Spire Bank Limited v Hafaya Construction Company Limited & 4 others (Civil Case 440 of 2016) [2021] KEHC 61 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)

Neutral citation: [2021] KEHC 61 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 440 OF 2016

WA OKWANY, J

SEPTEMBER 23, 2021

BETWEEN

SPIRE BANK LIMITED ..... PLAINTIFF

AND

HAFAYA CONSTRUCTION COMPANY LIMITED ..... 1ST DEFENDANT

ALI JELE ABDI ..... 2ND DEFENDANT

YASMIN MOHAMED ABDI ..... 3RD DEFENDANT

FARAH MOHAMED ABDI ..... 4TH DEFENDANT

HASSAN MOHAMMED ABDI ..... 5TH DEFENDANT

RULING

1. The ruling is in respect to the application dated 16th March 2020 where the applicant seeks the following orders;

    1. Spent

    2. Spent

    3. THAT pending the hearing and determination of this application, there be a stay of execution of the judgment and decree given herein on the 18th February 2017 and all consequential orders therein and dated 5th February 2020.

    4. THAT judgment and decree given by this honourable court on the 18th February 2017 to the extent that the interest rate be at 32% and all consequential orders be set aside and replaced with interest at court rates

5. THAT this Honourable court is at liberty to order that this suit be heard afresh on the issue of interest rate.

6. THAT cost of this application be provided for.

2. The application is brought pursuant to Order 22 rule 22(1), Orders 45 Rules 1, Order 9 rule 9, Order 12 rule 7 as well as Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Rule 11 of the Practice Rules of *Advocates Act*, Article 48, 159(2) (d)& (e) and 159(3)(c) of the *Constitution of Kenya*.

3. The application is supported by the 5th Defendant's affidavit and is based on the following grounds;

1. THAT the defendant herein applied for a loan of Kshs 43 million from the plaintiff herein which loan was advanced and the 1st defendant repaid Kshs 10 million and unfortunately defaulted in Kshs 33 million.

2. THAT consequently in 2016 the plaintiff/respondent filed the instant suit for a claim against the defaulted amount together with the interests at bank rates.

3. THAT consequently the plaintiff's advocate filed an application dated 31st January 2017 for entry of judgment against the defendants herein and a judgment was entered against them in the sum of Kshs 50,966,004.61/= with interest thereon at the rate of 32% per annum from 2nd March 2016.

4. THAT the respondent/plaintiff later filed an application for arrest and committal to civil jail of the 2nd, 3rd and 5th applicants/defendants for failure to pay Kshs 93,190,393.77 and has obtained the said orders by virtue of ruling delivered on 5th February 2020.

5. THAT the defendant/applicants are apprehensive that the said warrants of arrests and committal to civil jail may be effected anytime by the respondents as their advocates on record has failed to attend court/or update the applicants or file the instant application or communicate that they will not attend court to enable them change advocates or attend in person.

6. THAT the said interest rate of 32% flies against Section 3 of the *banking Act* and the duplum calculation/rule which starts immediately a loan is defaulted and provides that the maximum interest rate should not exceed the loan defaulted and the loan defaulted was 33 million

7. THAT further to the above, the applicants/defendants has initiated communication with the bank with a view of settling the matter as a sign of good faith and have made partial payments of Kshs 3,500,000 and will continue to pay more as soon as funds are available.

8. THAT the court is invited to stay the execution of arrest and committal to civil jail of the applicants and party review its judgment of interest rate at 32.5% which is detrimental to the applicants

9. THAT the said application is made in good faith and also in line with the National council on the administration of justice press statement of 15th march 2020 which recommended that there be two weeks' suspension of all execution proceedings

10. THAT the applicants were condemned unheard on the application for arrest and committal to civil jail application and stands to suffer substantial loss and damages as the decretal amount of Kshs. 93,190,392.77/- is colossal and the mistake of their advocates should not be visited on them

11. THAT the whole purport and essence of this application shall be defeated if the same is not certified as urgent and conservatory orders granted pending the hearing and determination of the same

12. THAT we have been trying to reach our advocates for updates on the progress of this matter but he has not been picking our calls and whenever we visit his offices, we are told that he is not in the office

13. THAT be that as it may, the applicants herein are committed to settling this matter amicably in the interest of the parties herein

14. THAT we have tried to reach out to the outgoing advocates to no avail we had to reach out to our current advocates Obat Wasonga & Co. advocates to help us file the instant application.

15. THAT as such, it is only fair and just that the court do partially review its judgment on the issue of interest rate of 32% and replace it with interest at court rates

16. THAT the respondents are in a position to execute the decree obtained in these proceedings together with the arrest and committal to civil jail orders of 5th February 2020 against the 2nd to 5th respondents to the detriment of the applicant thereby denying us a chance in Court to seek justice.

17. THAT as such, it is only fair and just that the court does review its judgment partially and set aside the judgment and replace the 32% interest rates with court rates.

18. THAT in view of the above my application for review should be allowed in its entirety as it ensures justice to all parties involved.

19. It is only just and fair that the said judgment and decree be set aside partially for the interest of justice

20. The defendants stand to suffer substantial loss and damage unnecessarily if this suit is not heard on its merit.

4. The Plaintiff/Respondent opposed the application through the replying affidavit of its Legal Officer Mr. Wageche who states that the application is malicious, ill-advised and an abuse of the court process as it is aimed at denying the respondent the fruits of its judgment. He observes that the applicants did not make any attempts to settle the claim after the decree was issued and are therefore guilty of laches considering that the application has been filed at least 3 years after the delivery of the impugned judgment.

5. The Respondent's deponent states that the application is an afterthought intended to delay the execution process as it was instituted upon issuance of warrants of arrests and committal to civil jail.

6. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether applicants have made out a case for the granting of orders for stay of execution and setting aside/review of the judgment delivered on 18th February 2017.

7. The applicants' main contest is with regard to the judgment entered against them in the sum of Kshs 50,966,004.61 together with interest thereon at the rate of 32% per annum. The applicant submitted that the respondent claims an amount of Kshs 106,841,435 which is excessive, oppressive and unenforceable in law. According to the applicant, the amount of interest that has accrued on the principle sum is excessive and against the duplumrule as the respondent seeks to recover more than double the amount that is owed in principle and interest.

8. In a rejoinder, the respondent argued that the application was made after an unreasonable delay that is inexcusable and does not augur well for the exercise of judicial discretion in favour of the applicants. The respondent observed that the applicants have been unwilling to settle the matter despite the respondent's efforts to embrace amicable settlement. It was the respondent's case that they have suffered losses due to the outstanding debt owed.

Setting Aside

9. Interlocutory judgment in default of appearance and defence was entered against the applicants on 31st January 2017 and the instant application filed on 16th March 2020.

10. I find that the relevant law governs the court in coming up with its decision is found under Order 10 Rule 4 (1) and (2) of the *Civil Procedure Rules*, 2010 which provide as follows:

> 4(1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
>
> (2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

11. Order 10, rule 11 of the Civil Procedure Rules, on the other hand, provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside, it reads as follows:

> Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

12. The above provision grants the court the discretion to set aside a default judgment. In the case of, *Patel vs EA Cargo Handling Services Ltd (1974) EA 75*, the Court held that:

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

13. In the case of, *Kenya Commercial Bank Ltd vs Nyantange &Another (1990) KLR 443* Bosire J, (as he then was) held that:

> Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.

14. The discretion of a court to set aside or vary ex-parte judgment entered in default of appearance or defence is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. This was the position that was taken in *Rayat Trading Co. Limited vs Bank of Baroda & Tetezi House Ltd* . In the exercise of this discretion the Court will consider inter alia if: -

    i) the defendant has a real prospect of successfully defending the claim; or

    ii) it appears to the court that there is some other good reason why;

    iii) the judgment should be set aside or varied; or

    iv) the defendant should be allowed to defend the claim

15. Similarly, in the case of, *Thorn PLC vs Macdonald*, the Court of Appeal stipulated the following guiding principles: -

    i) while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;

    ii) any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;

    iii) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and

    iv) prejudice (or the absence of it) to the claimant also has to be taken into account.

16. In *Rahman vs Rahman* , the court considered the nature of the discretion to set aside a default judgment and concluded that the elements the judge had to consider were: the nature of the defence, the period of delay including why the application to set aside had not been made before, any prejudice the claimant was likely to suffer if the default judgment was set aside, and the overriding objective.

17. In *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd vs Augustine Kubede* , the Court of Appeal held that:

> " The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. *Kimani -v- MC Conmell* where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue."

18. In *Sebei District Administration vs Gasyali & others* Sheridan J. observed that one of the key factors to consider when setting aside an ex-parte judgment is whether the defendant has a defence on merit. In the case of:

> " The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court"

19. In the present case, I note that the applicants do not seek to set aside the interlocutory judgment, per se, so as to be able to file a defence, but rather to set aside the resultant decree issued on 18th February

2017 to the extent of the interest rate stated to be at 32% per annum. The defendants do not state that they have a defence, on merit against the plaintiff's claim. I have perused the Plaint and I note that the Plaintiff sought, inter alia, "judgment against the defendants jointly and severally for the sum of Kshs. 50,966,004.61together with interest thereon at the rate of 32.5% per annum from 2nd March 2016 until payment in full."

20. The applicants herein did not state that they were not served with the Plaint and neither have they explained why they did not defend the suit at the appropriate time or at all. In the circumstances of this case, one can say that the defendants were fully aware of the nature of the Plaintiff's case including the interest rate that was attached to the principle sum but chose not to challenge the same only to raise an objection, albeit belatedly and at the 11th hour when the matter is ripe for execution by way of notice to show cause. My take is that the challenge on the interest rate applied to the principle debt, at this stage, and in the absence of a defence, is a backdoor attempt to 'defend' the suit when the proverbial horse had long bolted at the time the interlocutory judgment was entered. My finding is that it is not open for this court to alter/review the interlocutory judgment in piecemeal at the behest of a party who chose not to defend the suit when it had the opportunity to do so and who does not state that it has a valid defence against the suit. It is instructive to note that one of the prayers sought in the application is for an order that the suit be heard afresh on the issue of interest rate. This court is at a loss as to how such a hearing will be conducted in the absence of a defence.

21. I further find that the failure by the applicants to offer an explanation for their inordinate delay in filing the application lends credence to the respondent's position that the application is a time buying gimmick intended to delay their realization of the fruits of the decree. For this reason, even assuming that the court was to consider invoking its discretion to set aside the judgment, the conduct of the applicants does not inspire such a consideration as it is trite that the courts discretion should not be exercised to assist a party who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. In sum, I am not persuaded that the applicant has made out a case for the granting of orders to set aside the judgment.

Review

22. The applicants also alluded to a prayer for partial review of the judgment on the aspect of interest rate while arguing that the same is oppressive. Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules govern orders for review. They provide that: -

> " Section 80. Review
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> Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (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."
>
> [Order 45, rule 1.] Application for review of decree or order.
>
> 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 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"

23. Order 45 of the Civil Procedure Rules, 2010 is explicit that a court can only review its orders if the following grounds exist: -

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay.

24. The pertinent question that arises is therefore whether the applicants established any of the above grounds to warrant an order of review

25. My finding is that the applicants have not indicated that there is any error on the face of the record or discovery of a new and important matter or other sufficient ground for the review save for the duplum rule and Section 44A of the *Banking Act* which, they argued, sets out the maximum amount that a banking institution that grants loans may recover from the original loan. The issue of interest rate, as I have already stated elsewhere in this ruling, did not appear out of the blue in the court judgment as it was part and parcel of the prayers contained in the plaint which the defendant did not challenge through a defence. I have also noted, in this ruling, that the application was not filed without unreasonable delay. I am therefore not satisfied that the application meets any of the conditions set for the granting of order of review.

26. My above findings notwithstanding, I am still minded to consider the issue of the duplum rule in the context of this case. In *Kenya Hotels Ltd vs Oriental Commercial Bank Ltd (Formerly known as Delphis Bank Limited)* the Court of Appeal stated as follows regarding the duplum rule: -

" In duplum" is a Latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Since the introduction of this principle on 1st May, 2007 it has been applied by the courts with reasonable degree of consistency. See Lee Kenya Hotels Ltd vs Oriental Commercial Bank Ltd (Formerly known as Delphis Bank Limited), *Mwambeja Ranching Company Limited & another V. Kenya National Capital Corporation* , along a host of many others

where it has been invoked. The rationale for this rule was elucidated in the latter decision by this Court in the following passage.

"The in duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides".

27. In *Housing Finance Company of Kenya Limited vs Scholarstica Nyaguthii Muturi & Another* as in the following terms:

> " As we have shown Section 44A of the *Banking Act* came into force on the 1st May, 2007. That provision of law sets up the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. The banking institution is limited in what it may recover from a debtor with respect to a non performing loan and the maximum recoverable amount is defined as follows in section 44A (2):
>
> "The maximum amount referred in subsection (1) is the sum of the following –
>
> a) The principal owing when the loan becomes non -performing;
>
> b) Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and
>
> c) Expenses incurred in the recovery of any amounts owed by the debtor."

28. A perusal of the record and the submissions reveals that it is not disputed that applicant is indebted to the respondent. The applicants' main concern is in respect to the interest that has accrued on the amount owing. The pleadings reveal that the initial principal amount advanced to the applicant was Kshs. 43 million. The duplum rule as captured under Section 44A of the *Banking Act* limits the amount that can be recovered as interest from the applicants. In this regard the applicants take issue with the interest rate of 32% per annum claimed by the plaintiff and awarded by the court on the basis that it offends the duplum rule.

29. My finding is that the interest rate per se does not offend the duplum rule since interest is pegged on the terms of the agreement between the parties. I find that the rule is only applicable where interest exceeds the principle debt at the time the loan becomes non performing. The applicants alleged that the principle debt owing at the time the loan became non performing was Kshs. 33 Million. I however note that no cogent evidence was tendered by the applicants to support their claim on the outstanding principle debt due when the loan became non performing so as to enable this court determine if the interest exceeded the said principle amount due.

30. In a nutshell and having regard to the findings and observations that I have made in this ruling, I find that the instant application is not merited and I therefore dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF SEPTEMBER 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. Wasonga for the Defendant/Applicant.

Ms Kamunya for Plaintiff/Respondent

Court Assistant: Sylvia.