Petrocity Energy (K) Limited v Imperial Bank Limited (In Receivership) (Civil Suit 54 & 55 of 2019 (Consolidated)) [2024] KEHC 17081 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEHC 17081 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 54 & 55 OF 2019 (CONSOLIDATED)

DKN MAGARE, J

MAY 9, 2024

BETWEEN

PETROCITY ENERGY (K) LIMITED ..... PLAINTIFF

AND

IMPERIAL BANK LIMITED (IN RECEIVERSHIP) ..... DEFENDANT

RULING

1. This is a Ruling on an Application dated 27th September 2023 and filed by the Plaintiff seeking the review of the Judgement of this Court dated 10th July 2023.

2. The Application is brought under the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules and is materially based on the ground of an error apparent on the face of the record.

3. The Applicant sought the following reliefs in the Application:-

    a. That there be issued sanction for the purpose of this Application and the execution of this Court's Judgement delivered on 10th July 2023.

    b. The Judgement of this Court delivered on 10th July 2023 be reviewed as follows:

    c. By allowing the prayers sought in the Plaint dated 16th July 2019 filed in High Court Civil Suit No. 55 of 2019- Scarce Commodities Limited v Imperial Bank Limited (In Receivership)

    d. By substituting the amount of USD 4,135,924.40 with USD 4,688.503.80 as the new amount to be offset by the Defendant.

4. The Application is premises on the grounds that the Orders in the judgment concerned only HCCC No. 54 of 2019 when in fact the suit was consolidated with HCCC No. 55 of 2019.

5. It was also grounded that the court erroneously applied the value of USD 2,000,000 in computing the amount to be offset by the Defendant yet the record shows that the right to offset was executed by Fossil Fuels Limited over its deposits amounting to USD 4,688,503.80 which was separate from the corporate guarantee of USD 2,000,000/-.

6. The Defendant filed a Replying Affidavit sworn by one Andrew K. Rutto on 30th September 2023.

7. The Defendant opposed the Application substantially on the following Grounds:

    a. The court correctly considered both suits in arriving at its Judgement

    b. The Applicant was asking the court to rewrite and amend the Judgement

    c. To review the guaranteed amount would be to make a new and different finding after scrutinizing the facts afresh which is not supported by the law on review.

Submissions.

8. The Applicant filed submissions stated to be dated 10th November 2022. This is an error, the correct date should be 10th November 2023.

9. On review, they submitted that there was an error apparent in the two aspects stated in the Application. It was thus submitted that this is a proper Application for review under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

10. On sanctioning the Application and execution of Judgement, it was submitted that sanction was necessary to enable the Applicant execute the Judgement.

11. They also submitted that the prayer was not opposed.

12. They urged me to allow the Application.

13. The Respondents filed also submissions dated 31st January 2024. They contended that there was no error apparent on the face of the record.

14. They relied on Republic v Kenya Medical Practitioners and Dentist Board & Another Ex Parte Kinganga [2021] eKLR to submit that review was not an appeal and the alleged mistake should be visible as to not require elaborate argument.

15. On the prayer for sanction, they stated that Section 56 (2) of the *Kenya Deposit Insurance Act* provided that no action or civil proceeding may be commenced or continued against an institution under liquidation or in respect of its assets without the sanction of the Court.

16. It was their submission that the court may allow the sanction to prosecute the review Application but not to execute the Judgement.

17. They relied on Section 56 (3) of the *Kenya Deposit Insurance Act* to submit as follows:

> " No attachment, garnishment, execution or other method of enforcement of a judgment or order against the institution or its assets may take place or continue.

18. They relied on Kwanza Estates Limited v Dubai Bank of Kenya Limited [2015] eKLR, where Justice P.J Otieno held as follows:

> " I find that the order sought to be enforced was an order against the defendant now under liquidation...That being the position I find that to proceed with the proceedings on the Notice to show cause will be to seek enforce the order against the defendant while under liquidation. That to me would ran affront the provisions of sections 56(3) of the Kenya Deposit Insurance Corporation Act (No. 10 or 2012), which provides:-
>
> "(3) No attachment execution or other method of enforcement of a Judgment or order against the institution or its assets may take place or continue."
>
> I am convinced that the arrest and detentions sought of the two individuals is a method of enforcement of the Order of 8/8/2013 against the defendant. The law says it is impermissible."

19. They urged me to dismiss the Application with costs.

Analysis.

20. I have perused the Application and the response thereto as well as the submissions and authorities filed in support and opposition to the Application.

21. The issues for my determination are two:

    a. Whether the Applicant has met the legal threshold for an Order of review on account of the error apparent on the face if the record.

    b. Whether this court can sanction this Application for review and the execution process.

22. The Jurisdiction of this Court to grant review is well set out in the law.

23. The jurisdiction to review is underpinned in Section 80 of the *Civil Procedure Act* which states thus:

> " Any person who considers himself aggrieved—
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> (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 order thereon as it thinks fit".
>
> Section 63 (e) of the *Civil Procedure Act* states that:
>
> "In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient

24. Similarly, Order 45 of the Civil Procedure Rules provides for Review and it states 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 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, 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

25. In the case of National Bank of Kenya v Ndungu Njau (1997) eKLR the court stated as follows:

> " 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 for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review".

26. I also associate myself with the reasoning of Kuloba J (as he then was) in Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994 where he opined that:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

27. Flowing from the authorities, the Jurisdiction to review is limited. It is founded on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within a party's 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.

28. Review does not include re- infusion of new wisdom to the court. On the face of the Judgement, there is nothing to review in the manner stated in the Application dated 27th September 2023. This is so because there was no mistake or error apparent on the face of the record or sufficient cause.

29. The Application though christened for review is not an Application for Review in the eyes of the law. Court's intention in the Judgement was clear and the Judgement clearly referred to HCC No. 54 of 2019 as consolidated with HCCC No. 55 of 2019. The court did not find merit in allowing amounts of Ksh. 4,688,508/=. If the court was wrong, it is not a ground for review. It is a ground for Appeal.

30. Allowing the application for review will be sitting on Appeal from the decision of the court. It should always be clear that prayers not allowed are deemed dismissed. Section 7(explanation) of the *civil procedure Act* provides as hereunder: -

> "Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused."

31. It therefore follows that al reliefs that were no granted were refused. Having been refused, the only option available is section 79G of the *civil procedure Act*.

32. The Court of Appeal in Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418 expressed itself as follows:

> "The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."
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> Consequently, I agree with counsel for the Appellant that the Respondent would better be placed in law to challenge the Judgement dated 27th May 2020 by way of an appeal as opposed to review. The jurisdiction of this Court to review its orders is limited under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. The Application did not fall within the stated provisions of the law."

33. The alleged error as to the guaranteed amount is not self-evident. It requires reevaluation of evidence. I cannot entertain it. The Applicant had the opportunity to fill up its case in the pleadings and at trial and not after Judgment. If the court did not grant those orders, they cannot be granted now. Finality of court orders brings with it certainty. It should never be that parties keep infusing wisdom to the same court after it has made a decision.

34. In legal practice, we hide criticism of the courts in the postulation that the court below erred in law. This should not be a case where a party wants a re-match post match. Sometimes a court can make a mistake that appears silly. It is not the duty of the court to correct itself by rethinking its position.

35. In the case of Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party) [2019] eKLR, it was therefore held that: -

> " ...A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay."

36. In the The Code of Civil Procedure, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

> " The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

37. Therefore, there is no error apparent on the face of the record. The court decision stand as in the Absence of an appeal.

38. On the issue of sanctioning this Application for review, I do not think there is need for this court to sanction the application for review. The right to apply for review is anchored in the law. The import of the review in this case is to correct a mistake apparent on the face of the record. It is not to commence any fresh action or continue an existing action. It is to alter a finding as between the court and the party who claims but not the party who opposes the review. In a typical applications for review, I would expect that their be no opposition by the corresponding party or if there be such objection, it will be prima facie, frivolous.

39. On the prayer for sanction, they stated that Section 56 (2) of the *Kenya Deposit Insurance Act* provided that no action or civil proceeding may be commenced or continued against an institution under liquidation or in respect of its assets without the sanction of the Court.

40. As submitted by the Respondent under Section 56 (3) of the *Kenya Deposit Insurance Act* in respective of institutions under receivership like the Respondent, no attachment, garnishment, execution or other method of enforcement of a judgment or order against the institution or its assets may take place or continue.

41. In the case of Kwanza Estates Limited v Dubai Bank of Kenya Limited [2015] eKLR, where Justice P.J Otieno held as follows:

> " I find that the order sought to be enforced was an order against the defendant now under liquidation...That being the position I find that to proceed with the proceedings on the Notice to show cause will be to seek enforce the order against the defendant while under liquidation. That to me would ran affront the provisions of sections 56(3) of the Kenya Deposit Insurance Corporation Act (No. 10 or 2012), which provides:-
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> "(3) No attachment execution or other method of enforcement of a Judgment or order against the institution or its assets may take place or continue."

I am convinced that the arrest and detentions sought of the two individuals is a method of enforcement of the Order of 8/8/2013 against the defendant. The law says it is impermissible."

42. The order I had granted were to deal with accounts. If the accounts were empty, then the Plaintiff will have obtained a judgment by lying to the court.

43. There is no need to grant the prayer for sanction execution where there is nothing to execute.

44. I do not find merit in the application herein. It is ripe for dismissal. It is so dismissed with costs.

Determination.

45. The upshot of the foregoing is that I make the following Orders:

    i. The Application dated 27th September 2023 is dismissed with costs of 25,000/= for lack of merit.

    ii. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY, 2024 RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Luchiri & Company Advocates for the Defendant

Wachira King'ang'ai & Co. Advocates for the Plaintiff

Court Assistant - Brian