



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

COMM CASE E016 OF 2018

LOGISTICS GLOBAL LOGISTICS LIMITED..... PLAINTIFF

VERSUS

STANBIC BANK KENYA LIMITED.....1ST DEFENDANT

LEAKEY AUCTIONEERS APPLICANT.....2ND DEFENDANT

RULING

PLEADINGS:

By an application dated 7th January 2019, the Applicants sought the following orders;

- a) **The orders granted on 13th December 2018 be set aside , vacated and reviewed pending the hearing of the application;**
- b) **The orders granted on 13th December 2018 be set aside , vacated and reviewed pending the hearing of the suit;**
- c) **The Plaintiff/ Applicant be granted 60 days to conclude its agreement with Dubai Islamic Bank to take over the loan facility from the Defendant.**

The grounds of this application were based on;

- 1) **That the Plaintiff had entered into an agreement with Dubai Islamic Bank to take over the loan facility from the Defendant;**
- 2) **That the agreement could not be successfully concluded when there was uncertainty about the status of the Plaintiff Company's assets;**
- 3) **That the Defendant disposed some of the Plaintiff's assets at a time when the matter was still in court and stay had been granted hence the necessity of seeking these orders for a smooth transition;**
- 4) **That due to the Defendants' acting in bad faith the Applicant opted to engage Dubai Islamic Bank to take over the loan facility.**

The application was supported by the affidavit of **Osman Abdullahi Osman** who stated that the Plaintiff instituted the proceedings and obtained a stay on condition that **Kshs.5,000,000/-** was to be paid by the Plaintiff to the Defendant. He claimed that while the matter was still in court and stay orders were still in force, the Defendants through its agents disposed some assets namely trucks registration **No. KCG 593, KCG 595M**, Excavator caterpillar registration **No. KHMA 535J** and wheel loader registration **No. KHMA 535J**. The Defendants have never accounted for the proceeds of the sale to enable the Plaintiff ascertain the recovery of outstanding debt. The Plaintiff was also certain that the proceeds exceeded **Kshs. 5,000,000/-** Throughout the engagement between the parties, the Defendant failed to disclose to their advocates on record that there were negotiations between the parties, which showed that the Defendant was not acting in good faith.

At this point, the Plaintiff opted to engage another bank to take over the loan facility, which was communicated, to the Defendants. The Plaintiff undertook that if the takeover was not finalized within **60 days** from the date of the stay as requested, then they would park the trucks at their own costs within 14 days after the lapse of the 60 days.

DEFENDANT/RESPONDENT SUBMISSIONS

The Defendants' replied to the application above on 18th January 2019 by the affidavit of one **Mr. Hamilton Suba** who stated that; the Applicant had not satisfied the court on the grounds for review. There must be an error on the face of the record, the discovery of new evidence, which existed but was not in the knowledge of either party or for sufficient reason.

The Defendants also claimed that the Plaintiff/Applicant was in contempt of court previously by failing to comply with the various directions given by the court. He further states that the Applicant had not disclosed when it started the discussions with the said financial institution as no correspondence to this effect was annexed to the instant application. The Applicant did not avail evidence confirming its claim of the intended takeover by the said financier. The 1st Defendant stated that the Applicants are not being forthright in the nature of the facility it was pursuing since the Applicant was aware it had several types of facilities with the Respondent.

He claimed that the Applicants failed to disclose to the court that the vehicles that were securities were taken out of the jurisdiction of the court to curtail recovery efforts by keeping the securities away and out of reach of the Respondents. The Applicants were also said to continuously vandalize and interfere with the condition of the said vehicles which consequently led to the orders that the vehicles be repossessed back to the country.

In the Defendants submissions dated 5th March 2019, the issue for determination is whether or not the Applicant had established any basis for the orders sought **Order 45 CPR 2010; review of the Court order of 13th December 2018.**

It was the Defendant's submission that the Plaintiff had not satisfied the grounds for review. The nature of the order sought by the Plaintiff does not set out the legal basis on review of the Court orders granted.

The Defendant also submitted that the Applicants cannot legally interfere with the orders dated 13th December 2018 unless they set a basis for review, setting aside or variation or lodge an appeal to the said ruling.

The Defendant submitted that the Plaintiff attempted to mislead the court into re-opening a matter by claiming that the Defendant withheld information from the court. The Defendant claims that it was indeed the Plaintiff who failed to disclose to the court the meetings it had with Dubai Islamic Bank which was information well within its knowledge and no evidence has been filed in court regarding their discussions.

The Defendant also submitted that the Plaintiff has no substantial basis for the prayer that the Applicant be granted a period of 60 days to conclude the contract. The 60 days had lapsed since the filing of the application where the Plaintiff had still not availed the information on request for the other financial institution to take over the debt.

The Defendant submitted that the Plaintiff attempted to defeat justice by keeping away the securities from the reach of the bank and away from the court's jurisdiction. The Defendant further submitted that the allegation that the vehicles were sold cannot be a basis for the court to review the orders since the Applicant was the same party who requested for **40 days** to pay the arrears as indicated in the Replying Affidavit.

PLAINTIFF'S FURTHER AFFIDAVIT

The Plaintiffs filed a further supporting affidavit by **Osman Abdullahi** Osman dated 6th February 2019 in response to the Defendants replying affidavit dated 18th of January 2019. In response to the Defendant's claim that the Applicant had not satisfied the court the grounds of review; the Applicant stated that firstly, the application was filed within time. Secondly, there were new developments which were not before the court when the orders dated 13th December 2018 were granted. 2 trucks and trailers had been sold by the Defendant and since the Defendant had received more than the Kshs.5,000,000/- as was ordered by the court the orders then should be reviewed. The Plaintiff stated that there was also a third player now named Dubai Islamic Bank.

PLAINTIFF'S SUBMISSIONS

On this issue, the Plaintiff filed submissions for review dated 6th February 2019, where they relied on **Order 45 rule 1 of the Civil Procedure Rules 2010** which provides;

“Application for review of decree or order

(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.”

The Plaintiff avers that the court should look at whether the information that some assets had been sold and that the Defendant was in possession of more funds than what the Plaintiff was to deposit was a reasonable ground for review. The above information is said to have been in the Defendants knowledge who failed to disclose to the court. The Plaintiff relied on the case of **Court Appeal Decision in Civil**

Appeal 235 of 1997 between the Official Receiver and the Liquidator and Frieght Forwarders Kenya Ltd where Okubasu J.A stated that;

“I would add that I also agree with the reasoning of Nyarangi J.A that the third head under Ord 44 r. 1(1), enabling a party to apply for a review namely "or for any other sufficient reason" is not necessarily confined to the kind of reason stated in the two preceding heads in that sub-rule, which do not themselves form a "genus or class of things with which the third general head could be said to be analogous”.

With regard to the claim of the Applicant being in contempt of court, the Applicant responded by denying the allegation and stating that they have always tried to solve the matter amicably, however, the Defendants did not always honour what was agreed in the meetings held including the fact that they sold the Plaintiff’s assets.

The Plaintiff also responded to the allegation that the Defendants were not aware of the takeover intention by stating that, on the 15th of January 2019, the Defendant who was on his feet, admitted to being aware of the takeover intention.

The Plaintiff claimed that the Defendants have not been giving them peace to attend to meaningful business in order to repay the loan. They further responded that they have always acted in good faith but the Defendant wants to misinterpret facts that they have not been briefed on everything the Plaintiffs do.

The Plaintiff denies interfering with the vehicles in changing the paint work and number plates. It also denies the allegation of frustrating court orders and claims that the Defendant is the one trying to frustrate their efforts to conduct business.

DETERMINATION

The court considered the above facts of the case and makes a determination on the following issue;

1. Whether the Plaintiff has made out a case for the grounds of review

The court makes reference to the case of James Mwaniki Kamau v Republic [2018] eKLR, where the learned Judge reiterated the case below which stated that;

“A similar situation arose before the Court of Appeal in the case of Rose Kaiza –vs- Angelo MpanjuKaiza – Mombasa Court of Appeal Civil Appeal No.225 of 2008(unreported). The court expressed the need for caution in the following words:-

“Applications on this ground must be treated with great caution... Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the Petitioner had not acted with due diligence it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

The court also relied on the case of Salama Mahmoud Saad v Kikas Investments Limited & another [2014] eKLR the court held that;

“The Applicant has not shown that the new and important matter of evidence, 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. The information which the Applicant says is new and important evidence was all along within the reach of the Applicant or could easily have been obtained by him, In those circumstances, under Order 45 of the CPR, the question of ‘discovery’ of new evidence does not, therefore, arise.”

The Court finds that it is the Plaintiff who failed to disclose to the court the meetings it had with **Dubai Islamic Bank**, which was information well within its knowledge and no evidence has been filed in court regarding their discussions. *From the above submissions by the parties, it is evident to the court that the takeover intention between the Plaintiff and Dubai Islamic Bank was within the knowledge of the Plaintiff. The Plaintiff can therefore not rely on the ground that Dubai Islamic Bank is a new development which was not before the court at the time the application that culminated with Court orders of 13th December 2018 was heard.*

Secondly, this Court did not find any of the requirements of review of Court orders of 13th December 2018. The Court granted conditional stay by the Plaintiff depositing **Ksh 5million** in court. The Plaintiff did not confirm compliance with the Court order. Thirdly, the Plaintiff/Applicant did not contest indebtedness to the Defendant Bank. Instead of settling the same and/or renegotiating/restructuring payment schedule; the Applicant opted to move to another financial institution without first fulfilling its legal obligations with the Defendant bank. Fourthly, the Plaintiff sought 60 days to complete the takeover of the facility with defendant bank to Dubai Islamic Bank; in spite of no production of evidence that such negotiations were on going, at this point of Ruling, there has been more than **60 days** to complete the same. It would be necessary to pursue the same at this point. Finally, the Plaintiff /Applicant did not make out a case for review of Court orders of 13th December 2018.

DISPOSITION

1. The application dated 7th January 2019 is hereby dismissed with costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH JUNE 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

N/A FOR PLAINTIFF

N/A FOR DEFENDANT

COURT ASSISTANT -JASMINE