REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 211 OF 2010

RONALD NDIRANGU NDEGWA.....1ST PLAINTIFF/RESPONDENT

EUNICE MURINGO MUTAHI.....2ND PLAINTIFF/RESPONDENT

VERSUS

WILFRED KASHONGA SARONI.....1ST DEFENDANT

LIBERTY GRAPHICS (K)LIMITED.....2ND DEFENDANT/APPLICANT

RULING (3)

The Ruling relates to Notice of Motion application dated 15th January 2020, pursuant to **Section 80 of the Civil Procedure Act, Cap 21, Order 45 Rules 1, 2 and 3, and Order 51 Rule 1 of the Civil Procedure Rules**. The Applicant sought orders: -

a. That there be stay of execution of the Warrants of Arrest issued against the 1st Defendant pending the hearing and determination of this application.

b. That the order of this Court made on the 28th November 2019 dismissing with costs the Defendants Application be reviewed, varied and/or set aside

c. That the costs of this application be provided for.

The application was based on grounds;

a. That by arriving at the finding that the disputed judgment was entered on 25th May 2010 had the effect of reviewing and varying Justice Njagi's ruling dated 5th May 2010, Lady Justice R. Ng'etich's Ruling dated 30th April 2018 and an earlier ruling by this Court dated 22nd July 2018, which made a finding that the disputed judgment was entered on 28th May 2010.

b. That all the rulings and the Plaintiff's own documents show that the disputed judgment was allegedly entered on 28th May 2010 and not 25th May 2010 as found by this Court.

In the supporting affidavit of Geoffrey Sore, the Advocate for the 2nd Defendant/Applicant herein, He stated that the 1st Defendant's advocate in his application dated 14th June 2010 for setting aside the default judgment, erroneously quoted the 25th May 2010 as the dates of the judgment but the same was rectified by Justice L. Njagi in his Ruling at paragraph 7 which stated that the disputed judgment was entered on 28th May 2010.

The 1st Defendant further stated that all the rulings and the Plaintiff's own documents showed that the disputed judgment was allegedly entered on 28th May 2010 and not 25th May 2010 as found by this Court.

The 1st Defendant averred that the Plaintiff also served the Defendant's advocates with a Notice of Entry of Judgment that was allegedly entered on 28th May 2010. Marked as **GS3** is a copy of the excerpt of the Notice. That to further buttress the above contention, the Plaintiff's

advocate through her affidavit dated 13th December 2017, swore that judgment had been entered on 28th May 2010. Marked **GS4** is a copy of the said affidavit.

A perusal of the court file revealed that the decree being executed against the 1st Defendant was allegedly issued on 25th May 2010, lodged in court on 27th May 2010 yet the alleged judgment giving rise to the decree was allegedly entered on 28th May 2010. Marked **GS4** is a copy of the Decree.

REPLYING AFFIDAVIT

The application was opposed vide an affidavit dated 19th February 2020, sworn by Judith Nzula Mbindyo the advocate for the Plaintiff/Respondent herein, she averred that she had perused the ruling by this Court dated 28th November 2019 and it was indeed apparent that the date of judgment in this matter as indicated therein is at variance with the dates indicated in earlier rulings in this matter.

The Respondent stated that in the same ruling the Court also did state explicitly that it was satisfied that there was judgment entered in this matter '**inspite of the same not being reflected in the Court file as some proceedings of 2010 are missing/misplaced/destroyed by either design or default by parties who dealt with the matter before'**. It is therefore clear that the court did not see the date on which the judgment was endorsed, but relied on the totality of the proceedings in the court file.

The Respondent contended that it was clear that the substantive ruling of the court was that there is judgment, and that the quoting of a date different from the one consistently quoted in previous proceedings was an inadvertent error.

The Respondent stated that in view of the foregoing, the ruling may be corrected purely for correctness of the record, but that it was of no consequence to the current proceedings in the matter, and in particular the ongoing execution of the judgment which the Defendant seeks to stay.

1ST DEFENDANT/APPLICANTS SUBMISSIONS

It was the 1st Defendants/Applicant's submission that the Plaintiffs' advocate failed to serve the Defendants with the draft decree for approval contrary to **Order 21 Rule 8(2) Rules**

Order 21 Rule 7 provides;

> **"7. (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.**
>
> **(2) the Decree shall also state by whom or out of what property or in what proportion the costs incurred in the suit are to be paid.**
>
> **(3) The court may direct that the costs payable to one party by the other shall be set-off against any sum which is admitted or found to be due from the former to the latter.**

Order 21 Rule 8 provides;

> ***"8. (1) A decree shall bear the date of the day on which the judgment was delivered.***
>
> **(2) any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.**
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> **(3) If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.**
>
> **(4) on any disagreement with the draft decree any party may file the draft decree marked as "for settlement" and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.**

The1st Defendant submitted that the decree being executed by the Plaintiffs' advocate quotes the date of judgment as being on 25th May 2010 yet the Plaintiffs advocate in her Replying Affidavit aligned herself with the argument that judgment was entered on 28th of May 2010.

Further, the Plaintiffs advocate failed to serve the Defendants with the draft decree for approval contrary to **Order 21 Rule 8(2).** The Decree was filed on 27th May 2010 and issued on 28th May 2010 despite there being a letter to the Deputy Registrar dated 25th May 2010 by the then advocate of the Defendants complaining that the file was missing and therefore he could not file the defense. It is evident that the Defendants were not served with the draft decree or given an opportunity to either approve or reject the decree.

The Defendants suffered an injustice by being denied an opportunity to consider and approve the draft decree which was not accurate because of two reasons, as it charged more interest than allowed by **Section 4(4) of the Limitations of actions Act**. Which expressly provides that;

> **"(4) 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 judgment debt may be recovered after the expiration of six years from the date on which the interest became due."**

The 1st Defendant relied on the case of ***Ecobank Kenya Limited vs Afrikon Limited HCCC NO. 121 of 2016*** in which Tuiyott J. while setting aside the decree, stated as follows;

> **"The rationale for the above provisions cannot be difficult to surmise. A Decree is often at a tail-end of proceedings and would usually set out the rights and obligations of the parties that the Judgment would have declared or ordered. A Decree must accurately and faithfully reflect the Orders or judgment of the court. The provisions of Order 21 Rule 8 offers an opportunity for parties to settle the terms of the decree so that they are satisfied that it is a true and faithful reflection of the judgment. But parties may sometimes disagree as to whether a draft decree prepared by one of them is in accordance with the judgment and in that event it is submitted to a judge for resolution (order 21 Rule 8(4)). The provisions of order 21 Rule 8 are important and no party can be permitted to circumvent them."**

2ND DEFENDANT'S SUBMISSIONS

The 2nd Defendant on its submissions relied on the case of **Henry Simiyu Mura vs Timothy Vitalis Okwaro T/A Tim Okwaro & Company Advocates & Another [2019] eKLR** where P.J.O. Otieno observed that;

> ***"12… Where a decree differs with the judgment, it cannot be upheld because then it is something other than the decision of the court. For the reason that the decree incorporated interests contrary to the decision of the court, it presents an obvious and apparent error on the face of the record committed by the person who drew the decree and the judicial officer who had the same executed.***
>
> **13. That presents a clear case for review, and it matters not that a notice of appeal was filed against the judgment which itself is not sought to be reviewed. Even if there had been an appeal filed and pursued, this is a case in which the decree extracted is in fact a nullity [3] for being at variance with the judgments by including in it a matter not decided by the court. It is such situations the court may have to overlook the rules and go for substantive justice while invoking its overriding objective to do justice and to prevent abuse of the process of the court. I am in no doubt that to amend a decision of the court at the time of drawing the decree is not only an abuse of the court but also a usurpation of the judicial authority of the court otherwise than by law provided. In the Highway Furniture case (supra) the Court of Appeal said:**
>
> > **'The decree in this case was, in our view a nullity as it included a large claim which was not awarded in the judgment.'**
>
> **14. Being so convinced, the decree shown to have been given on 11th December 2017 and issued on 4th June 2018 is not only subject to being review, but it is set aside entirely ex-debito Justitiae. Set aside on the additional ground that the dates given therein do not agree with the date of judgment as is mandatory under Order 21, Rule 8(1)."**

The 2nd Defendant submitted that it was evident that the Respondents' advocates applied for execution of the Judgment against the Defendants before granting them the mandatory 10 days period required for them to comply, contrary to **Order 22 Rule 6 CPR 2010** which provides;

> **" where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A: provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days' notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."**

The 2nd Defendant submitted that the failure of Plaintiffs' advocates to serve the Defendants with the draft decree for approval contrary to **Order 21 Rule 8(2) of the Civil Procedure Rules** denied the Defendants their constitutional right to a fair hearing provided for in **Article 50 of the Constitution** as they were not afforded the opportunity to either approve or reject the decree.

It was the 2nd Defendants submission that the Plaintiffs/Respondents calculated interest on judgment for a period of **3437 days (9.4 years)** contrary to **Section 4(4) of the Limitations of Actions Act.**

This is supported by the case of ***Justus Ogada Agalo vs The Managing Director Kenya Railways Corporation HC Kisumu Misc. Application 135 of 2013/[2016]eKLR***, where E.N. Maina J. stated;

"He is entitled to interest on that decretal sum (judgment sum and costs) together with interest at 14% per annum up to a period of six (6) years as Section 4(4) of the Limitation of Actions Act makes it clear that 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. Accordingly, I direct that an order of mandamus do issue compelling the respondent to pay the decretal sum together with interest at 14% per annum from the date of the judgment up to a period of six years but no more."

RESPONDENTS/PLAINTIFFS SUBMISSIONS

The Plaintiffs submitted that this court already made a substantive ruling now being challenged. The court found that there was indeed judgment properly entered against the Defendants. The court specifically stated that it was satisfied that there was judgment entered, 'inspite of the same not being reflected in the court file as some proceedings of 2010 are missing/misplaced/destroyed by either design or default by parties who dealt with the matter before.' No new evidence has been availed before the court to make it reconsider that very specific and definite finding.

The Plaintiff submitted that the decree is not defective, judgment was applied for on 24th May 2010 and entered on 25th May 2010. The Certificate of Costs was filed on 27th May 2010, and a Decree issued on 28th May 2010. There is no inconsistency in these dates and the questions raised by the Applicant are irrelevant when viewed against these facts.

As to the submissions that the Plaintiff should have served the draft decree upon the Defendants for approval, the Plaintiff submitted as follows;

That under **Rule 8** itself;

1. Sub-rule 1 is not couched in mandatory terms, but states that 'Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit…'

2. Sub-rule 4 further clarifies this, by providing that 'on any disagreement with the draft decree any party may file the draft decree marked as "for settlement" and the registrar shall thereupon list the same in chambers before the judge who heard the case…'

That sub-rule 7 expressly provides that 'Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order."

DETERMINATION

The Applicant sought review of this Court's Ruling of 28th November 2019 on the following grounds;

a. That by arriving at the finding that the disputed judgment was entered on 25th May 2010 had the effect of reviewing and varying Justice Njagi's ruling dated 5th May 2010, Lady Justice R. Ng'etich's Ruling dated 30th April 2018 and an earlier ruling by this Court dated 22nd July 2018, which made a finding that the disputed judgment was entered on 28th May 2010.

b. That all the rulings and the Plaintiff's own documents show that the disputed judgment was allegedly entered on 28th May 2010 and not 25th May 2010 as found by this Court.

Order 45 Rule (1) CPR 2010 provides;

"(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."*

To the 1st allegation that this Court made a finding as follows;

"The record further shows that the Respondents applied for judgment on 21st May 2010, upon the Applicant's failure to file the defence on time. However, since there was no affidavit of service on record, judgment was not granted on account of that application. The Respondents thereafter applied for judgment on 24th May 2010, and judgment was duly entered on the strength of that application of 28th May 2010."

This is derived from 1st Defendant's submissions paragraph 2. I have compared the quoted excerpt with the Court Ruling of 28th November 2019 and nowhere did this Court make a finding except from the part that reads 'Determination'. The 'Findings' are from perusal of the Court file the Court Proceedings lifted and quoted verbatim and excerpts of the Trial Court's Ruling also lifted as is and quoted verbatim.

This was deliberately done, so as to reflect what the Court record contains with regard to what transpired before this Court took conduct of the matter. The excerpt quoted above is one of the paragraphs the Court found in the Ruling of J L Njagi of 5th March 2011 and goes to show what was sought in that application; the said Ruling addressed setting aside of the default judgment already entered.

Page 3 as per this Court's Ruling of 28th November 2019 (as lifted from J L.Njagi in his Ruling of 5th March 2011) reads as follows;

Page 3 of 8 paragraph 1reads;

> **"The record further shows that the Respondents applied for judgment on 21st May 2010, upon the Applicants failure to file the defense on time. However, since there was no Affidavit of Service on record, judgment was not granted on account of that application. The Respondents thereafter applied for judgment on 24th May 2010, and judgment was duly entered on the strength of that application on 28th May 2010. It is erroneous for Applicant's Counsel to suggest that default judgment was entered prematurely on 21st May 2010.**

Page 3 paragraph 2 reads

> **The record shows that on 21st May 2010, the Respondents filed a request for judgment on account on the Defendant's failure to file a defence. That was the last day on which the Applicants were supposed to file their Defence. If the file was there for Respondents to file their request for judgment, it means that the file must have been there for the Applicants to file their Defence. The reasons advanced for Applicant's failure to file Defence on time do not bear any weight. I therefore find that the judgment on record was a regular judgment."**

Therefore, from the Ruling of J L. Njagi of 5th March 2011 this Court and Parties are bound by that Ruling as it is a valid, regular and legal Ruling of the Court with equal competent and concurrent jurisdiction until it is set aside, varied or successfully appealed against.

It is conceded as reflected by the Rulings on record in this matter that each Ruling has a different date in relation to the date the default judgment was entered. However, all Rulings refer to default judgment save for diverse dates as follows;

a. Ruling by Mabeya J. of 19th April 2013 referred to Judgment of 25th May 2010;

b. Ruling by D.W Nyambu of 12th February 2014 referred to judgment of 25th May 2010;

c. Ruling of J. L. Njagi of 5th March 2011 which observed judgment was entered on 28th May 2010;

d. Ruling by J J L Onguto of 6th November 2017 who observed judgment was entered on 28th May 2010;

e. Ruling by L.J R.Ngetich of 30th May 2010 observed judgment was entered on 28th May 2010

f. Ruling by this Court of 22nd July 2019 and [28th November 2019] found judgment was entered on 28th May 2010.

The right to review Ruling/Judgment/Order/decree is limited to conditions set out above in **Order 45 CPR 2010. This Court can only review its own Ruling of 28th November 2019 or specific Ruling but not all the Rulings on record.** In that Ruling, there is no error on the face of the record as Applicants admit there are Court Rulings that refer to default judgment of 25th May 2010 and others 28th May 2010 as outlined above and not that all Rulings refer to judgment of 28th May 2010 only.

Due to the diverse dates employed in various Rulings, the actual date of default judgment cannot be confirmed as on 25th or 28th May 2010, as part of Court proceedings are missing. The Court record confirms proceedings commence from Page 5. The fact of typed proceedings does not confirm or deny this fact, one can only type existing proceedings on record and not what is missing as is the case here. This Court allowed parties through Counsel to peruse the record through Deputy Registrar and confirm or deny the fact that the Court record starts from Page 5.

It is curious to note that now the Applicant who seeks review of this Court's Ruling of 28th November 2019, states that the 1st Defendant's advocate in his application dated 14th June 2010 for setting aside the default judgment, <u>erroneously</u> quoted the 25th May 2010 as the date of the judgment but the same was rectified by Justice L. Njagi in his Ruling at paragraph 7 <u>which stated that the disputed judgment was entered on 28th May 2010.</u>

If the Court as requested states the default judgment was on 25th May 2010, on review, because the Applicant's advocate made error, then it will be asked to review again to reflect 28th May 2010 and *vice versa*. This Court relies on the Ruling by L Njagi of 5th March 2011 where Applicants by application of 14th June 2010 sought setting aside of the said Judgment of 25th May 2010 and the Court referred to entry of judgment on 28th May 2010. This Court quoted verbatim and cannot at this stage correct the same as it would amount to sitting on appeal of the said Ruling.

In an application for review, parties may not introduce new issue(s) that were not the subject of the proceedings based on application of 13th November 2019 that there was no valid judgment entered against the Defendants. The only new evidence (issue (s)) is in relation to

discovery of new and important matter or evidence which, after the exercise of due diligence, was not within [Applicants] knowledge or could not be produced by him at the time when the decree was passed or the order made. The Applicants did not prove this position.

Therefore, the Court will not at this stage and address the execution process and issue of limitation of actions with regard to the decree and interest as these were not the subject of proceedings that culminated to the impugned Ruling of 28th November 2019.

This Court by its Ruling of 28th November 2019 found that a default judgment was duly entered by the Court then, albeit reference is made to different dates by different Courts as illustrated above.

Secondly, the Applicants were party to proceedings vide the application of 14th June 2010 and they prayed '***for orders to set aside the exparte judgment entered against them on 25th May 2010 in default of filing Defence'.***

The application is [was] supported by the annexed Affidavit of Edward Muchai, the advocate having conduct of the matter for the Applicants and 2 Further Affidavits sworn by Wilfred Kashonga,1st Defendant on 29th July 2010 & 13th September 2010…..'

These are excerpts from the Ruling of 5th March 2011 by J L Njagi on setting aside default judgment which application was dismissed. The said Ruling made reference to default judgment of 25th May 2010 but found it was entered on 28th May 2010. This Court quoted both parts of the Ruling which is annexed by the Applicants and this fact can be confirmed by a full reading of the same.

The review sought cannot make any other finding save for what is in the valid regular and legal Rulings by Courts of equal jurisdiction. Even if dates are different, this Court lacks appellate powers to sit on appeal over the 7 Rulings that all refer to default judgment entered but on different dates.

So the Applicant's claim that this Court found that the disputed judgment was entered on 25th May 2010; is not borne out by evidence on record as the stated paragraph is verbatim from the Ruling of 5th March 2011 by JL Njagi did not have the effect of reviewing and varying Justice Njagi's ruling dated 5th May 2010, Lady Justice R. Ng'etich's Ruling dated 30th April 2018 and an earlier ruling by this Court dated 22nd July 2018, which made a finding that the disputed judgment was entered on 28th May 2010.

The 2nd issue raised is that this Court found that judgment was entered on 25th May 2010 and not 28th May 2010 as per its Determination of the Ruling of 29th November 2019.

The finding by this Court is from the excerpts referred to above is that Interlocutory judgment was entered on 25th May 2010 as the Applicants themselves deposed in their application of 14th June 2010 and was found to have been entered on 28th May 2010 after the 1st application for judgment was denied.

Secondly, the actual date of judgment could not be confirmed from the record as some proceedings were missing. So, the Court relied on the Ruling by LJ Njagi of 5th May 2011 which referred to default judgment of 25th May 2010.

This Court is moved appropriately by parties submissions. In submissions culminating to Ruling of 22nd July 2019 and 28th November 2019, parties referred to default judgment of 28th May 2010 and this Court therefore referred to Judgment of 28th May 2010.

In the application of 13th November 2019, Applicants referred to '***a perusal of the entire Court file reveals that there is no judgment that was entered against the Defendants on 28th May 2010 or any other date after that and that the entire proceedings herein leading to the said execution are void ab initio,***

This Court arrived at the decision based on the Court record which the parties/Counsel were also allowed to peruse. The Applicants have not confirmed that the Ruling of the Court emanated from any other facts, pleadings or evidence not on record save from pleadings, submissions and Rulings of various Courts on record.

It is not contested that the Court record begins from Page 5 naturally and logically there are missing proceedings of Pages 1-4. We cannot rule out that no default judgment was entered. If there was no default judgment entered; what was the Applicants application of 14th June 2010 about/based on? The Ruling of 5th March 2011 confirms the Applicant referred to a default judgment. The Court record confirms parties participated and filed pleadings culminating with the Court gave Ruling of 5th March 2011 dismissing the application to set aside *exparte* judgment.

DISPOSITION

1. The Court finds the application for review is not based on grounds set out by law. The Applicant cannot rectify its position now that it was by error it referred to judgment of 25th May 2010 before J L. Njagi and then at the same time ask the Court to review its Ruling of 28th November 2019 which relied on the Applicant's position which it derived from Court proceedings pleadings and Rulings on record.

2. At the very least there is consensus now that an Interlocutory default judgment was entered against the Defendants in favor of the Plaintiffs.

3. The Courts lacks jurisdiction to correct at this stage pleadings proceedings and/or Rulings by Courts of equal concurrent and competent jurisdiction

4. The application to review the Ruling of 28th November 2019 is dismissed with costs.

DELIVERED SIGNED DATED IN OPEN COURT ON 13TH APRIL 2021

(VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

GSLAW LLP ADVOCATES FOR PLAINTIFF/RESPONDENT

MS KALINGA & CO. ADVOCATES FOR DEFENDANTS/APPLICANT

COURT ASSISTANT- TUPET