



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 196 OF 2014

MANASSEH DENGA.....PLAINTIFF/APPLICANT

VERSUS

ECOBANK KENYA LIMITED1ST DEFENDANT/RESPONDENT

SAID AHMED 2ND DEFENDANT/RESPONDENT

RULING

1. Before this Court is the Notice of Motion dated 27th August 2020 by which **MANASSEH DENGA** the Plaintiff / Applicant seeks the following orders:-

“1. SPENT

2. SPENT

3. **THAT the time granted by the Court to the Plaintiff for compliance with the order to deliver Vacant Possession to the 1st Defendant be extended for a further period of 90 days.**

4. **THAT the Judgment and Decree issued on 28th July 2020 by Honourable Lady Justice Maureen A. Odero be reviewed and the amount awarded to the Plaintiff be rectified to read Kshs. 70,000,000/00 in place of Kshs. 67,500,000/00.**

5. **THAT the Court be pleased to issue any other orders that it may deem fit.**

6. **THAT costs of this application be provided for.”**

2. The Application was premised upon **Sections 1A, 63(e) & 80** of the **Civil Procedure Act**, as well as **Order 45 Rule 1** of the **Civil Procedure Rules, 2010, Article 159** of the Constitution and all other enabling provisions of the law and was supported by the Affidavit dated 27th August 2020 sworn by the Applicant.

3. The 1st Defendant **ECO BANK LIMITED** opposed the Application through the Replying Affidavit dated 14th September 2020 sworn by **CAROLINE MBENGE** the Company Secretary of the Applicant.

The 2nd Defendant **SAID AHMED** did not oppose the application. The Application was disposed by way of written submission. The Plaintiff / Applicant filed its written submissions dated 8th October 2020 whilst the 1st Defendant / Respondent filed written submissions dated 15th December 2020.

ANALYSIS AND DETERMINATION

4. This application arises from the Judgment of this Court which was delivered on 28th July 2020. In said Judgment the Court entered Judgment in favour of the Plaintiff against 1st Defendant in the amount of **Kshs. 67,500,000/-** plus interest thereon at Court rates from the date of said Judgment until payment in full. The Plaintiff / Applicant contends that there exists an error on the face of the record and that the

amount accorded to him ought to have been **Kshs. 70,000,000/-**. Accordingly the Applicant prays that the Judgment be reviewed.

5. The 1st Defendant however counters that given that they have filed an appeal against the Judgment of **28th July** vide the Notice of Appeal dated **10th August 2020** there exists no scope for any review of the Judgment.

6. I have carefully considered this Notice of Motion, the Affidavit in Support, the Replying Affidavit filed by the 1st Defendant as well as the written submissions filed by both parties. By prayer (3) of this Application the Plaintiff sought on extension of time within which he would be required to deliver up vacant possession of the suit property to the 2nd Defendant. However the Plaintiff and the 2nd Defendant later entered into a consent dated **8th September 2020** as follows:-

“1. The time granted to the Plaintiff to give vacant possession of the House No. 1 on L.R. 1734/815 be extended by 14 days from 1st September 2020.

2. Prayers 2 and 3 of the Plaintiffs Notice of Motion dated 27th August 2020 seeking extension of the time to comply be and is hereby withdrawn.

3. The Plaintiff may proceed with Notice of Motion dated 2nd August 2020 in respect of other prayers.”

7. The said consent appears as Annexure ‘3(a) & (b)’ to the Replying Affidavit dated **14th September 2020**. It is manifest therefore that by way of the above consent prayer (3) of this Notice of Motion was dispensed with. Indeed **Mr. Muchoki** Counsel for the 2nd Defendant on **26th February 2021** confirmed to this Court that their client would not be participating in the Application as he had already taken up possession of the suit property.

8. The Plaintiff / Applicant prays that the Court review the amount of **Kshs. 67,500,000/-** awarded to him in the final Judgment and submits that this award which the Court based on the mid-point between the sums of **Kshs. 75,000,000/-** as per the Plaintiffs valuation and **Kshs. 65,000,000/-** as per the 1st Defendant valuation, ought to have been **Kshs. 70,000,000/-**.

9. The 1st Defendant in opposing the application submits that the Plaintiff has not met the criteria for grant of an order of review. The powers granted to a Court to review its Ruling / Judgement are set out in **Section 80** of the **Civil Procedure Act Cap 21, Laws of Kenya** which 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.”

10. Order 45 Rule 1 of the **Civil Procedure Rules** provides as follows:-

“(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.” [own emphasis]

11. In the case of **NATIONAL BANK OF KENYA LIMITED –VS- NDUNGU NJAU [197]eKLR** the Court held as follows:-

“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.” [own emphasis]

12. In the Judgment dated **28th July 2020** this Court stated as follows at paragraph 89:-

“The suit property was sold in May 2014. The Court has on record a Valuation Report dated 13th May 2014 giving of Market Valuation of Kshs. 65,000,000/- and another dated 27th May 2014 returning a Market Value of Kshs. 75,000,000/-. Obviously the Valuer commissioned by the Plaintiff could seek to inflate the value of the suit property while the Banks Valuer would seek to somewhat depress its value. To be fair to both 1st Defendant and the Plaintiff I will take a value midway between the two valuations presented to Court being Kshs. 67,500,000/-. This in my view represents the loss occasioned to the Plaintiff by the 1st Defendant breach and what the Plaintiff is entitled to in damages. I therefore award the Plaintiff Kshs. 70,000,000/- in damages with interest thereon at Court rates from the date of this Judgment until payment in full.” [own emphasis]

13. It is clear from the above that the final award of **Kshs. 67,500,000/-** was a mathematical error. The mid-point between **Kshs. 65,000,000/-** and **Kshs. 75,000,000/-** is obviously **Kshs. 70,000,000/-**. It is evident from the body of the Judgment that this is the amount that the Court intended to award the Plaintiff. The reference to **Kshs. 67,500,000/-** clearly amounts to an error on the face of the record.

14. The Court delivered its Judgment on **28th July 2020** and this application for review was brought on **27th August 2020**. As such I find that the application was filed in a timeous manner.

15. The fact that an Appeal has been field in the matter and the fact that a Bill of Costs has been filed by the Plaintiff against the 1st Defendant is not in my view a bar to the Court reviewing its own Judgment.

16. I find that there has clearly been shown to exist an error on the face of the record. As such I allow this application for review. Accordingly I direct that the judgment and Decree issued on **28th July 2020** by **Honourable Lady Justice Maureen A. Odero** be and is hereby reviewed and the amount awarded to the Plaintiff is hereby rectified to read **Kshs. 70,000,000/-** instead of **Kshs. 67,500,000/-**. I make no orders on costs.

DATED IN NAIROBI THIS 12TH DAY OF MARCH, 2021

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MAUREEN A. ODERO

JUDGE