REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.172 OF 1997

STEPHEN MUKIRI NDEGWA.............................PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated **2nd April 2019** by which **KENYA COMMERCIAL BANK** (the Defendant/Applicant) seeks the following Orders:-

"1. SPENT

2. SPENT

3. THAT this Honourable Court do set aside warrants of attachment and sale of the Defendant's property issued by this Honourable Court on 2nd April 2019.

4. THAT this Honourable Court do declare that the Applicant has fully satisfied its obligations to the Plaintiff arising out of their claims in this suit.

5. THAT the costs of and occasioned by this Application be provided for.

(2) The application which was premised upon **Order 51 Rule 15 of the Civil Procedure Rules 2010, Section 34 of the Civil Procedure**, the Inherent Jurisdiction of this Honourable Court and all other enabling provisions of the law was supported by the Affidavit of even date sworn by **JOHN MBALUTO**, an Advocate of the High Court of Kenya the Affidavit dated **2nd April 2019** and the Supplementary Affidavit sworn by **WALTER AMOKO**, Advocate of the High Court of Kenya.

(3) The Plaintiff/Respondents opposed the application through the Replying Affidavit dated **23rd April 2019**, sworn by **STEPHEN MUKIRI NDEGWA** the 1st Plaintiff/Respondent who is also a Director of **CONTINENTAL MARKETING LIMITED** (the 2nd Plaintiff/Respondent herein).

(4) The application was canvassed by way of written submissions. The Defendant/Applicants filed their written submissions on **7th June 2019** and filed Supplementary Submissions on **30th July 2019**. The Plaintiff/Respondents filed their written submissions on **15th July 2019**.

BACKGROUND

(5) Vide a judgment dated **2nd May 2008** the 2nd Respondent was awarded the sum of **USD 32,869.26** together with interest at court rates from the date of filing of the suit until payment in full. The Defendant/Applicants filed an appeal against said judgment, which appeal was partially successful. In their judgment of **11th July 2014** the Court of Appeal varied the judgment of the High Court and reduced the sum awarded to the Plaintiff/Respondent from **USD 32,869.26** to **Kshs.1,939,286.30**.

(6) The Defendant/Applicant alleges that vide a consent entered into between the parties on **10th August 2015** all the Respondents claim were settled by the Applicant at an aggregate sum of **Kshs.10.7 Million** as full and final settlement of the suit. This sum comprised of

Kshs.7.5 Million due to the 2nd Plaintiff and costs of **Kshs.3.2 Million.**

(7) On **1st March 2019 Messrs Matosha & Advocates** acting for the Plaintiffs wrote to the Defendant Bank demanding payment of **Kshs.215,477,964.74**. The Defendants by their reply of **8th March 2019** asserted that the Plaintiff's claim had been settled in full as there had been accord and satisfaction. The Defendant therefore categorically denied that the Plaintiff had any further claims as against the Bank.

(8) On **18th March 2019**, the Plaintiff/Respondents applied for a Notice to Show Cause to issue for the attachment of the Defendant for the decretal sum of **Kshs.215,477,969.74**. The Notice to Show Cause was heard by **Hon Claire Wanyama,** Deputy Registrar and subsequently warrants of Attachment and sale of the Defendant's property were issued on **2nd April 2019.**

(9) The Defendant/Applicant seeks to have said Warrants of Attachment and sale set aside on grounds that the same were issued without the Applicants having an opportunity to present their side of the case. This is because an Affidavit in Response to the **NTSC** which was to be filed on the morning of **2nd April 2019** could not be filed in time due to delays at the Court Registry. Further that **Mr. Mbaluto** the Defendant's Advocate who was to appear before the Deputy Registrar in order to argue against the **NTSC** was held up in another matter that same morning before **Hon Justice Githua** and did not make it before the Hon. Deputy Registrar on time. The Court thus proceeded to issue the Warrants of Attachment and sale against the Defendant without hearing from the Defendant's Advocates.

(10) The Defendant/Applicant raises the following as the grounds upon which their application to have the warrants of Attachment and sale set aside on grounds that the same were obtained by the Plaintiff/Respondents on the basis of falsehoods as well as material non-disclosure which include:-

(i) It was represented that no appeal had been filed, yet not only had the Defendant appealed, but the Court of Appeal had varied the decretal figure.

(ii) It was represented that no payment had been made yet the Defendant had paid the sum of **Kshs.10,700,000/=** in terms of the consent in full and final settlement.

(iii) The sum claimed of **Kshs.215,477,969.74** is upon the application of a rate of interest which the Plaintiffs had sought to be awarded by their application dated **1st February 2018** which application was dismissed by **Kasango J** on **29th November 2018.**

(iv) In view of the consent filed on **10th August 2015,** and the payment made by the Defendant which has never been set aside, there are no further sums due to either Plaintiff from the Defendant either as sought or at all.

ANALYSIS AND DETERMINATION

(11) I have carefully considered the rival submissions filed in this matter as well as the relevant law. The following two issues arise for determination.

(i) sufficient basis been laid to have the Warrants of Attachment and sale issued on 2nd April 2019 set aside.

(ii) Is the consent of 10th August 2015 binding on the parties.

(i) Ought the Warrants of Attachment and sale issued on 2nd April 2019 be lifted

(12) The Applicants pray that the Warrants of Attachment and sale issued in this matter by **Hon Claire Wanyama** Deputy Registrar be lifted. They submit that the Advocate who was to represent the Applicants at the hearing of the Notice to Show Cause was not able to make it to Court in time and thus the matter was heard in their absence.

(13) **Order 51 Rule 15** of the **Civil Procedure Rules, 2010** provides that the Court may set aside an order which has been made Ex parte. What is required is that the Court be satisfied that there exist good and sufficient reasons to set aside such Ex parte Order.

(14) I have perused the Supporting Affidavit dated **2nd April 2019** sworn by **Advocate John Mbaluto**. In it Counsel states that he had prepared an Affidavit in Response to the Notice to Show Cause filed by the Plaintiff which affidavit was due to be filed in court on the morning of **2nd April 2019**. However due to delays in the Court Registry said Affidavit was not filed in time.

(15) The Courts have severally decried the habit of some Advocates have of filing relevant documents on the date of hearing of the matter in question. Advocates must learn to file their documents within good time or at least three (3) clear days before a matter is scheduled for hearing. This habit of skidding into the Registry at the last minute seeking to file documents relating to a matter to be heard that very day is what leads to congestion in the Registry as well as misfiling of documents. In this matter had the Reply been filed in good time, it would have been on the court file on the date for hearing of the **NTSC** and the court would undoubtedly have taken note of the same. The delay in filing the Applicant's response to the **NTSC** lies squarely at the feet of Counsel on record. No reasons are given as to why this Reply could not be filed in good time.

(16) The Advocate further avers that on the date when the **NTSC** was scheduled for hearing before the Hon Deputy Registrar, he had another matter before **Hon Justice Githua**. Thus when the **NTSC** was called out by the Hon Deputy Registrar Counsel for the Applicant was on his feet before **Hon Justice Githua**. The pupil who had been left to monitor the matter before the Hon Deputy Registrar was unable to communicate with counsel on time and thus by the time he managed to complete the matter before the Judge and rush to the Court of the

Deputy Registrar the Warrants of Attachment and sale against the Defendant bank had already been issued.

(17) Here again I find that this was a question of proper planning and organization by counsel of his diary. He ought to have sought a fellow Advocate to hold his brief before the Hon Deputy Registrar as he proceeded with the matter before the Hon Judge. Having said that it is clear that the errors or omissions which led to the lack of representation for the Applicant when the **NTSC** came up for hearing cannot be blamed on the client. I find that these were all errors of counsel which led to the making of orders adverse to the Applicant. The Applicant ought not be punished for the and/or faults of his Advocate.

(18) In **PHILLIP CHEMWOLO & ANOTHER –VS- AUGUSTINE KUBEDE [1982-88] KAR** the Court held that:-

> **"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter unless there is fraud or intention to over each there is no error or default that cannot be put right by payment of costs. The court it is often said exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline."**

I find that Counsel for the applicant has explained the events that led to his failure to appear in court to defend the **NTSC.** While I feel counsel could have acted more efficiently. I do find that it would be wrong to penalize the client in the circumstances.

(19) The Applicant further submits that the Warrants of Attachment and sale issued on **2nd April 2019** ought to be set aside because the same were obtained based on falsehoods and material non-disclosure on the part of the Plaintiff/Respondent. In their **NTSC** application dated **18th March 2019** the Respondents stated that no appeal had been filed against the judgment delivered in their favour on **2nd May 2008** in **HCCC No.132 of 2008**. This as it turns out was not correct. The Applicants had filed an appeal against that judgment and the Respondents filed across- appeal. This was an outright falsehood.

(20) The Plaintiff/Respondents in their **NTSC** claimed that there had been no payment and/or adjustment of the decretal sum. This again was not true as the Court of Appeal in its judgment delivered on **11th July 2014** adjusted the Decretal sum from **USD 32,869.26** to **Kshs.1,939,286.30**. The claim that no payment had been made towards settling the decretal sum is also challenged by the Applicants who maintain that a sum of **Kshs.10.7 Million** was paid to the Respondent's Advocate in full and final settlement of the decretal sum (more of this later). It is quite obvious that the Applicant has been less than candid in the statements made in its application for execution.

(21) The Applicant also accuses the Respondent of material non-disclosure in that they failed to disclose the existence of a consent entered into between the parties on **10th August 2015**. The Respondent denies having instructed its Advocate to enter into any consent on its behalf and states that it has reported the matter to the Advocates Disciplinary Tribunal. Notwithstanding the Respondents challenge to the validity of the said consent they were obliged to at least reveal the existence of the same to the Court. I am guided by the case of **RE: KENYA NATIONAL FEDERATION OF CO-OPERATIVES LTD & OTHERS [2004] 2E.A** in which **Hon Justice Mohamed Ibrahim** (as he then was) stated:-

> **"…It does not matter the type of case or matter, once a matter is before the Court in the absence of another or other parties (ex parte) the duty of full and frank disclosures are imposed on the applicants and the standard must always be fairly high considering the authorities."**

(22) The learned Judge went on to cite with approval the decision of **Carnwath J in MEMORY CORPORATION PLC –VS- SIDHU [200] 1WLR 1443** that:-

> **"Full disclosure must be linked to fair presentation. The Judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Once that confidence is undermined he is lost…"**

(23) I agree with the learned Judge that courts must insist on strict compliance with the rules pertaining to full disclosure in order to afford protection to the absent party at the ex parte stage. I highly doubt that the Hon Deputy Registrar would have proceeded to issue Warrants of Attachment and sale had she been made aware of the existence of said Consent (whether challenged or not). Indeed the record indicates that on **2nd April 2019,** counsel acting for the Plaintiff/Respondent stated as follows:-

> **"The decree has never been settled to date. The decree was for 1/7/2008."**

(24) No mention was made of the fact that a sum of **Kshs.10.7 Million** had been paid and received by an Advocate then on record for the Respondents. This was a crucial and material fact which the Respondents were fully aware of as they had filed a complaint with the Advocates Disciplinary Tribunal over the same and were obliged to bring to the attention of the Court.

(25) I find and hold that the Plaintiff/Respondent did obtain issuance of the Warrants of Attachment and sale through perpetration of blatant falsehoods and by material non-disclosure to the trial court. On this basis those warrants are for setting aside. Accordingly having been satisfied that sufficient reason has been advanced by the Defendant/Applicant, I do hereby set aside the Warrants of Attachment and sale issued in this matter on **2nd April 2019.**

Validity of the Consent dated 10th August 2015

(26) The Defendant/Applicant contends that there has been full satisfaction of the amount due to the Plaintiff/Respondents. They rely on the Consent dated **10th August 2015**, and claim that a sum of **Kshs.10.7 Million** was paid to Counsel on record at the time for the

Respondents in full and final satisfaction of the suit.

(27) On their part the Plaintiff/Respondents deny having instructed their Advocate to enter into any consent and claim that they have taken the matter before the Advocates Disciplinary Tribunal. The Respondents submit that the said Consent is not valid on enforceable or two reasons. Firstly, that they did not instruct their Advocates to enter into any consent and secondly the said consent having never been adopted as an order of the Court cannot be enforced by the Court.

(28) I have looked at the Consent in question (annexture **"T04"** to the Supporting Affidavit) sworn by **Mr. TOM OGOLA** sworn in support of this Application. The said Consent which was filed in court on **24th August 2015** reads as follows:-

> **"By consent**
>
> **The above mentioned be settled on the following terms:-**
>
> > **a) The Defendant pay the aggregate sum of Kshs.10.7 Million consisting of the sum due to the 2nd Plaintiff of Kshs.7.5 million and costs of Kshs.3.2 million in full and final settlement within 21 days.**
> >
> > **b) The Defendant to execute the discharge of the charged property and release the title documents within the said period of 21 days;**
> >
> > **c) In default of payment at the expiry of 21 days from the date of this consent, execution to continue; and**
> >
> > **d) The Defendant to meet the costs of the Auctioneer."**

(29) That Consent is signed by **Mr. Walter Amoko Advocates** for the Defendant on the one hand and **Kelvin Mogeni Advocate** for the Plaintiff/Respondent on the other. There is no contest that at the time the Consent was entered into signed **Mr. Kelvin Mogeni** had instructions and was acting for the Plaintiffs. There is also no contest that pursuant to that Consent the sum of **Kshs.10.7 Million** was transferred into the client account of **Mr. Kelvin Mogeni**, by the Defendant's Advocates. The remittance Advice is annexture **"WAI"** to the supplementary Affidavit sworn by **Mr Walter Amoke** on **4th April 2019**.

(30) By virtue of being on record for the Plaintiffs an Advocate is deemed to be acting at all times with the full consent and with full instructions from his client. The Plaintiff/Respondents cannot run away from a consent entered into on their behalf by their Advocate on record at the time. In **FLORA N. WASIKE –VS- DESTINO WAMBOKO [1988] eKLR**, the Court of Appeal stated as follows:-

> **"Furthermore WAUGH –VS- H.B CLIFFORD & SONS [1982] Ch 374 is persuasive authority that a solicitor or Counsel would ordinarily have ostensible authority to compromise suit so far as the opponent is concerned….**[own emphasis]

(31) Although the Plaintiff claims to have taken his advocate before the Disciplinary Tribunal for acting without his consent there is a loud silence regarding whether or not the said Advocate transferred the **Kshs.10.7 Million** to the Plaintiff/Respondent. In any event it is clear that the Consent of **10th August** was performed. At this point and in the absence of any decision from the Disciplinary Committee confirming that the Plaintiffs Advocate acted without consent in entering into this consent, this court can only conclude that as Counsel on record he was acting willful authority of his client. The Consent as signed is valid unless and until an order to set it aside is made. No application has been made by the Plaintiff (who disputes the consent) to have it set aside. The Court was informed that on **2nd September 2016**, the 2nd Plaintiff filed an application to set aside the consent but later withdrew the application on **5th December 2017**. As such the Consent remains valid and on record as it was filed in Court on **24th August 2015**. As such I find the said consent is valid.

(32) The Applicants seek a declaration that they have fully satisfied its obligations to the Plaintiff arising from the suit. This relates to enforceability of the Consent. Whilst I do find that in pursuance of the consent dated **10th August 2015** the sum of **Kshs.10.7** Million was indeed transferred to the Plaintiff's Advocate the court cannot ignore the fact raised by the Plaintiffs that this Consent was never adopted by the Court.

(33) In order for a Court to enforce a Consent, the same must have been duly adopted as an order of the Court. This consent was not so adopted and as such cannot be enforced by the court. This fact I believe informed the decision of **Hon lady Justice Mary Kasango** in her Ruling dated **29th November 2019** to give no consideration to the Consent dated **10th August 2015**.

(34) I find that this Consent will only be enforceable once it has been placed before court for adoption. As such the party seeking to place reliance on said consent must move the court to have the consent adopted as an order of Court. Only then will the consent dated **10th August 2015**, have effect and be enforceable by this Court. I therefore decline to issue the declaratory orders sought by prayer (4) of the Notice of Motion dated **2nd April 2019.**

CONCLUSION

Finally the Notice of Motion dated **2nd April 2019** succeeds only partially. The Court hereby makes the following Orders:-

(i) The Warrants of Attachment and sale issued by this Honourable Court on **2nd April 2019** be and are hereby set aside.

(ii) Prayer (4) of the Motion seeking declaratory orders is dismissed.

(iii) Each party to meet its own costs for this application.

It is so ordered.

Dated in **Nairobi** this **15th** day of **April 2020.**

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Justice Maureen A. Odero

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020,** this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

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Justice Maureen A. Odero