REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E193 OF 2019

GLOBAL IMPEX MACHINERY LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

VLAN CONSTRUCTION LIMITED.....DEFENDANT/APPLICANT

RULING

Background

1. The Respondent herein, Global Impex Machinery Limited, sued the Defendant through the Plaint dated 24th June 2019 seeking to recover the sum of Kshs. 27,714,503.02/= due and owing from the Defendant as at 20th February 2019. The Respondent also sought interest at Court rates together with costs.

2. The Defendant entered appearance on 9th July 2019 after which the Respondent/Plaintiff filed an application dated 15th July 2019 seeking summary judgment against the defendant. The defendant opposed the application through a Replying Affidavit and notice of Preliminary Objection. The defendant later withdrew the Notice of Preliminary Objection and sought leave to file a further Replying Affidavit to the Application, which leave was granted.

3. The Defendant did not file the further replying Affidavit and instead filed a Statement of Defence on 6th December 2019.

4. In a ruling delivered on 14th May 2020 this Court allowed the plaintiff's application for summary judgment upon finding that the defendant's defence did not raise any triable issues and that that the plaintiff's case is plain, obvious and merited.

5. Aggrieved by the said ruling the defendant filed the application that is the subject of this ruling.

Application

6. Through the application dated 21st May 2020, the defendant/applicant seeks orders, *inter alia*, that the firm of **Kimani Michuki & Company Advocates** be allowed to come on record for the defendant, that the plaintiffs be restrained from executing against the defendant for recovery of the amount awarded in the Summary Judgment entered on 14th May 2020 or any portion thereof, that the judgment entered on 14th May 2020 be set aside and/or reviewed and that the defendant be allowed to file a defence, affidavits and any other documents in response to the plaintiff's claim. The defendant also seeks the costs of the application.

7. The application is supported by the affidavit of **Manjinder Sigh Sondh** and is premised on the grounds that: -

> ***a. That subsequent to the delivery of the ruling of 14th May 2020, the Defendant has discovered unlawful collusion between the Defendant's Advocate on record M/S Enock Otieno and a representative of the Plaintiff;***
>
> ***b. That as a result of the said credible information the Applicant has discovered, upon retrieving its file from the Defendant's Advocates, that crucial facts and evidence was never placed before the Court;***
>
> ***c. That there exits multiple professional negligence on the part of the Defendant's Advocates on record in handling the suit; and***
>
> ***d. That the Applicant has an arguable Defence to the Plaintiff's suit.***

8. The plaintiff opposed the application through the Grounds of Opposition dated 9th June 2020 wherein it lists the following grounds:

1. That the Plaintiff/Respondent has not yet commenced the execution process as provided for under Order 22 Rule 6 of the Civil Procedure Rules 2010, the Defendant/applicant's application is therefore premature and incompetent.

2. The Applicant's Advocate in the name of Kimani & Michuki Advocates is not yet on record as Advocates for the Defendant, to cause the application praying for issuance of any stay of execution orders in accordance with the provisions Order 9 Rule 10 of the Civil Procedure Rules 2010.

3. The Defendant/Applicant's Notice of Motion application dated 21st May 2020 does not meet the test and or conditions of Order 45 Rules 1 and 2 of the Civil Procedure Rules 2010 to bring forth the application.

4. That an application on the power or discretion of review is available only when there is an error apparent on the face of the record. The review must be confined to error apparent on the face of record and re –appraisal of the entire evidence or how the judge applied or interpreted the law as sought by the Defendant/Applicant would amount to exercise of Appellate Jurisdiction, which is not permissible.

5. Mr. Manjinder Singh Sondh who is a Director of the Defendant/Applicant and refers to himself as Singh Sondh in the supporting affidavit to the Notice of Motion application dated 21st May 2020 and Mani Singh in the Replying Affidavit dated 24th July 2019.

6. That in the view of Mr. Manjinder Singh Sondh Replying Affidavit sworn on 24th July 2019, the applicant is estopped from further asserting that the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within its knowledge or could not be produced by him at the time when the judgment was passed or the order made.

7. The Plaintiff/Respondent should not be made to shoulder the consequences of the negligence of the Defendant's Advocates if any.

8. That no affidavits have been sworn or filed by the persons named in the affidavit of Mr. Manjinder Singh Sondh, in the name of Mr. Manubhai and George Ouma, to enable the Plaintiff/Respondent call them for cross examination in connection to the contents of Defendant/Applicant's affidavit in view of Order 19 Rule 1 of the Civil Procedure Rules 2010. The information by the deponent therefore is hearsay which is not admissible.

9. That no credible information has been produced by the Defendant/applicant in terms of evidence in the allegations of unlawful collusion between the firm of Enock Otieno Advocates and the plaintiff.

10. That the stamp on the invoices marked as annexture "JPV 1" in the Plaintiff/Respondent's Notice of Motion application dated 15th July 2019 is the Defendant/Applicant's Stamp.

11. That Mr. Manjinder Singh Sondh in his Replying Affidavit on 24th July 2019 in fact acknowledges receipt of the invoices which were stamped by the Defendant/Applicant stamp as exhibited.

12. That upon filing suit vide a plaint dated 24th June 2019, the Plaintiff/Respondent effected service of the plaint and summons upon the Defendant/Applicant personally who received the documents using the same stamp.

13. The fact that the Defendant/Respondent advocates entered appearance on 10th July 2019, is a clear indication and demonstration that they received the Plaint and Summons from the Defendant/Applicant itself hence the stamp belongs to the Defendant/Applicant.

14. The truth and verification of the information by the applicant in their application as exhibited by its attempt to disown their stamp is clearly in question, pointing to an attempt to deceit to induce this Honourable Court to believe their side of the story.

15. The Defendant/Applicant is in the event guilty of the material non-disclosure for intentionally failing to inform this court that it has transacted with the Plaintiff/Respondent to a sum more than what is stated in the application and annexed Statement of Defence.

16. The Defendant/Applicant is well and truly indebted to the Plaintiff/Respondent for the sum of Kshs 27,714,503.02 as claimed in the plaint herein.

17. The application for Summary Judgment was properly brought before court and determined in a fair manner in the knowledge of Defendant/Applicant and his advocates on record.

18. Since all the requisite procedures had been followed in obtaining a fair summary judgment and orders subsequent thereto, the applicant herein is a futile attempt to delay the inevitable.

19. The annexed Statement of Defence is full of denials, a sham, frivolous and only intended to divert the course of justice.

20. The annexed Statement of Defence raises no triable issues, is not arguable and is fit for striking out. Further the explanations provided for by the Defendant/Applicant are not reasonable and only point to deceit on the part of the Defendant/Applicant.

9. The Plaintiff also filed the Replying Affidavit of its Director **Mr. Jayantilal Premji Velji** in response to the application.

10. The Defendant's advocates on record, **M/S Enock Otieno Advocate**, opposed the application through the replying affidavit dated 9th June 2020 wherein they state that the application is fatally defective, incompetent and devoid of merit.

11. Parties canvassed the application by way of written submissions which I have considered.

12. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

Leave to come on record for the Defendant.

13. Order 9 Rule 9 of the Civil Procedure Rules stipulates as follows: -

"[Order 9, rule 9.] Change to be effected by order of court or consent of parties.

9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

14. In ***S. K. Tarwadi v Veronica Muehlmann*** [2019] eKLR, W. Korir J. expounded on the rationale behind the provisions of Order 9 Rule 9 Civil Procedure Rules as follows: -

"In my view, the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away. Indeed, Order 9 does not foresee how Rule 9 can be side stepped hence the enactment of Rule 10 as

"An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first. "

15. The plaintiff submitted that since the Defendant's Advocates on record had opposed the application by **Kimani Michuki Advocates** to replace them as advocates for the Defendant, the prayer to come on record could not be granted. I respectfully disagree with the plaintiff's argument as it is trite that parties to a suit have a right to be represented by advocates of their choice. In this regard, the court cannot stand in the way of a party seeking to exercise this right to legal representation as long as it is shown that such representation will not prejudice any of the parties to the suit and that the legal fees of the previous advocates on record are settled. I am guided by the words of *O'Kubasu, JA in* ***William Audi Odode & Another v John Yier & Another*** *Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04). In declining to bar an advocate from acting for some of the parties in the matter, the learned Judge stated as follows at page 3 of his ruling: -*

"I must state on (sic) the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and <u>unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.</u>' (Emphasis added)

The Learned Judge of Appeal further observed as follows: -

"The Constitution of Kenya does not specifically talk about the right of representation by counsel in civil matters as it does in respect of criminal matters section 77(1)(d) but section 70(a) guarantees citizens the protection of the law and to enjoy that right fully, the right to representation by counsel in civil matters must be implicit. <u>Accordingly, for a court to deprive a litigant of that right, there must be a clear and valid reason for so doing.</u> I can find no such clear and valid reason for depriving the applicants of their right to be represented by counsel of their choice.' *(Emphasis added)*

16. From the above decision, it is clear that parties to a suit are entitled to appoint advocates and to change such advocates should they deem it necessary. The rights of a party to be represented by a counsel of their choice is a right that this court must uphold as it has a bearing on the right to fair hearing. I find that the mere fact that the defendant's previous advocates have resisted the applicant's decision to replace them is not sufficient ground to decline the application for leave to come on record for the defendant. Moreover, the defendant has alleged that there may have been a collusion between its former advocates and the plaintiff thus creating a scenario where the issue of conflict of interest could be explored. I note that in the circumstances of this case, it will be foolhardy to reject the defendant's prayer to change advocates in these proceedings.

17. As was observed in ***S.K. Tarwadi*** case (supra) the intention Order 9 Rule 9 Civil Procedure Rules was to prevent changes in Advocate from happening without the prior knowledge and/or consent of the party's former advocates so as not to deprive such advocates of their fees for the work they had done for the client.

18. In the present case, the firm of **Enock Otieno Advocates** have not indicated that the defendant owes them any legal fees so as to entitle them to object to the change of advocates. Consequently, I allow the prayer for leave to come on record for the defendant but with a caveat that any legal fees due to **Enock Otieno** advocates, if any, be settled as long as the same is agreed upon or taxed by the court.

Setting aside/Review of Summary Judgment.

19. In the celebrated case of ***Shah v Mbogo*** (1967) EA 116, the court set out the principles governing the exercise of the Court's discretion to set aside proceedings, judgments, rulings and/or orders as follows:

> ***"The principles governing the exercise of the courts discretion to set aside judgment obtained. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."*** [Emphasis added]

20. The overriding principle in determining whether or not to set aside any judgment, ruling or order, which is an equitable remedy, is that the Court will look into the circumstances of the case, including the conduct of the parties both prior and subsequent to the order being challenged.

21. The principles governing review of and/or setting aside orders, on the other hand, are set out under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010. The said section 80 provides as follows:

> ***"80. 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 the judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.***

22. Order 45 of the Civil Procedure Rules on the other hand provides as follows:

> ***"45 1 (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 review of judgement to the court which passed the decree or made the order without unreasonable delay.***

23. The above provisions limit the court's jurisdiction in review applications to the following conditions: -

> (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could no/ be produced by him at the time when the decree was passed or the order made or:
>
> (b) on account of some mistake or error apparent on the face of the record or;
>
> (c) any other sufficient reason and further that whatever the ground, there is a requirement that the application has to be made without un reasonable delay.

24. In ***Ajit Kumar Rath v State of Orisa & Others*** **9 Supreme Court Case 596,** the Supreme Court of India stated as follows regarding what constitutes the discovery of new and important matter of evidence and *'any other sufficient reason'*:

> ***"The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can he exercised only for correction of a patent error of law or fact which appears in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule I means a reason sufficiently analogous to those specified in the rule."***

25. In the present case, the defendant/applicant averred that after the delivery of the impugned Ruling of 14th May 2020, it discovered that there was unlawful collusion between the Defendant 's Advocate on record **M/S Enock Otieno** and a representative of the Plaintiff which

resulted in the failure by the said advocates to present some crucial facts and evidence before the Court. The defendant also accused its advocates on record of failure to file written submissions and defence on time or at all thereby jeopardizing its case which was then not properly presented before the impugned orders for entry of summary judgment was entered.

26. The question which then arises is whether the reasons advanced by the applicant for seeking the orders for setting aside and/or review of the ruling fall within the scope of Order 45 Rule 1 of the Civil Procedure Rules. It is not disputed that the defendant's advocates on record had not filed their written submissions at the time the application for summary judgment was considered and neither did they file their defence within the statutory timelines. My finding therefore is that the applicant's claim that their advocate on record was negligent and that there could have been collusion between their advocate and the plaintiff's representative is not without justification. It is also curious to note that the defendant's said advocates on record did not bother to explain why they did not file the pleadings thus lending credence to the applicant's claim that there may have been some mischief on the part of the said advocates. It is trite law that the mistakes of an advocate should not be visited on his client. This is the position that was taken in ***Belinda Muras & 6 Others v Amos Wainaina*** **[1978] KLR** in which **Hon Madan JA** (as he then was) defined what constitutes a mistake as follows:

> ***"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."*** *[own emphasis]*

27. Similarly in ***Phillip Chemwolo & Another v Augustine Kubede*** **[1982-88] KLR 103 at 1040 Apaloo JA** (as he then was) stated thus:-

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit".*** *[own emphasis]*

28. Having found that there was lapse, on the part of the defendant's advocates on record in not filing the defence and the written submissions to the application for summary judgment on time or at all, I find that even though the summary judgment was entered regularly and upon considering all the pleadings that were presented before the court, this court must still weigh the rights of the plaintiff who has judgment in his favour against the rights of the defendant to have his case heard and determined on the merits.

29. Furthermore, considering the serious allegations that the applicant has made against its former advocates and taking into account the fact that this court has allowed the defendant's new lawyers to come on record, I find that it will be in the interest of justice to allow the prayer set aside the summary judgment. The setting aside will however be subject to certain conditions that will ensure that the plaintiff's interests in as far as securing the claimed decretal sum is concerned. The court has also not lost sight of the plaintiff's apprehension that the instant application could be a ploy intended to delay its realization of the fruits of its decree.

30. Consequently, I grant the following final orders: -

> ***i) The firm of Kimani Michuki & Co. Advocates is hereby allowed to come on record for the defendant.***
>
> ***ii) The judgment entered on 14th May 2020 is hereby set aside and the plaintiff is restrained from executing the said judgment but on condition that the defendant deposits, as security, the full decretal sum in an interest earning account to be held in the joint names of counsel for the parties herein in a financial institution of repute within 45 days from the date of this ruling.***
>
> ***iii) That in the event of failure to comply with the conditions for stay and setting aside stated in ii) hereinabove, the orders of stay and setting aside shall stand vacated and the summary judgment reinstated forthwith, in which case, the plaintiff will be at liberty to proceed with the execution proceedings.***
>
> ***iv) The defendant is granted leave to file its defence, affidavits and any other relevant documents in response to the plaintiff's claim within 14 days from the date of this ruling.***
>
> ***v) I grant the costs of the application to the plaintiff.***

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF MARCH 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Owiti for Maranga for Plaintiff/Respondent

No appearance for defendant.

Court Assistant: Sylvia.