NIC Bank Limited v Dracko Haulage Limited & 3 others (Civil Suit 108 of 2014) [2023] KEHC 20146 (KLR) (3 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20146 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 108 OF 2014

DKN MAGARE, J

JULY 3, 2023

BETWEEN

NIC BANK LIMITED ..... PLAINTIFF

AND

DRACKO HAULAGE LIMITED ..... 1ST DEFENDANT

DINESH B PARMAR ..... 2ND DEFENDANT

FAIZAL AMIN HAJI ..... 3RD DEFENDANT

OSMAN ESMAIL ALI MOHAMED ..... 4TH DEFENDANT

RULING

1. This is a ruling in respect of two applications dated 23/9/2021 and 3/5/2023. The background to the application is the Notice of Motion dated 15/11/2018. On that notice of motion, my predecessor Justice P.J.O. Otieno made an order that the Defendants were to avail to the plaintiff, within 30 days, that is by 24/10/2019 discover on oath and avail to the 2nd and 4th Defendants all letters by the 1st Defendant to the plaintiff requesting for invoice discounting facilities between the period 7/5/2007 and 22/1/2013. The matter was to be mentioned on 31/10/2019 to confirm compliance.

2. Among the grounds on which the application was opposed, is that the documents have been lost, misplaced or destroyed as the correspondence is more than 10 years. They also said this was a fishing expedition.

3. The Court found at paragraphs 12 and 13 as follows: -

> " 12. Once there is proved that the document sought to be discovered is necessary and relevant a court would be enjoined, if not anything else but for the

attainment of its overriding objective to determine the dispute in a just, expeditious and appropriate fashion, to order discovery.

13. The plaintiffs advocate having asked the court on more than three occasions for time to avail the documents, it was incumbent upon it to avail for some evidence that the documents were either misplaced or destroyed. I am not persuaded that the plaintiff, being a bank, would be casual with the custody of a document that would be its security and basis of pursuing a debt, by simply saying with an element of ambivalence that the document could be lost, misplaced or destroyed. That is not expected of an institution in the plaintiffs standing."

4. The application dated 23/9/2021 was adjourned and a date was taken on 1/2/2023. The court gave a date for hearing on 15/5/2023 on the day the matter came for hearing, the Respond filed an Application dated 3/5/20223. This was done 18 months later.

5. The later application appears to be a knee jerk reaction to the earlier application dated 23/9/2021. Both parties replied to the applications and the application dated 3/5/2023 was said to be urgent because the Defendant's application dated 23/9/2021 was due for hearing on 15/5/2023.

6. The said application sought orders that:-

> " The Ruling by P.J.O. Otieno given on 23/9/2019 be review, varied or set aside and be substituted with an order dismissing the application dated 15/11/2018."

7. The grounds were that the documents could not be found.

8. I am unable to really understand the nature of this application. Not that it is in spurge English. The order was that the issue of loss was dealt with by the court by the Ruling that is sought to be set aside. What I understand is that the plaintiff has been unable to comply.

9. What he needed to do was a simple discovery of what they have and explain. They did nothing for 1½ years. The application is said to be made under Section 99 and 80. I dismiss Section 99 as the same relates to clerical errors.

10. Review on the other hand must be made in compliance with Section 80 of the *Civil Procedure Code* and Order 45 Rule 1 of the *Civil Procedure Rules.*

> " Whereas Order 45 rule 1 sets out the grounds for review as follows:
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> "(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.

11. What I hear the Applicant stating is that justice P.J.O. Otieno made an error of law in not dismissing the application. If the party were aggrieved by the same, they ought to have appealed. In the case of

Njoroge & 104 others (suing in representative capacity for Kariobangi South Civil Servants Estate tenant Purchasers) v Savings & Loan Kenya Ltd & another [1988] eKLR, Justice B.K. TANUI, had this to say: -

> " 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 there on as it thinks fit." confers jurisdiction of reviewing orders to the court which passed them.
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> There appear to be very little case law in East Africa on the exercise of this discretion especially on its limitations and distinctions between it and appeal. Bennet, J in the Uganda case of *Balinda v Kangwamu and another* [1963] EA 557 at page 558 said –
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> > "Order 42 rule 1 of Uganda Civil Procedure Rules is identical with order 47 rule 1 of the Indian Civil Procedure Rules (and identical with our order 44 rule 1). In IAR Commentaries On the Code of Civil Procedure by Chitaley and Rao (4th Edn) Vol 3 page 3227 the learned authors in explaining the distinction between a review and an appeal have this to say –
> >
> > 'A point which may be good ground of appeal may not be a ground for an application for review. Thus an erroneous view for evidence or law is no ground for a review though it may be a good ground for an appeal."
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> There is also a helpful passage in the 13th Edition of Mulla on the Indian Code of Civil Procedure where order 47 rule 1 on review is discussed and at page 1672 it states:-
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> > "A mere error of law is not a ground for review under this rule. It must further be an error on the face of the record. The line of demarcation between an error simplicitar and an error apparent on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established."

12. The Court of Appeal in the case of Mary Wambui Njuguna v William Ole Nabala & 9 others [2018] eKLR, had this to say.

> " (18) As stated earlier, the appellant's application for review was based on allegations of errors apparent on the face of the record; mainly on her joinder to an abated and un-revived suit. It is common ground that the suit had abated, also as rightly pointed out by counsel for appellant, the abatement of a suit upon the lapse of the statutory period is an issue of law. This begs the question, does an 'error apparent on the face of the record' include errors of law? In the case of Nyamogo & Nyamogo vs. Kogo (2001) EA 174, this Court stated that;-
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> > "An error apparent 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 on the facts of each case. There is 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 opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning

> or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal." (Emphasis added)

(19) It therefore follows, that questions regarding the abatement of suit and the propriety of the appellant's joinder to the abated suit, being issues of law, could only be raised in an appeal and not in a review. On the same point, the learned authors of;- Chittaley & Rao in the Code of Civil Procedure (4th Edn) Vol. 3, pg 3227 explain the distinction between a review and an appeal in the following words:-

> "A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal."

In the present case, the appellant faulted the Judge's appreciation of the law as far as her joinder to the suit was concerned. She also faulted his finding that by filing the application for joinder, she had effectively revived the suit. These are matters touching on the Judge's deliberate understanding and interpretation of the law and cannot be entertained on review by the same Judge or another one of equal jurisdiction.

13. The applicant in the Application dated 3/5/2023 has not laid basis for the same. In the circumstances I see no merit in the application dated 3/5/2023. I dismiss the same with costs of 25,000/= to the 2nd and 4th Defendants.

14. Regarding the application dated 23/9/23021, I note that the same seeks striking out of the entire suit against the 2nd and 4th defendant. This is because of noncompliance with the court order given on 23/9/2023.

15. The order given on 23/9/2019 required that all letters by the 1st Defendant to the plaintiff requesting for discounting between 7/5/2007 to 22/1/2013. The orders did not give penal consequences for failure to comply.

16. This means that there has to be a fall back to the law on consequences.

17. The failure to comply with an order of discovery does not make a case an abuse of the court process. The plaintiff states that the documents are lost.

18. This was rejected by Justice P.J.O. Otieno. There has been no appeal from his Ruling. I have already dismissed an application for Review. The court of Appeal in D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR stated as follows: -

> " We are asked to set it (action)aside, partly on the ground that it discloses no reasonable cause of action. I will not decide the case upon that ground, although I think it is most difficult to see what is the reasonable cause of action upon the pleadings as they stand" per Denman, J. in Kellaway v. Bury (1892) 66 L.T. 599 at pp. 600 and 601.

Upon appeal:-

"That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt....the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments."

per Lindley L.J. ibi, p. 602.

"It has been said more than once that rules is only to be acted upon in plain and obvious cases and, in my opinion, the jurisdiction should be exercised with extreme caution."

Per Lord Justice Swinfen Eady in Moore v. Lawson and Another (supra) at p. 419.

"It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised. and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". per Lord Herschell in Lawrence v. Lord Norreys, 15. A.C. 210 at p. 219.

19. The power to strike out pleadings is sparingly used. The court, P J O Otieno, did not order striking out of the suit. Failure to produce the documents can only mean that court can only makes a negative inference from such failure.

20. Further, failure to discover means that the application can use the best available evidence. There is solace in the fact that these was correspondences between the 1st Defendant and the plaintiff. If the plaintiff does not have them, then he or has failed to get the same, then the 1st Defendant is allowed to produce. Secondary evidence, even if not the best evidence available.

21. I have seen the Amended plaint. It deals with log books for various motor vehicles in the names of the 1st defendant. If is my humble view that the failure to comply with an order for discovery is not the dismissal of a suit.

22. I am aware that the burden of proof under Section 112 of the *Evidence Act* is now heavier as the 1st defendant and the plaintiff who were authors of the documents. It does not absolve the plaintiff from complying with the court orders but places the plaintiff at a great disadvantage so as I have to make, a negative inference.

23. Section 24 of the *Evidence Act* is to: -

    a. Issue a warrant

    b. Attach and sell property.

    c. Impose a fine

    d. Order furnishing of security.

24. There is no place for striking out the suit.

25. The plaintiff is therefore required to file an affidavit and file in court discovery that was ordered by the Court on.

26. Failing the discovery, the court shall take it that the documents exist but if they are produced they will be in favour of the 2nd and 3rd defendant's case, to the extent so far pleaded.

Determination

a. The prayer for striking out the suit is dismissed.

b. In lieu thereof, the plaintiff is to discover on affidavit evidence, such documents as were ordered by the court on 23/9/2019 for the period between 7/5/2017 and 22/1/2015. In default of so doing, the defendants be at liberty to produce secondary evidence of the same.

c. There is hereby made an inference, that till the said documents are produced, the court shall conclusively presume the said documents are adverse to the plaintiff 's case.

d. The application dated 23/9/2021 is that partly allowed to the extent above with cost of Kshs. 30,000/=.

e. The application dated 3/5/2023 lacks merit and is dismissed in limine with costs of 25,000/=

f. Shall the affidavit referred above not be filed within 30 days from today, the suit against the 2nd and 3rd Defendant shall stand struck out with costs on 31st day.

g. Shall the affidavit be filed and it is unconducive the above inference shall suffice.

h. The matter be fixed for hearing forthwith.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 3RD DAY OF JULY 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mburu for the Plaintiff

Nasiyu for the 2nd and 4th Defendant