Book Point Limited v Guilders International Bank Ltd & another (Civil Case 1807 of 2002) [2024] KEHC 6982 (KLR) (Civ) (12 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6982 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 1807 OF 2002

JN MULWA, J

JUNE 12, 2024

BETWEEN

BOOK POINT LIMITED ..... PLAINTIFF

AND

GUILDERS INTERNATIONAL BANK LTD ..... 1ST DEFENDANT

GUARDIAN BANK LIMITED ..... 2ND DEFENDANT

RULING

1. By a plaint dated 28/06/2021 and filed on even date the Plaintiff sued the Defendants seeking judgment jointly and severally for: -

   a. Rent and service charge/land rent for – Kshs. 8,253,600/=

   b. Interest thereon – Kshs. 1,287,314/=

   c. Advocates costs Kshs. 11,800/=
   TOTAL – Kshs. 9,552,714

   d. Further interest at court rates from 1/07/2001 on Kshs. 8,265,400/- @30% per annum @6,793.50 per day

   e. Rents, service charges, interest and other outgoings as and when they fall due from 1/09/2001 until expiration of the lease

   f. Costs with interest thereon.

2. It is noted that at the inception of the suit, the plaintiff in its statement of claim-plaint- at paragraph (e) reproduced above, did not specifically and explicitly plead the specific amount payable as special and or liquidated sum as for instance pleaded at paragraph (a).

3. The defendants filed their statements of defence denying the plaintiff's claim in totality.

4. By a notice of motion dated 23/01/2003 the plaintiff sought summary judgment against the defendants jointly and severally in the sum of Kshs. 9,552,714/= in terms of prayers (a), (b), (c) of the plaint. Upon hearing the suit, the court, P. Ransley J. on 9/07/2003 entered judgment as prayed against the 1st defendant as prayed in the plaint with costs of the suit. The judge further struck out the defendant's statements of defence for being abuse of court process with costs to the plaintiff

5. The decree was thereafter drawn to give effect to the judgment of P. Ransley J. It is dated 8/02/2010. It reads as hereunder: -

    1. That the 1st Defendant do pay to the Plaintiff the sum of Kshs. 14,573,311.50/= as more particularly set out hereunder: -

        a. Rent and service charge and rates

        land rent – Kshs. 8,253,600/=

        b. Interest thereon. Kshs. 1,287,314/=

        c. Advocates costs Kshs. 11,800/=

        TOTAL Kshs. 14,573,311.50/=

        2. Rent service charge interest and other outgoings as and when they fall due from 1/09/2001 until expiration of lease.

        3. The 1st defendant do pay the plaintiff costs of this suit to be taxed and certified by the taxing officer of this honourable court.

        4. The 2nd defendant's statement of defence be and is hereby struck out

        5. The 2nd defendant do pay the plaintiff costs of this suit to be taxed and certified by the taxing officer of this honourable court with costs.

6. The 1st decree particularly set out hereunder.

    a. Rents and service charge and rates/land rent – Kshs. 8,253,600/=

    b. Interest thereon – Kshs. 1,287,314/=

    c. Advocates costs – Kshs. 11,800/=

    Tee (above) was amended on the.....to read as hereunder: -

    That the 1st Defendant and 2nd Defendant do jointly and severally pay to the plaintiff the sum of Kshs. 14,573,311.50 as mOTAL – Kshs. 9,552,714.00/=

    d. Further interest at the rate aforesaid from 1/07/2001 to 9/07/2003 on Kshs. 8,265,400 at 30% per annum @Kshs. 6,793.50 per day – Kshs. 14,573,311.50/=

        1. That rents, service charge, interest and other outgoings as and when they fall due from the 1st September until expiration of the lease.

2. That the 1st and 2nd defendant to jointly and severally pay to the plaintiff costs of the suit to be taxed and certified by the taxing master of this honourable court.

3. That the 1st and 2nd defendants' statement of defence be and is hereby struck out.

4. That the 2nd defendant do pay the plaintiff its costs of this application as well.

7. By an application by the Plaintiff dated 17/01/2012, Sergon J. considered the two decrees issued by the court and noted that both are similar save that by the ruling of D. A. Onyancha J. (as he then was) included the 2nd defendant as a Judgment Debtor, and that

at paragraph 10 of his ruling the Judge added that there were other monies payable under the decree that the Plaintiff needed to explain then being Kshs. 178,514,179/= in the Notice to Show Cause, but at the end the court (Sergon J) dismissed the motion with costs to the Plaintiff on 11/1/2012.

8. The Plaintiff having failed to explain how it arrived at the sum of Kshs. 178,514,179/= as stated in the Notice to show cause dated 11/01/2012 delegedly being the balance of the decretal sum together with interest, costs of execution and collection fees. The notice to show cause was dismissed by Sergon J. on 3/03/20217.

9. It is instructive to note that the 2nd Defendant paid the decretal sum captured in the amended decree in the sum of Kshs. 14,573,311.50/= on 15/10/2020 by depositing the same in court.

10. Against the above backdrop the plaintiff brought the instant under Application dated 9/08/2021 under provisions of Article 159 of *the Constitution*, Sections 34, 39 and 100 of *Civil Procedure Act* of the inherent powers of the court seeking orders:

i. THAT this Honourable court be pleased to order the Defendants to pay the plaintiff Kshs. 38,643,696/= which is the amount of rent and service chare due from 1st September, 2001 until 28th February, 2006 that the Court granted as per paragraph (e) of the reliefs sought in the plaint.

ii. THAT this honourable court be pleased to correct the decree to indicate that Kshs. 38,643,696/= is the amount rent and service charges due from 1st September, 2001 until 28th September, 2006

iii. THAT paragraph (e) of the reliefs sought in the plaint be amended to read "Kshs. 38,643,696/= being rents and service charges as and when they fall due from 1st September, 2001 until expiration of the lease"

iv. THAT the costs of the Application be provided for.

11. It is supported by two affidavits by Sudhir Sha a director of the plaintiff sworn on 9/08/2021 and on grounds found on the face of the application and strenuously opposed by both defendants by Replying Affidavits and Grounds of Opposition dated 25/11/2021 (by 1st defendant) and by 2nd defendant dated 31/01/2022 and Relying Affidavit by Mary Omollo sworn on even date.

THE PLAINTIFFS CASE AND SUBMISSIONS

12. The Plaintiff avers that it is not its intention to overturn the findings and or judgment of the court but to enhance public confidence in the rule of law and system of justice. It states that at paragraph 5 of its plaint it pleaded the full areas of rent and service charge for the entire period of lease but unfortunately failed to state the specific sums and interest for the period at the plaint paragraph *13* (e) arguing that the omission was accidental and erroneously omitted.

13. Additionally, it states that the said mistake by its advocate ought not be visited upon the client and so pleads with the court do amend the plaint at paragraph (e) of the reliefs sought to read: "Kshs 38,643,696/= being rents and service charge as and when they fall due from 1st September 2001 until expiration of the lease." And thereafter correct the decree to indicate that Kshs. 38,643,696/= is the amount of rent and service charge for the period 1st September 2001 until 28/02/2006.

14. It is the plaintiff's further case that allowing the application will not prejudice or cause the defendants to suffer and that denial will cause the plaintiff not to enjoy fruits of its judgment.

15. On the requirement for specification of the amount payable, the plaintiff has urged the court to explicitly amend the plaint to state the amount payable to enable the plaintiff execute the judgment. Cited is the courts power to allow amendments of its judgment to give effect to its inherent jurisdiction to dispense justice under section 99 and 100 of the *civil procedure act*, and specifically cites ruling by Sergon J when he stated that "it emerges therefore that there are additional sums payable to the plaintiff by the 1st and 2nd defendants"

16. The plaintiff has cited the following decisions to support its submissions;

    1. Dominic Aloise George Omenye t/a Omenye & Associates v. Prime Bank Limited (2017) eKLR.
    2. Ruling by Rausley J dated 9/07/2003
    3. Ruling by Onyancha J. dated 8/02/2010
    4. Ruling by Sergon Judge dated 3/03/2017.

DEFENDANTS CASE AND SUBMISSIONS

17. Both defendants opposed the application on similar grounds of opposition and submissions. They urge the court to find that the application is misconceived, incompetent and an abuse of court process, more so on the following grounds that:

    a. The plaintiff seeks to amend a plaint post judgment, precisely after 12 years.
    b. Amount sought to be included as a liquidated sum was not pleaded in the plaint.
    c. That the decree of the court is fully settled.
    d. The plaintiff by seeking amendment of the decree is an attempt to circumvent the court of appeal decision in the suit wherein it clearly stated that a decree should agree with the judgment
    e. The defendants defences having been struck out the plaintiff ought not be allowed to re-open the case whose judgment and decree have already been settled.
    f. Defendants pray for dismissal of the application with costs

ANALYSIS AND DISPOSITION

In my view only three issues fall for determination:

1. Whether the decree of the court dated 9/7/2002 is time barred for execution purposes.

2. Whether a decree that has been satisfied can be amended to include liquidated damages post judgment that were not specifically pleaded in the plaint giving rise to the judgment and decree.

3. Which party bears the costs of the application.

18. Section 4(4) of the *Limitation of Actions Act* Provides:

> 4(4)An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods)the date of the default making the payment or delivery in question and no areas of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due"

19. From the construction of the above provision, it is evident that the court may exercise its discretion to extend time for execution of a decree after the statutory period of twelve years. By use of the word may not, that in itself gives the court some leeway to consider peculiar circumstances that may be satisfactory to the court. It is not in any way mandatory.

20. The court of Appeal in M'ikiara M'rinkanya another V.Gilbert Kabeere M'mbijiwe (2007)e KLR while dealing with construction of Section 4(4) Limitations of Action Act rendered that the phrase "May not" does not grant courts absolute discretion to extend time limits for all actions as there are various actions under sections 7 in relation to recovery of land section 8 in actions to recover rent, among others.

21. The Honourable Judges in the same court pronounced, in regard to recovery of debts, that a judgment debt becomes statute barred after 12 years.

In this case, in my view there is no judgment or decree that has not been executed.

The impugned judgment and decree was endorsed by the court on 9/7/2003. The plaintiff obtained a Certificate of Taxation on its costs against the defendants and thereafter the defendants settled the full decretal sum. There is no contest that the decree and certificate of costs have not been fully satisfied. In my view therefore, there is no judgment debt to be recovered by the plaintiff from the defendants. In the premises therefore, Section 4(4) of the Limitations of Action Act is inapplicable.

22. The gravamen in the motion dated 9/8/2021 is whether the court may allow the plaintiff to amend to correct the decree to add an amount of Kshs. 38,643,696/= post judgment and satisfaction of the decree. The decree is for a liquidated sum. I have perused the plaint dated 28/6/2001. At the relief paragraph *13*, it is clear that what was sought was a liquidated amount of Kshs. 9,552,714/= at a, b, c.

As for prayers 13(d) and (e) these were subject to prove; and that is why the court in its wisdom allowed the liquidated damages as prayed, leaving the balance of the claim for proof upon hearing on merit.

23. It is trite that a liquidated demand or special damage must not only be pleaded but also proved. Under Order 36 Rule 1 of the Civil Procedure Rules (CPR), a plaintiff may for judgment for the amount claimed or part thereof with or without interest. This is what the plaintiff herein did, and indeed obtained judgment as sought for in his pleadings as clearly found by Ransley J. in his ruling dated 9/07/2003. At the same time, the learned judge proceeded to strike out the defendant's defenses. The same is the case in the subsequent rulings by Onyanja J. dated 8/02/2010 and Sergon J. dated 3/03/2017.

24. It is now over 18 years since the judgment was delivered and the defendants satisfied the second and final decree.

At this point in time the plaintiff wishes orders to be granted to amend the plaint post satisfaction of the 18 years old judgment and decree. The court in Andrew Wabuyele Biketi vs. Chinese Centre for the promotion of investment development & trade in Kenya Limited and 2 others (2015) eKLR held that:

> "the court has discretion to order an amendment at any stage before judgment. An amendment should be freely allowed provided it is not done mala fide and does not occasion prejudice of injustice to the other party which cannot be compensated by award of costs"
>
> See also Hiran Bere Kinuthia & 2 others V. Edick Omondi & 3 others (2014) eKLR, and GRLEY Enterprises Ltd vs. Agricultural Finance Corporation and another (2018) eKLR.

25. In view of the above, what justice or prejudice would be occasioned to the defendants should the application be allowed?

In its submissions, the plaintiff submits that allowing the application and re-opening of the case would enable it to execute the decree as well as ensure that justice is served in accordance with the law. In my considered view, what the plaintiff seeks is but leave to re-open the case, go back to the beginning and allow it to amend the plaint to add or amend its pleadings so as to cure what it calls "mistake by counsel"

26. This same "mistake" if any was clearly evident even when it sought for summary judgment in 2003. The same "mistake" was evident when the court struck out the defendants defences.

Why did the said counsel seek to review the judgment of Rausley J in 2003 or that of Onyanja J if indeed there was a mistake? A case for an afterthought to arm-twist the court hoping that it would close its eyes to the glaring mischief?

27. Section 3(2) of the appellant jurisdiction Act grants the court wide discretion to amend judgments. This is what section 99 of the *Civil Procedure Act* donates to the High court to correct errors where it is fully satisfied that by doing so, it would give effect to the intention of the court at the time which such judgment is given or where a matter was overlooked. However this discretion and power is donated to the court, not to a litigant.

28. A litigant under the same circumstances may apply for review orders under Order 45 of the Civil Procedure Rules. At all material times and precisely about eighteen (18) years ago, the plaintiff was represented by able advocates. It cannot be said that the said advocates did not know what they ought to have done to rectify the situation for such a long period of time. To awaken the defendants to realization that they may be required to revisit a case they settled over 18 years ago is but cruel uncalled for unjustified and vexatious and a clear abuse of court process.

29. The same having not been pleaded and or proved, any action towards satisfying the plaintiff by granting it the orders it seeks in the application before me, would be gross violation of not only the 2010 constitution Article 50 on fair hearing but would cause undue prejudice to the defendants.

30. The court of appeal in this case in civil appeal no. 90 of 2017 upon interrogation of the ruling by the Hon. Sergon j. in particular at paragraph 9 of the ruling rendered that: -

> ".....it emerges therefore that there are additional sums of money that are payable to the plaintiff by the 1st and 2nd defendants..... And according to my calculations the total sum payable is Kshs. 57,390,517.4... the decretal sum of Kshs. 14,573,311.50 was not the only money payable under the decree....." The court further rendered itself that "the decree shall

agree with the judgment as provided under Order 21 Rule 7(1) of the CPR. This is the final decree that has since been satisfied.

31. By the foregoing, it is evident that the Notice of Motion application dated 9/08/2021 lacks merit. It is dismissed with costs to the defendants.

Dated, signed and delivered at Nairobi this 12th Day of June 2024.

J. N. MULWA

JUDGE.

Hcc. No. 1807 Of 2002 Page 5 of 5