



Savannah Cement Limited v KCB Bank Kenya Limited & another (Commercial Case E174 of 2022) [2023] KEHC 17479 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E174 OF 2022**

A MABEYA, J

MAY 12, 2023

BETWEEN

SAVANNAH CEMENT LIMITED PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

ABSA BANK KENYA PLC 2ND DEFENDANT

RULING

1. Before Court are three applications that were triggered by the ruling of Okwany J delivered on 24/11/2022 dismissing the plaintiff's application dated 20/5/2022. That application had sought to restrain the defendants from taking any steps to realize the securities in their debenture.
2. Of the 3 applications, 2 are by the plaintiff while the 3rd is by the 2nd defendant. The plaintiff's applications were dated 24/11/2022 and 7/12/2022, respectively. The one dated 24/11/2022 was supported by the two affidavits sworn by Benson Sande Ndetta on 24/11/2022. It sought orders inter alia to review and set aside the aforementioned ruling of 24/11/2022 on grounds that the Court did not first consider the application for her recusal dated 7/11/2022 and that it also failed to consider that the plaintiff's loan was only repayable as of 2024.
3. The 1st defendant opposed that application vide the replying affidavit sworn by Daniel Musyoka on 5/12/2022. The 2nd defendant opposed the same vide grounds of opposition dated 28/11/2022. Both defendant's contested that the plaintiff's advocate was aware of the ruling date of 24/11/2022 having been served with notice of that date on 22/11/2022.
4. That the advocate failed to bring to the Court's attention that the plaintiff's application dated 7/11/2022 for recusal was yet to be determined and had been allocated a further date of 16/2/2023.



- That the application failed to meet the threshold for granting of orders for review and was an appeal in disguise.
5. The plaintiff's 2nd application was dated 7/12/2022. It was supported by the affidavit of Benson Sande Ndeti sworn on 7/12/2022. It was a contempt application against the 2nd defendant and its directors for breaching the Court's orders of 25/11/2022 which granted 14 days status quo and warned the defendants against taking any peremptory action within the 14 days. That the orders were a consequence of the plaintiff's above highlighted application for review.
 6. The plaintiff claimed that as of 25/11/2022, the 2nd defendant had not filed Insolvency Cause E173 of 2022 against the plaintiff and the same was only filed on 28/11/2022 during the subsistence of the status quo orders. That the 2nd defendant had also not appointed an administrator over the plaintiff. That the move to file the insolvency cause and appoint an administrator amounted to contempt of court by the 2nd defendant and its directors who had been duly served with the order through their advocate. In that application, the 2nd defendant's 12 directors were joined as parties.
 7. The plaintiff also claimed that the appointment of the administrator was not done procedurally yet the administrator now purported to take over the company and swore an affidavit to that effect.
 8. The 2nd defendant opposed that application vide the replying affidavit of Faith Mutuku sworn on 8/12/2022. It was contended that the insolvency cause and appointment of the administrator were done on 24/11/2022 and all necessary documents were filed in court at 4:56pm after being filed with the Official Receiver and after demand was made on the plaintiff to pay the 2nd defendant's debt.
 9. That this was before the status quo orders of 25/11/2022 were granted. That all the 2nd defendant did after those orders was to make an application dated 28/11/2022 seeking to discharge the orders of 25/11/2022. That the administrator had only sought the Court's directions on execution of his mandate considering the status quo orders and had taken no other action since his appointment. That the 2nd defendant and its directors had therefore not acted contrary to the court's orders and were therefore not in contempt thereof.
 10. The third application was dated 28/11/2022. It was brought by the 2nd defendant. It was supported by the affidavit sworn by Faith Mutuku on 28/11/2022. It sought orders discharging the ex parte status quo orders of 25/11/2022. It was based on the assertions that the orders were obtained by material non-disclosure.
 11. That the plaintiff failed to disclose that when the matter came up on 10/11/2022, this Court directed that it was not necessary for the recusal application to be placed before Okwany J as she had been transferred to Nyamira. That though this Court fixed the matter for hearing on 16/2/2023, the ruling was not stayed. That the plaintiff did not also disclose that it had notice of delivery of the ruling as of 22/11/2022 and failed to object to its delivery.
 12. The plaintiff opposed that application vide the replying affidavit sworn by Benson Sande Ndeti on 7/12/2022. It was denied that there was any material non-disclosure on the plaintiff's part and blamed the defendant's for exerting pressure on the Court to find in their favor hence the filing of the application for the recusal of Okwany J. That the application for recusal was placed before this Court on 10/11/2022 and directions on responses thereto and submissions given, and a hearing date of 16/2/2023 reserved.
 13. All the applications were canvassed by way of written submissions. The plaintiff's submissions were dated 16/12/2022, whereas those of the 1st and 2nd defendants were each dated 15/12/2022. This Court has considered those submissions as well as all the rival pleadings, responses and evidence before Court.



14. This Court will begin by determining the application for contempt. The plaintiff claimed that despite the status quo orders of 25/11/2022, the 2nd defendant proceeded to file an application for insolvency on 28/11/2022 and appointed an administrator in direct contravention of those orders.
15. This Court has seen attachment “FM 1” produced by the 2nd defendant. The same constitutes documents showing the appointment of the administrator. From the receipt derived from the court’s “CTS filing system”, Insolvency Notice E173 of 2022 was filed on 24/11/2022 at 14:56pm. The filing stamp on the Notice of Appointment of Administrator also indicates the date of 24/11/2022, as well as the Official Receiver’s stamp. The filing fees was also paid on 24/11/2022 as per the receipt generated by the Registrar-General.
16. All the documents appearing in that attachment are dated and signed on 24/11/2022 and there’s an email sent on 24/11/2022 at 4:10pm forwarding the 2nd defendant’s demand notice equally dated 24/11/2022.
17. Further, though the plaintiff claimed that the notice of appointment was dated 28/11/2022, it did not produce a copy of that notice. The plaintiff’s director had also sworn an affidavit dated 24/11/2022 in support of its review application whereby he attached a demand notice from the 2nd defendant dated 24/11/2022.
18. There is nothing before this Court to indicate that the Insolvency Cause or the appointment of the administrator were done on 28/11/2022 as claimed by the plaintiff. The plaintiff did not produce any evidence to prove the allegation that the said action was done during the pendency of the status quos orders, or that the 2nd defendant and/or the administrator have acted in any way contrary to the said orders post appointment.
19. As such, the application dated 7/12/2022 is unmerited and is dismissed with costs to the 2nd defendant only.
20. This Court now turns to the application for review brought by the plaintiff and dated 24/11/2022.
21. It is now well settled that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45 Rule 1 of the Civil Procedure Rules, 2010 and section 80 of the Civil Procedure Act. This means that the Court has the power of review, but such power must be exercised within the framework of the law.
22. Under Order 45 Rule 1 of the Civil Procedure Rules, 2010, review can only be done on discovery of new and important matter or evidence which was not within the knowledge of the applicant at the time when the decree or order was passed or made; on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. On whatever ground, there is a requirement that the application must be made without unreasonable delay.
23. In the present case, there is no dispute that the application was made timeously as it was filed almost immediately the impugned ruling was delivered.
24. On the merit, the plaintiff based his application on the 2nd ambit; that there was an error apparent on the face of the record owing to the fact that Okwany J delivered the ruling of 24/11/2022 without being aware of the application dated 7/11/2022 which had sought for her recusal. That there was also an error on the face of it as the Court found that the loan was repayable immediately whereas repayment was to commence in the year 2024.



25. The defendants accused the plaintiff of failing to bring to the attention of Okwany J, the existence of the application dated 7/11/2022 before she delivered her ruling. In its submissions, the plaintiff stated that it was not its duty to bring to the Court's attention issues that were on the Court record.
26. The plaintiff's advocate did not deny the allegation that his firm was notified of the ruling date of 24/11/2022 on 22/11/2022. It was also not denied that the plaintiff's advocate was in court on 24/11/2022 when the ruling was delivered but not bring to the Court's attention that there was a pending application for recusal.
27. It is undeniable that after 2020 when the Covid-Pandemic struck the country, advocates file their pleadings online, and notify their counter-parts through service. It is common practice that when advocate's appear before court, they inform the court what the matter is coming up for.
28. It is not clear why the plaintiff's advocate failed to inform from informing Okwany J on 24/11/2022 that, though the matter was coming up for ruling on its application of 20/11/2021, there was a pending application for her recusal.
29. As an officer of the court, the plaintiff's advocate cannot be seen to simply brush off his duty to the court by claiming that he is not bound to inform the court of what is on its record. In any case, the advocate's client, that is, the plaintiff, had much more to loose and it was expected that in the interest of his client, the existence of the application for recusal ought to have been raised with the before it rendered its decision on the application for injunction.
30. Undoubtedly, the Court rendered its ruling unaware of the pending application for its recusal. However, this cannot be visited on the Court. The plaintiff's failure to bring such existence to the court's attention can only be inferred as an abandonment of its application seeking the Court's recusal. At not point was the ruling stayed despite the plaintiff having notice of its delivery as of 22/11/2022. The plaintiff's inaction cannot be turned around and blamed on the Court.
31. As submitted by the defendants, the plaintiff gambled with the possibility of a success in its application for injunction but when that backfired, it hastily filed the application for review and now sought to rely on its application for recusal.
32. It is unlikely that if things went the plaintiff's way, the application for review would have been filed.
33. On the second ground of the application, the plaintiff averred that the Court failed to consider that the loan was not payable immediately, but rather payment was to begin in 2024. Respectfully, any attempt by this Court to re-open the application which was already determined upon on merit would amount to sitting on an appeal on that ruling. That won't do.
34. Any dissatisfaction with the finding of the Court which falls outside the ambit of a review can only be dealt with by way of an appeal. In this regard, I lack jurisdiction to sit on appeal against the ruling of 24/11/2022.
35. From the foregoing, it is this Court's finding that the application dated 24/11/2022 fails to meet the threshold for granting of orders for review. The same is dismissed with costs to the defendants.
36. In view of the foregoing, it would be futile to interrogate the 2nd defendant's application dated 28/12/2022 which sought to set aside the orders of 25/11/2022.
37. In light of the appointment of the administrator, the Insolvency Court in IN E173 OF 2022 is now vested with the jurisdiction over the plaintiff. This Court must down its pen and let all the disputes between the parties be resolved in that matter.



38. In the end, the following orders hereby issue: -

- a. The application dated 7/12/2022 is dismissed with costs to the 2nd defendant only.
- b. The application dated 24/11/2022 is dismissed with costs to the defendants. The status quo orders made on 25/11/2022 are discharged forthwith.
- c. The application dated 28/11/2022 is overtaken by events and is hereby struck out with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

A, MABEYA, FCIArb

JUDGE

