REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 693 OF 2008

KRK IMPEX PVT LTD.....PLAINTIFF/RESPONDENT

VERSUS

SAFMARINE KENYA LTD.....1ST DEFENDANT/APPLICANT

ACCORD METALS (K) LTD.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling relates to two applications dated 8th December 2016 and amended on 6th January 2017 and 2nd February 2017. The application of 6th January 2017 (herein "the first application") is premised on the provisions of; Section 3A, 26(1) and (2), 34(1) and 100 of the Civil Procedure Act, Orders; 22 Rules (2)(3), 7(2) (e), 22(1) and 45 Rule 1(b) and 3(2) of the Civil Procedure Rules and all other enabling provisions of the law.

2. The Applicant is seeking for orders as follows:-

(a) That there be a stay of execution of the decree and warrants of attachment dated the 18th November and 24th November 2016, respectively pending the hearing and final determination of the application herein;

(b) That the warrants of attachment issued to M/S Jumbo Airlink Auctioneers be recalled, set aside and quashed;

(c) That an order do issue for the matter to be listed for formal proof on the residue of the claim herein with respect to interest and costs;

(d) That the decree herein be adjusted with the intent that the Plaintiff and its Advocates on record be ordered to refund the Safmarine Kenya Limited the sum of USD100,000 which the Plaintiff's lawyers have unlawfully appropriated and which constituted an unjust enrichment;

(e) That subject to (d) above, that a declaration be made that no further sums are due to the Plaintiff by way of principal sums or interest or costs on account of full tender and compromise of the subject matter of the suit by the consignee of the cargo herein as the Plaintiff has no claim whatsoever in this suit other than a claim to the said consignment;

(f) That the 1st Defendant/Applicant pay to the Plaintiff/Respondent the amount certified to be due to the Plaintiff/Respondent after the adjustment of the matter;

(g) That costs be provided for;

(h) Any other order the Honourable court deems fit to grant.

3. The application is premised on the grounds on the face of it and an affidavit in support dated 8th December 2016, sworn by Terry Wangui Ngure, the Applicant's Legal Claims Manager, Eastern Africa. She deposed that the Honourable Court entered judgment in favour of the Plaintiff (herein "the Respondent") on 12th March 2010, to the effect that the 1st Defendant (herein "the Applicant") pay the disputed sum of USD 100,000; being the value of a cargo destined for India. The Respondent was granted orders barring the Applicant from releasing the

cargo to the consignee in India which prompted parallel proceedings in India.

4. The suit in India was finally compromised and the consignee accepted payments in full and final settlement. In the event, the Respondent herein had no further claim whatsoever as the person to whom the Respondent had intended to consign the goods was fully paid for the full consideration of the value of the consignment.

5. However the Applicant preferred an appeal and applied for stay of the proceedings in Kenya. By consent, the stay was issued on terms that the Applicant provides a bank guarantee. However, the appeal was not successful. That the Respondent then purported to call the bank guarantee even though the subject matter of the suit had been compromised in India. The Applicant avers that, this clearly amounts to an unjust enrichment as the Respondent has received multiple payments in respect of the same subject matter.

6. Further, the Respondent has failed, neglected, refused and/or ignored to adjust the decree accordingly and has now instructed Jumbo Airlink Auctioneers to proclaim and subsequently attach it's assets for purported payment of the same amounts which have already been paid. The auctioneers intend to sell goods after seven (7) days, being 13th December 2016. It is only just and fair that the decree is adjusted between the parties for the multiple payments received by the Respondent on account of the same subject matter to be adjusted, and the Respondent be compelled to refund the Applicant the USD 100 lawfully due to the Applicant.

7. However, the Respondent filed a preliminary objection and argued that, the notice of motion application dated 8th December, 2016 and filed in court on the same date and the amended notice of motion application dated 6th January 2016 and filed in court on the 9th January 2016 be determined in limine, in that the applications are inept, incompetent, bad in law, misconceived and plainly non-sustainable. That the applications should be struck out forthwith, as the Honourable court is currently without jurisdiction to permit the applications and the amendments sought in light of both the ruling and judgment of the Honourable court made on 12th March 2010 and the judgment of the court of Appeal made on 16th October 2015.

8. Further, the applications are scandalous, frivolous and vexatious and are otherwise an abuse of the process of the court and made in transgression of the salient doctrine of estopel in its extended form of res judicata.

9. The Respondent further filed a replying affidavit dated 6th January 2017, sworn by Satish Kumar, the Respondent's director. He deposed that, the alleged consignee M/s Amita Enterprises is unknown to the Respondent and has never been the Respondent's consignee as stated by the Applicant. Infact, the bills of lading were illegally and wrongfully issued to the third parties including the said; M/s Amita Enterprises, against the undertaking and as a result of; collusion between the Defendants and the mess created by the Applicant, the Respondent was prompted to file this suit that was successfully concluded in its favour.

10. That the Applicant further failed to issue the bills of lading in the name of the Respondent and/or follow the Respondent's instructions in accordance with the undertaking that; the Honourable Court of Appeal has already found to be binding upon the parties. Therefore, Applicant could not and cannot run from its obligations to the Respondent.

11. It was argued that, the Respondent has not paid twice as alleged or stated. The only payment made to the Respondent in accordance with the law is the realization of the banker's guarantee which had been issued by the Applicant through its bank, in favour of the Respondent and which banker's guarantee was conditional upon the terms stated therein. Therefore the Respondent has not misappropriated the alleged monies as alleged or at all. The monies were indeed forwarded to the Respondent through the deponent on the 18th December 2015; by their Advocates.

12. However, the Applicant filed a supplementary affidavit dated 6th January 2017, sworn by Terry Wangui Ngure, who averred that, the contested decree has been extracted in error and relies on a clearly defective judgment. That, the interest, other than statutory interest is not a liquidated demand. The interest claimed herein is not the allowable statutory interest but is compounded commercial interest way in excess of court interest rates.

13. That the judge allowed judgment but did not allow for interest at all or any particular interest for that matter and in the absence of a specific order in that regard no interest is due or if due, can only be at court rates. In any event the plaintiff did not ask for interest at court rates. That the amended plaint does not prescribe an interest rate and the Deputy Registrar of the Honourable Court cannot adopt or come up with a rate without the express authorization of the judge handling this file.

14. Further there has been no formal proof in this matter and in the absence of such a formal proof, the Deputy Registrar is not empowered to issue or sign a decree with an interest other than that provided under statute. In the end, the decree is clearly wrong and cannot be executed and/or the execution is premature, as the suit has not been heard and finally determined.

15. The deponent further averred that, she is generally familiar with international business transactions in that;

(a) Interest rates on dollar denominating debt are pegged to LIBOR;

(b) LIBOR rates over the past ten (10) years have hardly touched 2%.;

(c) A dollar denominated interest rate of 24% is inconsistent with the prevailing interest rate regime of dollar denominated debt;

(d) The purported interest rate allowed by the Deputy Registrar is clearly unrepresented of the interest rate regime aforesaid;

(e) The applied interest rate is illegal, exorbitant and otherwise inapplicable.

16. Finally, the Applicant averred that, the amounts claimed will adversely affect the operations of the Applicant; therefore it is just and fair that the application herein is allowed.

17. The respondent director, Mr Satish Kumar filed a supplementary affidavit dated 2nd January 2017, in response to the supplementary affidavit sworn by Terry Wangui Ngure and averred that; the Applicant has exhibited incorrect amended plaint, that the original plaint was amended to include inter alia the rate of interest. That the court has no jurisdiction to permit the nature of amendments sought as stated herein.

18. The parties disposed of the application by filing submissions whereby; the Applicant submitted that the decree herein is more than one (1) year old, having been issued on the 12th March 2010, more than six years and therefore execution can only be effective by way of a notice to show cause. Thus the attachment is, ab initio, un-procedural, unlawful and is for immediate setting aside. Reference was made to the cases of; *Naivas Limited vs Newton Nyoro Mukuha & Another'* and *Rossly Development Ltd vs Bidco Refineries Limited HCCC No. 20 of 2004*.

19. The Applicant further submitted that, it is trite law that he who alleges must prove, yet the Respondent has not proved the interest rates it now seeks to apply in execution of the decree herein. Reliance was placed on the cases of; *Kenya Commercial Bank Limited vs Thomas Wandera Oyalo* and *Sai Sports Limited vs Narinder Singh Roopra & 4 Others*. Further reference was made to the case of; *Autolog Kenya Limited vs Navisat Telematics (Kenay) Limited*.

20. That the Respondent does not dispute that the decretal amount of USD 100,000 was paid and the amount was paid after the bank guarantee was honoured by the Applicant's bank. Yet the application contains the same claim for; USD 100,000 without giving credit to the Applicant. This is a material defect, which on its own nullifies the warrants. Further the failure to record that an Appeal had been preferred.

21. However, the Respondent submitted that, the Applicant has filed three separate applications principally in a bid to inter-alia; forestall the Respondent from executing the judgment and decree of the Honourable court made on the 12th March 2010; which is a gross abuse of the process of the court. The applications; including the current application now under consideration only serves to convolute the only principal question that is before the court being "execution of the decree."

22. That the decree which has been set in motion for purposes of execution is the decree dated the 27th October 2016, and one (1) year has not passed from its extraction thereof and duly complies with the orders and judgment of; the Honourable court as entered on the 12th March 2010 which judgment was allowed as prayed for in the amended plaint.

23. The Respondent bill of costs was taxed and same allowed vide a ruling of the Deputy Registrar delivered on 11th October 2016. The Applicant duly participated in the taxation proceedings knowingly fully well that the interest rate was 24% and without any allegations that the plaintiff had been fully paid as alleged. It was only after taxation of costs that the Respondent set in motion the process of execution.

24. Further that the amendment should not be allowed as the plaintiff had already questioned the legality, competence and validity of the first defendant's application and the grounds thereunder. The purported amendment will defeat an otherwise accrued defence by the plaintiff to the application and to permit the same will otherwise be equivalent of aiding a negligent leader/litigant. Reference was made to the case of; *James Ochieng Oduol t/a Ochieng Odueol & Co. Advocates vs Richard Kuloba (2008) eKLR.*

25. The Respondent argued that, it is settled law that frivolous prayers for amendments should be disallowed. The case of; *AAT Holdings Limited vs Diamond Shields International Ltd (2014) eKLR*, was relied on where the court held that; ".....power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action.....

26. The Respondent submitted that, the Applicant has failed to disclose to the Honourable court that the court proceedings and cases that the Applicant bespeaks of were part and parcel of the Applicant's record of Appeal in; Civil Appeal No. 210 of 2011. The Respondent relied on several authorities inter alia; *Aviation & Airport Services Workers Union (K) vs Kenya Airport Authority & Another (2014) eKLR*, *Ruaha Concrete Co. Ltd et al vs Paramount Universal Bank Limited et al, HCCC No. 430 of 2002*, where the court outlined the principles of non-disclosure and the consequences which will follow as a result of such non-disclosure. The celebrated case of; *Owners of the Motor Vehicle Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) 11 KLR 1.* was also cited.

27. The Respondent argued that should the court be minded to find that the judgment of the Court of Appeal fully settled the dispute between the parties herein. Thus the Applicant cannot run from its obligations to the Respondent.

28. I have considered the application and the arguments advanced by the parties and I find that; the following issues have arisen for consideration;

(a) Does the court have jurisdiction to entertain the application in view of the ruling and/or judgment of the High Court dated 12th March 2010 and Court of Appeal dated 16th October 2015;

(b) What were the terms of the judgment of the High Court herein and was any interest awarded in the same, if so, what was the rate?

(c) Has the Honourable Deputy Registrar included interest in the decretal sum without the same having been awarded?

(d) Is the decree being executed over one (1) year?

(e) Has the plaintiff been paid following the compromise in the matter in India and/or

(f) Does the plaintiff have any further claim against the Applicant;

(g) Should the orders sought be granted?

(h) Who should bear the costs of this application?

29. I shall deal with the issues of jurisdiction and interest together. In this regard, it suffices to note that, upon hearing an application dated 12th June 2009, filed by the plaintiff, the court struck out the statement of defence filed by the 1st defendant and entered judgment in the terms of the amended plaint against the defendants jointly and severally as prayed for in the amended plaint.

30. At this stage, it is important to appreciate what is the date of the amended plaint the court was making reference to. It suffices to note that, the first plaint filed by the plaintiff was dated 24th November 2008. According to the evidence herein, the same was amended on 3rd April 2009, and therefore this is the plaint upon which the court granted the prayers sought for in the application of 12th June 2009.

31. The prayers sought for in application were as follows:-

(a) That the 1st defendant's written statement of defence filed herein be struck out;

(b) That in the result, judgment be entered in favour of the plaintiff as prayed for in the amended plaint;

(c) That costs of the suit and of this application be awarded to the plaintiff

32. As a result of allowing the application, the following orders were made in favour of the plaintiff:-

(a) That the 1st defendant's written statement of defence be and is hereby struck off;

(b) That the undertaking given to the 1st defendant by the 2nd defendant be and is hereby enforced;

(c) That a permanent injunction be and is hereby issued restraining the 1st defendant either by itself, its agents and/or servants from releasing the containers to any other person other than the plaintiff;

(d) That there be a refund from the defendants jointly and severally of all the monies of US$100,000 received from the plaintiff together with interest thereto at commercial rates prevailing from time to time until payment in full;

(e) That the defendants do pay costs together with interest at court rates until payment in full;

(f) That the defendants do pay the plaintiff the costs of the suit and the application.

33. A decree was subsequently extracted and signed by the Deputy Registrar on 22nd September 2011, reflecting the above orders. However, after the decision of the High court, the 1st defendant appealed against the same vide Civil Appeal No. 210 of 2011, and upon hearing the Appeal, the Court of Appeal rendered its decision on 16th October 2015. In a nutshell, the court found that the Appeal had no merit, dismissed it with costs and upheld the decision of the High Court. It therefore follows that the final decision herein, is the decision rendered by the court on 12th March 2010.

34. In that regard, if any decree has to be extracted, it must then live within the orders given on that date. The issue in controversy is whether the court awarded any interest to the applicant and if so, what was the interest rate if any?. To answer this question, regard must be held on the prayers in the amended plaint dated 3rd April 2009. As indicated above, the prayer in relation to the same is found under paragraph 11(c) as amended which reads as follows;-

"*In the alternative, a refund from ~~either the first Defendant or the Second Defendant~~ Defendants whether jointly or severally of all the monies of US$ 100,000 received from the plaintiff together with interest thereto at commercial rates prevailing from time to time from until payment in full"*

35. As can be noted from the above, the plaintiff indeed sought for interest at "commercial rates" but did not indicate the particular interest rate. When the matter was heard at the Court of Appeal, there was no order indicating the interest rate payable. It therefore follows that, interest payable will have to be determined on the basis of prevailing commercial rates at the time in issue.

36. However, it does appear, that after the Court of Appeal decision, two (2) other decrees were extracted and signed by the Honourable Deputy Registrar dated 1st December 2015 and 27th October 2016. The first decree of 1st December 2015 states as follows in relation to the issue of interest;-

"in the alternative, a refund from either the first Defendant or the Second Defendant, Defendants whether jointly or severally of all the monies of US$ 100,000 received from the plaintiff together with interest thereto at 24% prevailing from time to time until payment in full."

37. A closer analysis of the above order in the subject decree of 1st December 2015, reveals the following;-

(a) It includes the following words "either the first Defendant or the Second Defendant" which were deleted from the amended plaint dated 3rd April 2009;

(b) It omits the words "commercial rates" which are in their amended plaint referred to above;

(c) It introduces a rate of 24% which is not in the said amended plaint

38. A further consideration of the decree dated 27th October 2016, reveals the subject order having been extracted as follows;-

(a) In the alternative, a refund from the defendants whether jointly or severally of all the monies of US$ 100,000 received from the plaintiff together with compound interest thereto at 24% per annum prevailing from time to time until payment in full."

39. It is noteworthy that, this particular decree reveals the following;-

(a) It omits the words "commercial rates" which are in their amended plaint referred to above;

(b) It instead introduces the words "compound interest";

(c) It introduces a rate of 24% which is not in the said amended plaint and unlike the decree of 1st December 2015, the 24% is indicated to be "per annum".

40. It is therefore clear that the decrees issued on 1st December 2015 and 27th October 2016 were issued after the decision of the Court of Appeal on 16th October 2015 which was based on the amended plaint dated 3rd April 2009 and which did not seek for "compound interest at 24% per annum". It therefore follows, the two subject decrees are null and void, and the only decree that can be sustained is a decree that was drawn based on the prayers in the amended plaint herein being the decree issued on 22nd September 2011.

41. I note from the replying affidavit dated 2nd March 2017, sworn by Satish Kumar, the plaintiff's director, that he avers at paragraph 6 to paragraph 10 that; he instructed his lawyer to amend the plaint to specifically include compound interest of 24% per annum. That the plaint was indeed amended on about 3rd April 2019 and duly filed in court on the same date. It was served upon the 1st defendant's Advocates believing that the same bore the correct amendments like the filed in court, but has now discovered that the amended plaint served does not bear the correct and accurate amendments as originally intended. That the service of incorrect and inaccurate plaint was not deliberate and/or unanimous with an act of fraud, but a genuine mistake on the part of the plaintiff's Advocate which should not be visited on the plaintiff or regarded as an act of fraud.

42. As is evident from the averments above, the alleged amended plaint was not served upon the 1st defendant and neither has the deponent annexed a copy thereof on the subject affidavit, nor have seen a copy thereof on the court file. I therefore hold that the only plaint that forms a basis of the decision of the High Court as upheld by the Court of Appeal is the amended plaint dated 3rd April 2009 and if indeed the plaintiff is executing any decrees issued basis of the same, then the only valid decree is that issued on 22nd September 2011 and not on 1st December 2015 and 27th October 2016.

43. In that regard, I allow prayer 1A and 1B of the amended notice of motion herein dated 6th January 2017; by ordering that there be a stay of execution of warrants of attachment dated 18th and 24th November 2016; issued to M/S Jumbo Airlink Auctioneers on the ground that, the sums indicated therein includes interest calculated on the interest rate of 24% not prayed for in the amended plaint.

44. However, I note that, the applicant prays for orders that; the court orders the matter be listed for formal proof on the residue of the claim in respect of interest and costs, that there be adjustment of the amount payable, the plaintiff refunds the applicant the sum of US$ 100,000 and that the 1st defendant be released from any further liability to the plaintiff.

45. But I find that, the orders sought cannot be granted as there is a final judgment in the matter and the court cannot re-open a matter that is concluded. If the applicants wanted to raise the issue of formal proof, they should have raised it before the court that rendered the decision granting judgment in favour of the plaintiff and/or in the Court of Appeal, or appealed against the decision of the Court of Appeal that upheld the judgment of the High Court. This court has no jurisdiction to sit on an appeal against a decision of another court of concurrent jurisdiction, leave alone the decision of the Court of Appeal. In that regard, I disallow prayer numbers 2, 3 and 4 of this application.

46. The applicant further prays for an order that the 1st defendant/applicant pays the defendant/respondent the amount certified to be due after the adjustment of the matter. In this regard, I find as follows:-

(a) This matter was filed in court since 24th November 2008, that is a period of eleven (11) years;

(b) The decision of the Court of Appeal was rendered in October 2015, that is period of four (4) years;

(c) The parties have been engaged in the execution process all this while, Litigation must come to an end.

(d) An order for formal proof on interest rate will not serve the interest of the parties in terms of expeditious disposal of this matter and/or costs.

47. I therefore find that it will be in the interest of justice for the decree to be drawn based on the amended plaint dated 3rd April 2009 and the interest rate to be applied to be calculated based on the "prevailing commercial rates" at the date of the judgment which rates can be obtained from the Central Bank of Kenya. Any other order made must be in compliance with that amended plaint.

48. However it suffices to note that; the Applicant also filed an application dated 2nd February 2017; brought under the provisions of Section 1A and 3A of the Civil Procedure Act and all other enabling provisions of the law, seeking for orders as follows:-

(a) That the fraudulently filed amended plaint dated 3rd April 2009 be expunged from the record;

(b) That the Plaintiff and its lawyers be cited for contempt and conspiracy to pervert the course of justice through alteration of a court record;

(c) That pending the determination of this application, there be a stay of all other proceedings in this matter;

(d) That the Honourable court be pleased to issue any other or further relief as may protect the dignity of the Honourable court and the general administration of justice;

(e) That costs be provided for.

49. The same is supported by an affidavit sworn by Terry Wangui Ngure and a supplementary affidavit by Kenneth Kiplangat, an advocate of the High Court seized of this matter. Basically he avers that the plaintiff has caused court records in the Court of Appeal file relating to this matter to be fraudulently altered as confirmed by the Court of Appeal. As such the integrity of the entire judicial process is at risk and there should be no further proceedings herein.

50. However the Plaintiff responded in an elaborate affidavit sworn by Satish Kumar dated 2nd March 2017. He averred that he instructed their advocate to amend the pleadings herein to include the rate of interest specifically a compound interest. That was done and served upon the 1st defendant with the belief that it bore the correct amendments and filed in court.

51. However it has come to light that the amended plaint served on the 1st Defendant was not the same as the one filed in court. That the service of the wrong plaint was not deliberate and/or synonymous with an act of fraud. It was a genuine mistake on the part of the Advocates' law firm.

52. The Plaintiff lamented that prior to determination of this matter; the Defendant wrote to the Hon. the Chief Justice unfairly accusing the Plaintiff of engaging in fraudulent activities and caused the issue of the alleged fraud to be negatively published in the media. Adversely affecting the Plaintiff.

53. I have considered the rival arguments advanced by the parties on the subject application and I find that, first and foremost this matter is concluded following the delivery of the judgment herein. Secondly the issue of the amended plaint that seems to be the subject of the "alleged fraud" has been dealt with in the first ruling herein. Thirdly and most importantly the alleged fraud and/or alteration of the court record is a criminal act which should be dealt with by the relevant criminal investigative agencies. Further if the Defendant/Applicant want the Plaintiff/Respondent cited for contempt then a proper application to that effect be filed.

54. In conclusion I find that none of the prayers sought for can be granted in that the judgment entered herein was based on the plaint on record at the time and that is the judgment that the Court of Appeal upheld. The alleged "fraudulently filed amended plaint dated 3rd April 2009" is irrelevant whether expunged from the record or not. I have already made a finding above on the prayer seeking that the Plaintiff and its lawyers be cited for contempt and conspiracy to pervert the course of justice through alteration of a court record. Similarly I have already ruled on the issue of stay of all other proceedings. I make no orders as to costs in the circumstances of this case.

55. Finally having dealt with this matter, I note that the parties herein have been involved in this litigation for too long. It is not serving any interest of justice to the parties. There is a final judgment and the parties should purpose to bring this litigation to an end pursuant to the overriding objectives under the Civil Procedure Act.

56. Those then are the orders of the court.

Dated, delivered and signed in an open court on this 22nd day of January 2020.

GRACE L NZIOKA

JUDGE

In the presence of;

Mr. A.S. Masika for the Plaintiff/Respondent

Mr. Wakwaya for Dr. Kiplangat for the 1st defendant

No appearance for the 2nd Defendant

Dennis ----------Court Assistant