Zakhem International Construction Limited v Kenya Pipeline Company Ltd; Kenya Revenue Authority (Interested Party) (Civil Case E322 of 2019) [2021] KEHC 65 (KLR) (Commercial and Tax) (23 September 2021) (Ruling)

Neutral citation: [2021] KEHC 65 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E322 OF 2019

GWN MACHARIA, J

SEPTEMBER 23, 2021

BETWEEN

ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED ..... APPLICANT

AND

KENYA PIPELINE COMPANY LTD ..... RESPONDENT

AND

KENYA REVENUE AUTHORITY ..... INTERESTED PARTY

RULING

1. The application for consideration is the Plaintiff's Notice of Motion dated 28th April, 2021 brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, Order 45 Rule 1 & 2 of the *Civil Procedure Rules, 2010* and any other enabling provisions of the law. The Application seeks the following orders.

    1. Spent.

    2. THAT this Honourable Court be pleased to clarify, relook, redefine, recalculate, delineate and review and/or vary its Ruling delivered on 6th January 2021 and in place issue and order that the sum payable to the Plaintiff/Applicant after payment of the principal tax to the Kenya Revenue Authority is USD 7,157,824.77.

    3. THAT costs be catered for by the Defendant/Respondent.

2. The Application is supported by the Affidavit of ERMANNO RABBIOSI, the Chief Quantity Surveyor and Contract Manager of the Plaintiff Company. He averred that this Court entered a Partial

Decree in favour of the Plaintiff vide its Ruling delivered on 16th June, 2020 for the sum of USD 44,019,024.64. After the issuance of the partial decree, the Interested Party (hereafter "KRA") issued various Agency Notices to the Respondent herein on account of the Plaintiff's unpaid taxes and attached part of the sums held in the partial decree towards the satisfaction of the Plaintiff's tax arrears.

3. In a ruling delivered by this Honourable Court on 6th January, 2021, the Court directed the Defendant to pay KRA the sum of KShs. 915,316,830 on account of the Plaintiff's tax arrears and the balance of KShs. 485,000,000 to be paid to the Plaintiff in United States Dollars (USD) based on the exchange rates provided by the Central Bank of Kenya (CBK).

4. Consequently, the sums of KShs. 3,099,971,539 and KShs. 915,316,830 were paid by the Defendant to KRA on account of the Plaintiff's principal tax arrears on 22nd October, 2020 and 8th January, 2021 respectively. That the CBK's mean rate as at 22nd October 2020 when the sum of KShs. 3,099,971,539 was paid was KShs. 108.7482 to the dollar which translates to USD. 28,505,957.24. Further, he averred that the CBK's mean rate as at 8th January, 2021 when the sum of KShs. 915,316,830 was paid, was KShs. 109.5500 to the dollar which translates to USD. 8,355,242.63. When the total of the above sums being, USD. 36,861,199.86, is deducted from the partial decretal sum of USD 44,019,024.64, there remains an unpaid a balance of USD. 7,157,824.77 which the Plaintiff now seeks to recover from the Defendant.

5. He averred that vide letter dated 13th January, 2021, the Plaintiff's counsel on record wrote to the Defendant demanding the payment of the said balance of USD 7,157,824.77. Subsequently, the Plaintiff applied for and obtained Warrants of Attachment for the unpaid portion of the partial decretal sum. Consequently, the Defendant filed an application dated 5th February, 2021 seeking to set aside the Warrants of Attachment which prayer was granted in a Ruling delivered by this court on 8th April, 2021. The court then directed the Plaintiff to tabulate the decretal sum at an exchange rate issued by the Central Bank of Kenya or as agreed by both parties.

6. Thereafter, the Plaintiff's counsel wrote to the Defendant's counsel on 14th April, 2021 in a bid to elicit an agreement on the applicable exchange rate. However, since the Defendant has refused and/or neglected to respond to the said letter, it is prudent that this Honourable Court intervenes and grants the orders sought in the instant application as the Defendant will not be prejudiced by the same.

7. In response, the Defendant filed a Replying Affidavit sworn on 26th May, 2021 by STANLEY MANDUKU, its Chief Legal Officer highlighting the history of the dispute herein. He added that contrary to the Plaintiff's averment, the Defendant Advocates on record responded to the Plaintiff's letter dated 14th April, 2021 vide a letter dated 19th April, 2021 in which it informed the Plaintiff that they were seeking instructions from the Defendant. Further, he averred that ruling sought to be reviewed is without any mistake or error apparent on the face of the record and that the instant application has been filed after undue delay and after the Plaintiff had already begun execution. In addition, he stated that there is no money due to the Plaintiff as the whole decretal amount has been paid to KRA on account of tax due and owed by the Plaintiff and in compliance with the Agency Notices of 3rd September, 2020 and 7th January, 2021.

8. The Interested Party also filed a Replying Affidavit sworn on 3rd May, 2021 by SHERYL SANYA, an officer in its Corporate Tax & Accounts Management Division. She also gave a detailed history of the tax owed to KRA by the Plaintiff. She averred that the Plaintiff paid KRA part of the Principal tax agreed and sought a waiver of penalties and interest. However, KRA declined to grant the waiver application since it was premature and was only admissible upon the full payment of the principal tax liability of KShs. 5,146,477,701/=. She noted that the Plaintiff still has an outstanding tax liability of

KShs. 1,749,654,709, which should be paid to KRA by the Defendant to clear the outstanding tax liability before the Plaintiff can receive any payments from the Defendant.

Submissions

9. The application was canvassed by both written and oral submissions.

10. In its written submissions dated 17th May, 2021, the Plaintiff reiterated the averments in its supporting Affidavit and added that the instant application is about ascertaining the sum due and payable to the Plaintiff by the Defendant in US Dollars pursuant to the Ruling of 6th January, 2021. The Plaintiff emphasized that the court's intervention is required so that this matter is brought to an end.

11. As for the Defendant in its written submissions dated 26th May, 2021, it submitted that there is no error apparent on the face of the record in the Ruling of 6th January, 2021. It argued that if there is any error, then the same is beyond the record and requires a deeper explanation and proof by evidence which is well outside the purview of review. In support of this position, it relied on the case of *Samuel Amugune & 4 Others v Attorney General* , where the Court of Appeal held that an error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not.

12. Reliance was also placed on the case of *Republic v Cabinet Secretary for Interior and Co-Ordination of National Government Ex Parte Abulahi Said Salad* where the Court stated that an error apparent on the face of record must be one that strikes one by merely looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. In further support, the Defendant cited the case of *Attorney General & Others v Boniface Byanyima* where the court held that such an error must be so manifest and clear that no court would permit it to remain on the record.

13. In addition, the Defendant submitted that there was unexplained and undue delay in bringing the instant application. It was stated that the impugned ruling was delivered on 6th January, 2021 while the instant application was filed on 28th April, 2021 and no explanation has been tendered for the 4 months' delay. In support of this, the Defendant cited the case of *Kosar Sultana v Khalid Iqbal [2017] eKLR* where the court quoted various cases in which delays of three months or thereabouts were found to be unreasonable and particularly where the same had not been explained. The Defendant also noted that the Plaintiff had even begun execution through Moran Auctioneers who proclaimed the Defendant's movable property pursuant to the warrants of attachment issued on 27th January, 2021.

14. Further, the Defendant asserted that the whole decretal amount has already been paid to KRA on account of tax due and owed by the Plaintiff in compliance with the Agency Notices of 3rd September, 2020 and 7th January, 2021. In its view therefore, the application lacks merit and should be dismissed with costs.

15. On the other hand, the Interested Party in its written submissions dated 24th May, 2021 laid a lot of emphasis on the tax owed and the refusal to grant the Plaintiff's request for waiver. Further, it submitted that in the event that the court finds that the Defendant is still holding the sum of USD 7,157,824.77 belonging to the Plaintiff, the same should be remitted to KRA to clear the tax balance in compliance with Order number (c) of the Court's Ruling of 6th January, 2021.

16. In rejoinder, the Plaintiff's advocate Mr. Ahmed Nassir, SC submitted that the figures as calculated have not been denied.

Analysis and Determination

17. The issue for determination is whether the Plaintiff has met the threshold for review of the court's Ruling of 6th January, 2021.

18. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 and 2 of the Civil Procedure Rules gives the court unfettered discretion to Review its decree or order as it thinks fit if sufficient reasons have been given for the same. Section 80 of the *Civil Procedure Act* 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."

19. Order 45(1) of the Civil Procedure Rules on the other and sets out the requirements for an application for review as follows:

> " 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 judgment to the court which passed the decree or made the order without unreasonable delay".

20. From the above, it is evident that an Applicant must establish that there is discovery of new and important matter or evidence which was not within his or her knowledge despite the exercise of due diligence; or that there is mistake or error apparent on the face of the record; or any other sufficient reason. Further, the application has to be made without unreasonable delay. In the instant case, the Plaintiff has not indicated the ground on which its application for review of the Ruling is based. The court shall therefore consider each of the grounds separately.

21. On the first ground, I find that the Plaintiff has not produced any material to demonstrate the discovery of new and important matter or evidence which it could not have produced before the impugned Ruling was made. The issue of the applicable exchange rate was raised by Counsel for the Plaintiff in his arguments and the court duly pronounced itself on the same in Order (d) of the said Ruling where it stated that parties were at liberty to confirm the rates from the Central Bank of Kenya if any dispute arose in respect thereof.

22. I am also not satisfied that the Plaintiff has not demonstrated that there is any mistake or error apparent on the face of the record. What constitutes an error on the face of the record was aptly spelt out by the Court of Appeal in the case of *Nyamogo and Nyamogo v Kogo* in which it was held that:

> "...an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

23. In *Kanyabwera v Tumwebaze*, the court stated that:

> "In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its correctness. It must be an error so manifest and clear, that no court would permit such an error to remain on the record. The "error" may be one of fact, but it is not limited to matters of fact and includes errors of law."

24. I am unable to see any error apparent on the face of the record in my Ruling of 6th January, 2021. The decision was made on the basis of the parties' pleadings, evidence and arguments in support of their respective positions at the time. The court cannot now go back into tabulating the balance payable to the Plaintiff by the Defendant especially in view of Order (d) of the said Ruling which clearly guided the parties on how to proceed with the payments. The fact that parties have failed to agree does not mean that there is an error apparent on the face of the record. Indeed, I find it necessary to reproduce the said Order at this point for ease of reference. It stated as follows:

> "d) That the disbursements of any monies shall be in US Dollars unless the parties otherwise agree. Parties are at liberty to confirm currency exchange rates from Central Bank if a dispute on the same arises."

25. Thirdly the court has to consider if there is sufficient reason to review the ruling. In the case of *Sadar Mohamed v Charan Singh and Another* , it was held that any other sufficient reason for the purposes of review refers to grounds that are analogous to the other two, that is, error apparent on the face of the record and discovery of new and important matter. In the instant case, I find that the Plaintiff has not elaborated any sufficient reasons to warrant a review of the court's ruling of 6th January, 2021.

26. The fourth condition that the Plaintiff has to satisfy is whether the application has been made without undue delay. The Ruling sought to be reviewed was delivered on 6th January, 2021 whereas the present application was made on 28th April, 2021. The three months' period cannot be said to amount to undue delay considering the totality of the circumstances of this case. The upshot is that the Plaintiff has not met the threshold for review of the ruling of 6th January, 2021.

27. In my considered view however, since the Defendant has not contested the Central Bank exchange rates applied by the Plaintiff nor denied the resulting figures, the Plaintiff is at liberty to take any necessary action to recover whatever amount of the partial decree is still owing from the Defendant. However, the court will not venture into the realm of helping the parties herein to calculate the same since the orders of 6th January, 2021 were very clear on what steps should be taken by the parties herein. In the same breath, I decline to order that any additional amounts be paid to KRA as argued by the Interested Party because that is not an issue for determination in this review application.

28. In the premises, I find that the Plaintiff's application dated 28th April, 2021 lacks merit and is therefore dismissed with no orders as to costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD SEPTEMBER, 2021.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Ms. Asli for the Plaintiff/Applicant.
2. Ms. Kariuki, Mr. Kihara & Ms. Wanjiku for the Defendant/Respondent.
3. No appearance for Interested Party/KRA.