



**Aggarwal v NCBA Bank PLC & another (Civil Case E017 of 2023)
[2024] KEHC 14191 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE E017 OF 2023
JRA WANANDA, J
NOVEMBER 15, 2024**

BETWEEN

AMIT AGGARWAL PLAINTIFF

AND

NCBA BANK PLC 1ST DEFENDANT

GARAM INVESTMENTS BANK AUCTIONEERS 2ND DEFENDANT

RULING

1. The Application before Court for determination is the Defendant's Notice of Motion dated 24/04/2024 filed through Messrs Nyaanga & Mugisha Advocates. The same seeks orders as follows:
 - a. [.....] spent
 - b. This Honourable Court be pleased to set aside and/or review its Ruling and resultant Order issued on 12th April 2024 as there are obvious and grave errors on the record.
 - c. The Costs of this Application be provided for.
2. The Application is premised on the grounds appearing on the face thereof and is supported by the Affidavit sworn by one Kenneth Mawira, who described himself as a Senior Legal Counsel at the 1st Defendant.
3. Mr. Mawira deponed that on 12/04/2024, this Court delivered a Ruling in respect to the Plaintiff's Notice of Motion Application dated 26/09/2023 and made the following orders:
 - a. Pending the hearing and determination of this suit, an order of injunction is hereby issued restraining the Defendants/Respondents by themselves, their agents, servants, employees and/or otherwise howsoever from advertising for sale, selling, disposing of, auctioning, transferring



or in any other manner interfering with the Plaintiff/Applicant's possession of the parcel of land known as Eldoret Municipality/Block6/6;

- b. Since I have dismissed all, but one, of the grounds raised by the Plaintiff in support of the Application, I do not make any orders on costs.
4. Mr. Mawira deponed further that this Court granted the injunction on the sole ground of disputed interest, that is, whether the 1st Defendant can recover interest over and above the principal amount of Kshs 115,000,000 in respect to the Charge dated 30/03/2017, that having interrogated the Ruling as well as the pleadings and evidence adduced by the parties, the Defendants are of the belief that there is a just cause for this Court to review and/or set aside the Ruling. He urged that there are errors apparent on the face of the record and/or justifiable reasons for this Court to review and/or set aside its Ruling and resultant orders on the following grounds;
 - a. The court did not consider Clause (c) of the Charge which entitled the 1st Defendant to claim principal sum plus, interest and other charges and costs/expenses.
 - b. The court did not consider clause 2(a) of the Charge which entitled the 1st Defendant claim interest at the rates specified in the facility letters, commitment letters/loan agreements/variation letters among others.
 - c. The Court did not take into consideration the provisions of various Letters of Offer and the letter of variation on the applicable interest rates produced as annexures 1 to 7 of the Replying Affidavit.
 - d. The finding that the 1st Defendant could not claim more than Kshs. 115,000,000 is erroneous because Clause 5 of Settlement Agreement entitles it to claim the initial principal sum and costs and interest, which amounts were over and above Kshs. 115,000,000, in the event the Plaintiff failed to settle the settlement amount of Kshs 115,000,000 on or before 31st October, 2016.
 - e. By granting injunction on the sole ground of disputed interest is grave error since the Plaintiff did not demonstrate anything exceptional to warrant court's invention.
 5. The deponent further contended that the 1st Defendants stands to suffer great prejudice and irreparable injury of losing its security and/or inability to recover the outstanding loan which currently stands at Kshs.195,023,495.44 and Usd. 24,378.74 as at 6/10/2023 if the orders sought herein are not granted and that the Application has been filed without delay.

Replying Affidavit

6. The Plaintiff opposed the Application vide the Replying Affidavit filed on 12/06/2024. He deponed that the Application does not meet the threshold for Review as provided under Order 45 of the [Civil Procedure Rules](#), which are; where there is discovery of new and important matter or evidence, where there is a mistake or error apparent on the face of the record or any sufficient reason to justify review, and that the grounds upon which the Application is premised amount to asking the Court to sit on appeal on its own decision and to alter it contrary to the law. She deponed further that there is no error apparent on the face of the record and/or the Ruling to warrant a Review as an error is one that can be easily seen on the record, that the Application by the Defendants requires elaborate arguments to be advanced to challenge the decision and which can only be done through an Appeal, and not Review, and that the grounds presented do not conform to the law. She contended further that it is clear from paragraphs 40 to 50 of the Ruling that this Court carefully considered and analysed the provisions of the Charge and Clause 5 of the Settlement Agreement and therefore there is no error apparent on the face of the Ruling.



Hearing of the Application

7. The Application was canvassed by way of written Submissions. The Plaintiff filed his Submissions on 23/07/2024. As for the Defendants, despite being the Applicants, up to the time of concluding this Ruling, I had not come across any Submissions filed on their behalf.

Plaintiffs' Submissions

8. Counsel for the Plaintiff reiterated that the Defendants are not deserving of the orders sought as the Application is alien in law, fatally defective, incompetent and must fail with costs as it does not meet any of the legal requirements for review to warrant consideration. She contended that the Ruling was well thought out in line with the law based on the pleadings on record and/or materials availed to the Judge and therefore there is no basis for the orders for review. She added that the Court considered all the relevant material on record in determining the matter, that this Court properly exercised its discretion in arriving at the decision and there is no single reason advanced that can sustain the misguided Application. She averred further that the instant Application cannot stand the legal test since before the Court rendered itself on the matter, it fully exercised and/or applied its legal mind to the issues in controversy and that there being no error, the Court's Ruling should stand pending determination of the suit.
9. Counsel further submitted that the Charge mentioned in the Application was on record and the Court had the opportunity to peruse and consider its provisions before making a determination, that the grounds for Review are well settled and the issue of failing to consider a particular matter in the case is not one of them, that there is no discovery of new important matter and that in any event, the Defendants have not claimed that there are any new matters. She reiterated that there is no error on the face of the record as none has been demonstrated, and that no evidence has been led as to any new and important matter that has been discovered that was not on record at the time the Court considered the Application for injunction. She cited the case of *National Bank of Kenya Limited vs Ndungu Njau* [1997] eKLR and the case of *Evans Omote & another v David Oginga Ogotu* (Civil Appeal E005 of 2021).
10. Counsel maintained that a perusal of the Court's Ruling does not reveal any error or mistake on the face of it. She cited the case of *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR and urged that if the Defendants were dissatisfied by the Ruling, then the proper and available legal approach is to appeal, and not to invoke the provisions of Order 45 of the *Civil Procedure Rules* in vain. According to her, the Application disguised as one for Review, is mischievous and must fail with costs as it is a back-door move by the Defendants to achieve their selfish intentions.

Determination

11. The one broad issue that arises for determination herein is “whether this Court should review its ruling delivered on 12/04/2024.”
12. Section 80 of the *Civil Procedure Act* provides as follows:
Any person who considers himself aggrieved—
 - (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.

13. Order 45(1) of the Civil Procedure Rules then provides as follows:

- “ 1. Any person considering himself aggrieved—
- (1) (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.”

14. Order 45 therefore provides for 3 circumstances under which an order for review can be made. The first one is where there has been “discovery of new and important matter or evidence”, the second is where there has been “a mistake or error apparent on the face of the record” and the third is “for any other sufficient reason”. The Defendants have come under the ground “mistake or error apparent on the face of the record”. The question therefore is whether the Defendants have successfully brought themselves within that ground.

15. The phrase “an error apparent on the face of the record”, was described by the Court of Appeal, in the case of *Muyodi -v- Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, in the following terms:

“...in *Nyamogo & Nyamogo -v- Kogo* (2001) EA 174 this Court said that 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...”

16. The phrase was also described in the Tanzanian case of *Chandrakhant Joshibhai Patel -v- R* [2004] TLR, 218 as one that:

“..... must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions.’



17. There is also the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, where the Court of Appeal had the following to say:

“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.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

18. It is therefore clear that “an error apparent on the face of record” must be one that is obvious to the eye, and self-evident. It must be one which when considered, would not yield two results and does not require elaborate arguments to be established.
19. In this case, the Defendants want the Court to review the Ruling dated 12/04/2024 on the ground that there is a material “error on the face of the record”, on account of an alleged failure to consider Clauses (c) and 2(a) of the Charge instrument, alleged failure to take into consideration the provisions of Letters of Offer, alleged failure to consider provisions of Clause 5 of the Settlement Agreement which, they submit, entitles the 1st Defendant to claim the initial principal sum, costs and interest and allegedly granting an injunction on the sole ground of disputed interest.
20. It is evident that the above matters cannot amount to “errors apparent on the face of the record”. It is settled law that the term “mistake or error apparent” by its very connotation signifies an error which is evident per se from the record and does not require detailed examination, scrutiny or elucidation either of the facts or the legal position. “If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record” (see the holding of Mativo J (as he then was) in the case of *Paul Mwaniki v NHIF Board of Management* [2020] eKLR)
21. The Defendants are asking this Court reconsider the documentary evidence that was presented before it and then render a decision that is different from the one it delivered. In essence, the Defendants are asking the Court to reconsider the contents of the Charge instrument and Letters of offer and pursuant thereto, to change its decision. These actions are beyond the scope covered by the jurisdiction of Review. I fully agree with the Plaintiff’s Counsel that the Application appears to be an appeal disguised as an Application for review. This Court cannot sit on appeal on its own decision as the law abhors such an action. The Application, no doubt, fails to meet the threshold laid down.
22. In any event, it is clear that the Defendant’s allegations that the Court did not consider Recital C and Clause 2 of the Charge instrument and Clause 5 of the Settlement Agreement in regard to the issue whether the 1st Defendant could recover interest over and above the sum of Kshs 115,000,000/- is



untrue. To put these allegations in context, I reproduce verbatim the portions of the Ruling whereof the Court dealt with the issues now raised, as follows:

“42. In the Agreement, it was appreciated that the Plaintiff was indebted to the 1st Defendant at much higher sums but it was however agreed that the Plaintiff would in full and final settlement pay the lesser amount of Kshs 115,000,000/-. The concession was on the condition that the Plaintiff would pay the said amount on or before 31/10/2016, that the Plaintiff would charge to the 1st Defendant the property described as Eldoret Municipality/Block 6/5 (not Eldoret Municipality/Block 6/6 that was eventually charged) as security for payment of the said amount. The Agreement was also guaranteed by the Plaintiff and two others. Further, it was a term of the Agreement that the guarantors would sell about 11 separate properties and deposit the proceeds thereof in an escrow bank account to be opened in the respective names of the parties’ Advocates. It was then agreed that if the guarantors pay the sum of Kshs 115,000,000/- by 31/10/2016, then the 1st Defendant would discharge the company (Turbo Highway Eldoret Ltd) and the guarantors and will withdraw the Winding-Up Cause. It was also a term of the Agreement, under Clause 5 thereof, that if the guarantors fail to pay the said sum of Kshs 115,000,000/- by 31/10/2016, the full amount of the debt then outstanding together with interest and costs will immediately fall due for payment and the 1st Defendant would then be at liberty to realize the charged property to recover the balance then due.

.....

47. As aforesaid, I notice that in the Agreement, under Clause 2, the property stated as the one to be charged was Eldoret Municipality/Block 6/5 which is different from the one that was in fact charged, namely, Eldoret Municipality/Block 6/6. Neither of the parties addressed this apparent discrepancy and it is not clear whether this discrepancy was intended or whether it was a simple typographical error. Be that as it may, the position is that the parties agree that they did subsequently execute the Charge dated 30/03/2017 over the property Eldoret Municipality/Block 6/6 to secure the said sum of Kshs 115,000,000/-.
48. Although at its Recital C, the Charge provides that “the total moneys for which this Charge constitutes a security shall be the aggregate of the Principal Sum together with interest from the time of the Principal Sum becoming payable until payment thereof and other charges costs and monies payable by the Chargor pursuant to the provisions of this Charge”, the Charge only specifies the amount of Kshs 115,000,000/-. Secondly, the Charge does not appear, on its own, to specify any rate of interest to be so applied.
49. Although it is therefore not in doubt that upon default, the earlier entire balance, including interest, reverted in full and became immediately due and payable to the 1st Defendant, the question is whether the 1st Defendant could rely on the Charge to realize even the interest portion over and above the principal sum of Kshs 115,000,000/- when the Charge does not by itself specify any rate of interest. In other words, did the Charge really secure any amount above Kshs 115,000,000/-?



50. According to the 1st Defendant, the Charge instrument should be read together with Clause 5 of the Settlement Agreement and be interpreted to mean that even the interest was secured under the Charge and could therefore be recovered under the Charge. On his part, the Plaintiff strongly digresses and holds the position that the Charge and the Settlement Agreement are distinct and separate and must therefore be read independently. In light of these conflicting and directly opposite positions, and considering that a huge component of the alleged balance consists of accrued interest, my view is that a firm conclusion on whether these further amounts can be recovered under the Charge can only be made after full trial, and not at this interlocutory stage.

.....

58. From the foregoing, it is clear that out of the grounds relied upon by the Plaintiff, I have only upheld the one challenging the 1st Defendant's right to invoke the Charge instrument to recover amounts over and above the principal sum of Kshs 115,000,000/-. The question is therefore whether this finding alone is sufficient to support a conclusion that the Plaintiff has established a *prima facie case*. My finding is that it does. This is because the principal sum being Kshs 115,000,000/- and there being indication that an amount of Kshs 87,000,000/- has been paid so far, it means that the balance of the principal sum is about 28,000,000/-. Considering therefore that the 1st Defendant is demanding sums approaching Kshs 200,000,000/-, it means that a huge bulk of the demand comprises only of interest accrued on the principal sum. If this is so, then my view is that a *prima facie case* has been established as to whether this huge interest can be recovered under the Charge when the Charge only expressly secured an amount of Kshs 115,000,000/-. My view is that the amount over and above the principal sum is just too enormous to be ignored.

59. Regarding the limb of "irreparable loss", in light of my finding that the biggest chunk of the amount claimed as being the basis for proceeding with the auction is purely accrued interest on the principal sum, I agree with the Plaintiff's that he stands to suffer loss that cannot be sufficiently compensated by damages if the property is disposed of and transferred to a third party before the validity of levying such huge interest is determined. Flowing from the above, I also find that the Plaintiff is likely to suffer irreparably should the auction proceed before the very serious question of whether the Charge instrument really secured any amount over and above the principal sum of Kshs 115,000,000/- is determined.

.....

60. It is true that generally, a dispute only on the amount of interest levied would not necessarily be sufficient to form the foundation for grant of an interim injunction to bar a Chargee from proceeding with recovery. However, in this case, the amount of interest alone is so substantial that I am prepared to term the case as being an exception to the general principle.

61. On "balance of convenience", my finding is that it tilts towards granting an order of injunction in view of the substantial questions of law identified above regarding whether the Charge instrument secured any amounts beyond the



principal sum of Kshs 115,000,000/-, including the huge interest demanded over and above the principal sum.”

23. A consideration of the above quotations proves beyond peradventure that, contrary to the Defendant’s contention, the Court dealt in detail with the issues relating to interpretation and/or applicability of Recital C and Clause 2 of the Charge instrument and Clause 5 of the Settlement Agreement to the matters herein, the issue whether the 1st Defendant could recover interest over and above the sum of Kshs 115,000,000/- and also the issue whether a dispute on interest can serve as a foundation for grant of an interim injunction in respect to the exercise by a lender of its statutory power of sale.
24. What the Defendants seem to forget is that at the stage of dealing with an Application for interlocutory injunction, the Court does not make conclusive or final or binding findings or determinations. All the Court considers at that stage, apart from the other *Giella v Cassman Brown* principles, is whether at that juncture, a *prima facie case* has been established. As is oft-stated, a *prima facie case* is not one that must succeed at the trial, but simply one with “a probability of success”. A *prima facie case* is therefore one in which on the material presented, a tribunal properly directing itself may conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. The findings made by the Court are simply interim at that stage and can therefore still be overturned after the trial after witnesses have given their testimonies and been cross-examined thereon. Rather than dwelling on Review of interim orders, the Defendants should be busy taking steps to expedite the full trial of the Court where they will strive to persuade and convince the Court to reach a different verdict at that final stage. Unfortunately, this Application has unnecessarily led to a loss of a further 7 months which could have been utilized to move the suit to trial and within which time, with diligence and resolve, the same could even have been concluded.

Final Orders

25. The upshot of my findings above is that the Defendants’ Notice of Motion dated 24/04/2024 is hereby dismissed with costs to the Plaintiff.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF NOVEMBER 2024.

.....

WANANDA J. ANURO

JUDGE

Delivered in the presence of:

Ms. Kale h/b for Mr. Mugisha for the Defendants

Ms Odwa for the Plaintiff

Court Assistant: Brian Kimathi

