REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.35 OF 2000

NICONA CONSTRUCTION CO. LTD.....PLAINTIFF/RESPONDENT

VERSUS

KEN SOUTH PLASTICS LTD .....1ST DEFENDANT

ANNE KILELE.....2ND DEFENDANT/APPLICANT

THE ESTATE OF THE LATE WALTER KILELE.....3RD DEFENDANT

RULING

1. The Notice of Motion by the applicant dated **16th November 2020** prays for the following reliefs;

a) That this court be pleased to set aside the judgement and decree herein.

b) That this court be pleased to review the ruling of Hon. Justice Ouko (as he then was) and set aside the judgement and decree herein.

c) That this court be pleased to stay and set aside any interest charged on the principal amount after 6 years from the date of the decree.

d) That this court does give the 2nd defendant one month after the ruling of this court to within which to present a formula /proposal of settlement of the decretal sum.

e) Costs of the application.

2. The application is supported by the annexed affidavit of the 2nd defendant sworn on the same date. When this matter came up for hearing the court ordered that the same be disposed by way of written submissions which the parties have complied.

3. The facts and issues in this matter are long and winding but not difficult to appreciate. The applicant is the widow of the late Walter Kilele whose estate is the 3rd respondent herein. She is also a co-director of the 1st respondent which according to her affidavit in support holds 50% of its shares.

4. The 1st defendant contracted the plaintiff to construct its go down and administrative offices in land parcel **LR NO. 8/65 NAKURU MUNICIPALITY**. This was sometimes in August 1997. The same was completed in the year 1998 but unfortunately Walter Kilele, the husband to the applicant passed away in a road accident on **17th September 1998.**

5. The applicant avers that she was not able to follow up the matter because of a long and protracted succession dispute in the 3rd respondent's estate. In the meantime, the plaintiff filed this suit claiming payments for the work done and it successfully obtained judgment against the defendants for the sum of Kshs. 9 million or thereabouts as well as interest at 5%.

6. The attempt by the applicant to set aside the judgement several years later was not successful as the court found the delay inordinate. What followed thereafter were flurry of attempts by the plaintiff to execute for the decretal amount.

7. It is this background that has led the applicant to file this application which among others has exhibited new documents showing some

payments which seemed to have been made to the plaintiff as well as some subcontractors. The applicant states that the said documents were not within her knowledge and thus she prays that this court exercises its discretion and set aside the ex-parte judgement and allow her to defend the case.

8. She has also prayed that the court grants her time to organise payments of the decretal amount by way of instalments. She further prays that because of the provisions of the Limitations of Action Act the plaintiff should not be allowed to levy interest on the principal sum after the expiry of 6 years.

9. She further argued that because the agreement was between the company, 1st defendant, and the plaintiff she should not have been sued under her own name and in any case execution should be against the company. She urges the court therefore to allow the application as prayed.

10. The plaintiff through the affidavit of one **Stanley Ngata Gathuru** dated 30th November 2020 has opposed the said application vehemently. He deponed that the application is vexatious and a total abuse of the court process and is only meant to stop the enjoyment of the plaintiff's fruits of judgement which he has been waiting for the last 20 years.

11. He went on to state that all that the applicant is asking for is reinstatement of a suit which matter was dealt with by the court vide its ruling dated 31st July 2018. In essence the same was *res judicata.*

12. He went further to state that the matter of review was decided again by Ouko J (as he then was) and it cannot therefore be revived as it does not meet the requirements of **Order 45 Rule 1 of the Civil Procedure Rules.**

13. On the question of interest of 5% the respondent deponed that the same was contained in the agreement and was well captured in the decree of the court. The same was to be applied every month till all the amount was fully paid.

14. In their submissions the parties almost took the same tangent as in their affidavits. The court has perused the same as well as the authorities cited and attached.

15. In the prayer for setting aside the applicant relied on the case of **James Kanyiita & Another vs. Marious Ghika & Another (2016) eKLR** among others. She said that the applicant was not aware of the documentary evidence contained in her affidavit at the time of filing the other applications which were disallowed by the court.

16. For the above reason it was her submission that since these are new and important documents the court ought to find reason to review the case and grant the applicant the opportunity to defend the same.

17. She also relied on the case of **Willis Inditi Odhiambo vs. Gateway Insurance Co. Ltd** on the question of limitation of time. She said that execution should not be levied against her since the twelve-year period had expired.

18. On its part the respondent has submitted that the applicant has not met the threshold envisaged under the provisions of **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.** It went on to state that there was no new and important evidence which was not within the applicant's knowledge all these years to warrant her get the orders she is seeking.

19. The respondent submitted while relying on the case of **Grace Akinyi v. Gladys Kemunto Obiri & Another (2016) eKLR** that the evidence which is sought to be introduced must be so clear that nothing should be left for elaboration.

20. The respondent reiterated the averments in its replying affidavit that the application was *res judicata* and that the issue of interest of 5% did not fall within the limitation period as it was anchored in the agreement. It as well urged the court to dismiss the application.

ANALYSIS AND DETERMINATION.

21. The court having perused the entire application as well as the pleadings in the file and the history of the matter herein finds the following issues germane.

(a) Whether the application is res judicata.

(b) Whether the respondent is entitled to the interest of 5% per month and whether the limitation period is applicable.

(c) Whether the applicant should bear the burden of the 1st defendant.

22. On the first issue of *res judicata* the court is in agreement with the respondent that the application for review and opening the matter afresh has already been dealt with by the court especially the rulings on record of Justice Ouko (as he then was) and Lady Justice Mulwa. Both learned judges found that the applications were made way out of time and that the applicant had essentially slept on her rights. Justice Ouko in particular set aside the *suo moto* court's decision dismissing the case for want of prosecution by reinstating it while Mulwa J thereafter in an application to review and allow the applicant to defend the same was found to be hopelessly out of time.

23. The only issue which I find crucial and significant are contained in the attachment to the applicant's affidavit in support of her application. These specifically are the payments which it seems were made to the plaintiff and its subcontractors. At this level of execution, this court would not want to wish away the same. If indeed the payments were part of the agreed amount, then it ought to be reckoned by the

respondent.

24. It may be true that the same were within the applicant's custody and knowledge and she ought to have produced them earlier own but I think there is no harm if the same are taken into consideration as part payment of the decretal sum if indeed they are valid. The above reasoning is for the simple reason that at this execution stage, the judgement debtor ought to prove any iota of payments towards the settlement of the liability.

25. Further it matters not that the amount was paid to the subcontractors by the 1st defendant since there seemed unless otherwise shown that part of the work was undertaken by the said subcontractors as it can be deduced from the plaint on record. If this is the case, then it is upon the parties to confirm the same or deny in taking of accounts a fact which does not require serious evidence.

26. The court can see for instance some payments made to Steel Structures Limited and other subcontractors. If this is true, then this court shall as expected consider the same as partial settlement of the debt however small it may be.

27. The next issue is whether the respondent is entitled to the 5% interest or is precluded by virtue of the limitation of time as envisaged under **Section 4(4) of the Limitation of Action Act Chapter 22 Laws of Kenya.**

28. The plaint herein prays for the court to order the amount of Kshs. 9,122,920.90 to attract an interest of 5%. The last part of the plaint indicates that position. However, there is an additional handwritten notes which states that ***"until payment in full".***

29. Clearly this handwritten addition was not in the original plaint filled in court. Although the figures are equally added by hand, and not countersigned, the words ***"until payment in full "*** does not appear in the body of the plaint. Neither does those key words appear in the decree of the court. The decree as is expected must mirror the contents of the final judgement or verdict of the court. It is a summary so the speak of the judgement. In the absence of the words in the decree one easily concludes that they were added after the event and in any case without the consent of the court.

30. It is trite law that a party is bound by his pleadings. In this case there is no evidence that the 5% interest on the principal amount would accrue till the full payment of the amount. This in my view was an afterthought and someone without the leave of the court simply decided to add.

31. The above conclusion is equally premised on the fact that the court has been unable to trace the contract agreement. Since judgement was obtained by default of the defendants failing to file their defence within time, it was in any event incumbent upon the parties' least of all the respondent to file its documents in support of the case contemporaneously with the plaint.

32. Consequently, it is the finding of this court that the 5% interest was to apply only to the extent permitted in law. That brings me to the provision of **Section 4(4) of the Limitation of Action Act.** The same states as hereunder;

> ***"An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due***."(underlining mine)

33. This courts reading and interpretation of the above statue clearly finds that interest shall be levied or charged only for the first 6 years. The respondent has tried to distinguish this by stating that the 5% interest is anchored in the agreement. As found above the same is not on record and what is contained in the plaint cannot be relied on as it was inserted illegally.

34. Where then does this leave the respondent and the decree? The only option is to calculate the interest upto and including 6 years after the judgement and nothing more. Had it been anchored in the contract agreement then obviously the court may have considered otherwise.

35. The next issue is a matter raised by the applicant in paragraph 9 of her affidavit in support of the application. According to her the agreement or the contract was between the plaintiff and the 1st defendant who are both companies. She said that she held 50% of the 1st defendant shares and the other 50% was held by her late husband. Effectively the 3rd defendant holds the 50%.

36. If that is the case, why should she pay the 1st defendants debts yet it was and is still a corporate entity capable of entering transaction and being sued as well as able to sue? This issue in my view should have been raised in the first instance but I suspect because the defendants did not have the opportunity to ventilate their defence the same was not raised. However, being a legal principle the court cannot gloss over it.

37. It is in our common legal parlance that a company is a legal entity separate and distinct from its directors and or subscribers as was well established in the old legal authority of **SALOMAN. VERSES. SALOMAN & CO LTD (1897) A C 22 HL.** In that regard the company being a legal person has the responsibility of suing and being sued. There was no doubt, although the court has not been able to see the contract between the plaintiff and the defendant, that the agreement was indeed signed. The work was done and whether it was finalised or not is an issue between the parties.

38. The 1st defendant did not pay the full agreed amount and the plaintiff sued and obtained judgement. What was the basis of the plaintiff suing the 2nd defendant yet she did not personally sign the contract with it? If the plaintiff was interested with suing the directors of the company in this case the applicant, then it should have applied to the court for leave to ***"pierce the corporate veil*** "as it is understood.

39. **Halsbury's Laws of England 4th edition volume 7 at page 90,** defines the same as follows;

> ***"Piercing the corporate veil. Notwithstanding the effect of a company's incorporation, in some cases the court will 'pierce the corporate veil' in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced".***

40. The court has gone through the entire 20-year record of the pleadings and all that I can see are applications upon applications and none has to do with seeking this courts leave to sue the applicant in the manner stated above. The grounds for piercing the veil are now clear including the fact that the director is attempting to defeat the decree and judgement of the court. This position has been held extensively and clearly by the courts. A good example is the findings of the court in **MULTICHOICE KENYA LTD VERSES MAINKAM LTD & ANOTHER (2013) eKLR** where the court stated that;

> ***"I agree that directors are generally not personally liable on contracts purporting to bind their company. If the directors have authority to make a contract, then only the company is liable on it. To my mind, there is no doubt that ever since famous case of Salomon v Salomon (1897) A.C. 22 Courts have applied the principle of corporate personality strictly. But exceptions to the principle have also been made where it is too flagrantly oppose to justice or convenience. Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity."***

41. In this case although the applicant claimed that the 1st defendant was under receivership, there was no sufficient evidence to that effect and this courts earlier orders found that argument untenable for want of evidence.

42. The above direction has obvious ramification in this matter. It is however a legal principle which this court cannot overlook. The purpose of the court is to ensure justice and fairness to all as long as natural justice and rule of law is applied. It has taken over twenty years for this matter to be settled. However, the question of whether the applicant should shoulder responsibility has never been raised. The court under substantial justice as enunciated under **Article 159 of the Constitution** demands that it looks both sides.

43. There is nothing lost on the part of the respondent. The company, the 1st defendant, presumably is still in existence. That is the one they contracted with. There is nothing to indicate that the applicant agreed to indemnify the 1st defendant. As a matter of fact, there is no evidence that she signed the contract and even if she signed she did so as a director which is lawfully permissible.

44. For now, the court has not been requested to discuss the issue of directorship and whether the veil should be pierced but suffice to state that since the issue at hand involved a limited liability company the laws and rules governing such an entity especially its obligations must be considered wholesomely. Should the respondent feel the need to take up the above issue, then the court shall still deal with it in detail. For now, the legal position is that the applicant cannot shoulder the responsibility of the company as an individual.

45. The court notes that efforts have been made to settle the debt by the applicant but that does not hold her liable for the liabilities of the 1st defendant in her individual capacity. There is also no evidence that she has tried to defeat the recovery of the decretal amount by the plaintiff for instance by frustrating its efforts.

46. The net effect of this application is as follows;

a) The prayer to set aside the Exparte judgement is hereby disallowed for being res judicata.

b) The levying or charging of 5% interest on the principal amount is only allowed for the first 6 years from the date of judgement and anything thereafter is hereby declared null and void.

c) The matter is hereby remitted to the Deputy Registrar of this court to compute the above interest afresh and while at it take into account the amount already paid to the plaintiff whether before the suit was filed, and or after the suit had been filed and judgement entered.

d) Once paragraph(c) above is completed the defendants within one month from the date thereof be at liberty to apply to this court to settle the balance in instalments.

e) The 2nd defendant to the extent that she remains the director of the 1st defendant is not personally liable to settle its debt unless proved or ordered by this court.

f) **There be stay of any execution pending compliance with paragraph (c) and (d) above.**

g) Each party shall bear its own costs in this application.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 11TH DAY OF MARCH 2021.

H K CHEMITEI.

JUDGE.