REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 568 OF 2008

TERRAZZO ENTERPRISES LIMITIED.....PLAINTIFF

-VERSUS-

PAVEMENT CLUB AND CAFE.....1ST DEFENDANT/JUDMENT DEBTOR

BLUE ELEPHANT LIMITED.....2ND DEFENDANT/JUDGMENT DEBTOR

SHAILESH PATEL.....3RD DEFENDANT/JUDGMENTDEBTOR

AND

JAIMINI PATEL.....1ST INTERESTED PARTY

SEEMA PATEL.....2ND INTERESTED PARTY

ARTHUR MILDOV.....3RD INTERESTED PARTY

VADIM MILDOV.....4TH INTERESTED PARTY

RULING

1. This ruling is in respect to the Notice of Motion dated 17th February 2020 wherein the 3rd defendant applicant seeks orders that: -

> ***1. That this Honourable Court be pleased to review and/or set aside and/or vacate the Ruling delivered on 3rd October 2016, by the Honourable Justice Farah Amin, and all consequential orders the same having been obtained through fraud, misrepresentation and non-disclosure of material facts.***
>
> ***2. Costs of this application.***

2. The application is supported by the 3rd defendant's affidavit and is premised on the grounds that: -

> ***1. The 3rd defendant herein, being unable to settle his debts, filed in the High Court at Nairobi Bankruptcy Cause No. 5 of 2010.***
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> ***2. A Receiving Order was subsequently issued against him.***
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> ***3. The plaintiff herein, being aware of the Bankruptcy proceedings filed their proof of debt and proceeded to publicly examine the 3rd defendant herein.***
>
> ***4. The plaintiff was aware at the date of filing of the application dated ** which gave rise to the impugned ruling, of the events hereinabove mentioned as the actively participated in the Bankruptcy Proceedings.***
>
> ***5. Failing to inform this Honourable court of the fact a Receiving Order had been filed against the 3rd defendant amounts to willful non-disclosure of material facts on the part of the plaintiff.***

3. A summary of the 3rd defendant's case is that he gave his personal guarantee for loans that the defendant owed the plaintiff as a Director of the 1st defendant company. He states that after the 1st defendant's business was demolished in 2009, he was unable to meet his financial obligations thereby prompting him to file for bankruptcy in Nairobi Bankruptcy Case No. 5 of 2010 wherein the plaintiff was recognized as a creditor and a receiving order issued as shown in Annexure **"SP-3"**.

4. He accuses the plaintiff of withholding crucial information from the court regarding the Bankruptcy Petition, the Receiving, the 3rd Defendant's Public examination in the Bankruptcy Petition and the fact that all the accounting documents were destroyed during the 1st defendant's aforesaid demolition.

5. The plaintiff/respondent opposed the application through the Replying Affidavit of its Managing Director, **Gopal Patel**, who avers that the application is baseless and discloses no reasonable cause of action. He states that there is a valid decree issued on 8th December 2009 emanating from the summary judgment of Justice Khaminwa in the sum of Kshs 16,598,988 and that there is no application or order for stay of execution of the decree or ruling of 3rd October 2016.

6. He further states that the present suit was filed in 2008 and the alleged demolition carried out in June 2009 while the Bankruptcy Cause was filed in February 2010. He adds that the order to cross examine the 1st defendants former and present director was issued on 3rd October 2016.

7. He further avers that on 17th February 2010, the Official Receiver noted that the Debtor had proposed to pay off the debt by instalments but that to date the 3rd defendant has not submitted any proposal on the payments. He further states that the Bankruptcy Petition is opposed and is still pending the judgment of the court.

8. It is the respondent's case that the 4 years' delay in filing the present application is meant to frustrate its efforts in realizing the fruits of its judgment in respect of a debt which the 3rd defendant acknowledged.

9. In a rejoinder to the respondent's replying affidavits, the applicant swore a further affidavit wherein he avers that he was never served with the application dated 17th September 2014 or the resultant impugned ruling of 3rd October 2016 and that he only learnt of the order when he received a notice to attend court for cross examination on 24th November 2019.

10. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the applicant/3rd defendant has made out a case for the setting aside and /or review of the Ruling delivered on 3rd October 2016.

11. The applicant faulted the respondent for failing to disclose the existence of a Receiving Order issued against him on 17th February 2010. On its part, the plaintiff relied on the provisions of Section 48 of the Insolvency Act and argued that a Receiving Order does not operate as an automatic bar to the pending court proceedings against a debtor. The section stipulates as follows: -

> ***1. "When a bankruptcy order commences-***
>
> ***a) All proceedings to recover the bankrupt's debts are stayed; and***
>
> ***b) The property of the bankrupt (whether in or outside Kenya), and the powers that the bankrupt could have exercised in respect of that property for the bankrupt's own benefit, vest in the Official Receiver.***
>
> ***2. Despite subsection (1), the court may, on the application by a creditor or other person interested in the bankruptcy, allow proceedings that had already begun before the bankruptcy commenced to continue on such terms as the court considers appropriate.***

12. The plaintiff further cited Section 306(7) (c) of the Insolvency Act for the argument that it obtained the courts approval to cross examine the 3rd defendant and the 1st and 2nd interested parties vide the impugned Ruling which had not been stayed.

13. Section 306(7) (c) of the Act stipulates as follows: -

> ***"…. While an interim order has effect in respect of a debtor-***
>
> ***c) "any other proceedings (including execution or other legal process) may be begun or continues, and distress may be levied, against the debtor or the debtor's property only with the approval of the court."***

14. The plaintiff case is that the 3rd defendant is not entitled to the discretionary orders sought herein.

Setting aside orders

15. In the case of ***Pithon Waweru Maina v Thuku Mugira*** **(1983) eKLR, t**he principles governing setting aside of ex-parte judgments obtained in the absence of an appearance or defence by the defendant or upon failure by the defendant to attend the hearing were stated as follows:

a) Firstly, 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.

b) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. As stated in Shah V Mbogo (1967) EA 116 at 123 and Shabir Din V Ram Parkash Anand (1955) 22 EACA 48

c) Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that as a result there has been injustice.

d)* Additionally*, the court has no discretion where it appears there has been no proper service (Kanji Naram v Velji Ramji (1954) 21EACA 20

e)* It is also important to note that *a discretionary power should be exercised judicially and in a selective and discriminatory manner not arbitrarily and idiosyncratically Smith V Middleton (1972) SC 30

16. I find that the above principles are applicable to instant application, it is necessary to note that the impugned orders of 3rd October 2016 were as follows:

1. The Preliminary Objection is dismissed.

2. Leave is granted for the cross examination of (i) Shailesh Patel, Jaimini Patel and Seema Patel on a dates to be fixed. In they even they fail to attend, summons shall issue.

3. The First defendant, the 3rd defendant and 1st and 2nd interested parties shall file and serve copies of all documents in their power custody and control pertaining to the issues and the time periods set out above.

4. In particular, the defendant and the interested parties shall produce the audited accounts for the period up to 30th November 2016.

5. The interested parties to pay the costs of the application to be shared equally and giving rise to joint and several liabilities.

Orders accordingly.

17. I note that the impugned Ruling was delivered in the absence of the plaintiff but in the presence of **Miss Baraza** for the defendants and the interested parties.

18. Courts have taken the position that they will exercise their discretionary powers to set aside orders only in the most deserving and not to assist a party who seeks to obstruct or delay justice. In the present case, the plaintiff accused the 3rd defendants of a 4 years' delay in filing the subject application. On its part, the 3rd defendant explained that it was not aware of the existence of the impugned ruling until 26th November 2019 when he was served with a notice to attend court for cross examination.

19. This court is of the view that the 3rd defendant was not very truthful in its reasons for seeking the orders to set aside the impugned ruling. I say so because the applicant concedes, in his affidavit in support of the application, that he is a former Director of the 1st defendant company but that he subsequently resigned. He however does not disclose when, if at all, he resigned from this directorship position. I note that the 1st defendant was represented by **Miss Barasa** at the time the impugned ruling was delivered**.** I therefore find that the 3rd defendant cannot claim that he was not aware of a ruling delivered in the presence of his company's lawyer.

20. I further note **Mr. Okoth** represented the 3rd defendant in proceedings that took place as soon as the impugned ruling was delivered and he cannot, in the circumstances of this case, claim that he was unaware of the said ruling until 2019.

21. My further finding is that even though the applicant contends that no leave was obtained from the court to cross examine him, the wordings of the impugned ruling at paragraph 2 thereof is clear that the court granted leave for his cross examination alongside the interested parties.

22. I also find that Section 48 of the Act allows proceedings that had already began before a Bankruptcy cause to continue on such terms as the court may consider appropriate.

23. For the above reasons, I am not persuaded that the applicant has made out a case for setting aside of the impugned orders.

Review

24. The question which also arises in these proceedings is whether the applicant has made out as a case for a review of the impugned orders.

25. Order 45 Rule 1 of the Civil Procedure Rules stipulates as follows:

> ***1. (1) Any person considering himself aggrieved—***
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> ***(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.***

26. In ***Muyodi v Industrial and Commercial Development Corporation & Another*** **[2006] 1 EA 243,** the Court of Appeal described an error apparent on the face of the record as follows:

> ***"…In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said 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 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 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***
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> ***cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us." (emphasis mine)"***

27. On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in ***Pancras T. Swai v Kenya Breweries Limited*** **[2014] eKLR** held that:

> *"In* ***Francis Origo & another v. Jacob Kumali Mungala*** *(C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated: -*
>
> ***"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."***
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> *We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.*
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> *We think Bennett J was correct in* ***Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557*** *when he held that:*
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> ***"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal"***

28. I have considered the reasons advanced by the Applicant for seeking an order of review. It is my considered view that the applicant has not satisfied the requirements for grant of the orders of review. As I have already noted in this ruling, the instant application filed almost 4 years after the impugned ruling was delivered, cannot be said to have been filed without undue delay.

29. In sum, I find that the instant application is not merited and the order that commends itself to me is to order to dismiss it with costs to the plaintiff/respondent.

Dated, signed and delivered via Microsoft Teams at Nairobi this 14th day of October 2020 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:

Miss Ndinda for Mr. Odoyo for plaintiff/respondent.

Miss Odemu for Miss Kamau for 3rd defendant.

Mr. Okoth for 1st and 2nd Interested Party.

Court Assistant: Sylvia