Nairobi this 9th day of March, 2004.

M.K. IBRAHIM

JUDGE