



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 395 OF 2017**

**A. A. BAYUSUF & SONS LTD.....PLAINTIFF**

**VERSUS**

**NORTHERN WATER SERVICES BOARD.....DEFENDANT**

**R U L I N G**

1. This ruling is on three applications dated 14<sup>th</sup> August, 20<sup>th</sup> August and 26<sup>th</sup> August 2019.

**BACKGROUND**

2. This Court by its Ruling of 8<sup>th</sup> May 2019 entered summary Judgment for the Plaintiff against the Defendant for Kshs. 4,381,784, Kshs. 12,480,320 and Kshs. 29,620,838.33 with interest. There was no other event in this matter until the Plaintiff filed its Garnishee proceedings application dated 14<sup>th</sup> August 2019. By that application the Plaintiff seeks to attach the proceeds of the Defendant's bank accounts with Kenya Commercial Bank Limited Garissa Branch accounts. On 16<sup>th</sup> August 2019 the Court granted Garnishee Nisi Orders. The Plaintiff now seeks those Orders to be made absolute. That Order is now the subject of this Ruling.

3. The Defendant filed Notice of Motion applications dated 20<sup>th</sup> August 2019, seeking review of the Order for summary Judgment and an application dated 26<sup>th</sup> August 2019 seeking the setting aside of the Garnishee Nisi Order, and the hearing of the Garnishee proceedings *de novo*, with its participation.

4. The Order of considering the three applications, in this Ruling, will be determined by the effect and the outcome that each will have on the others. I will begin by considering the Defendant's application dated 20<sup>th</sup> August 2019 which seeks to review the Order for entry of summary Judgment, against it. The second application that I will consider is the Defendant's application dated 26<sup>th</sup> August 2019 which seeks to set aside the Order of Garnishee Nisi. The last application to be considered will be the Plaintiff's application dated 14<sup>th</sup> August 2019. That application is seeking Garnishee Nisi Order be made absolute. It will be appreciated that if the Defendant's application for the review of entry of summary Judgment succeeds there will be no basis to consider the other two applications.

**NOTICE OF MOTION DATED 20<sup>TH</sup> AUGUST 2019**

5. By this application the Defendant seeks review of the Order of 8<sup>th</sup> May 2019 whereby summary Judgment was entered against it.

6. The application is supported by the affidavit of Abdikadir N. Osman. He began by deponing that the Defendant was aggrieved by the entry of summary Judgment against it on 8<sup>th</sup> May 2019. The deponent then deponed as follows:

*“4. That the Defendant seeks review on the ground of mistake or error apparent on the record as the Order subjugates express statutory provisions on inspection and acceptance to the general principles of the law of contract.*

*5. That the Order is erroneous as it disregards the fact that the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006 thereunder are an exception to the general law of contract.*

*6. That the Order is erroneous as it disregards the duty of the Plaintiff to confirm the Defendant's complied with the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006.*

*7. That the suit is barred by the case filed by the Plaintiff which case is pending before the Dispute Resolution Expert (DRE).*

Annexed hereto and marked "ANO 3" is a copy of the proceedings.

**8. That the Plaintiff therefore came to the Court with dirty hands by concealing from it the proceedings it initiated and that are pending before the DRE.**

7. Essentially, as is it to be noted from the depositions above, the Defendant is of the view that the Court committed an error in law in entering summary Judgment.

8. The Plaintiff opposed that application on the grounds that the Defendant was seeking the Court to revisit and reconsider the application for summary Judgment and to reach a different conclusion; and on the ground that if the Court had reached the wrong conclusion of law the Defendant should have appealed against the decision rather than seek a review.

### **ANALYSIS**

9. Review of a decree or Order is made under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules (the Rules). Order 45 Rule 1 of the Rules provides

**(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.**

10. The Defendant did not in making the present application, bring before Court any new or important matter which was not within its knowledge when the summary Judgment application was entertained. The issue relating to this matter in the application of the Public Procurement and Disposal Act 2005, was raised by the Defendant at the hearing of the summary Judgment application. Similarly, the Defendant argued that the Plaintiff's work needed to be inspected before Plaintiff could be entitled to be paid. The Defendant also argued that the Plaintiff's claim was pending before the dispute resolution expert. In raising the same issues, in the application for review, the Defendant is seeking this Court to reconsider its decision which is not the intention of Order 45 Rule 1 of the Rules. The Defendant has similarly not shown the error of the Court but rather relies on its argument that the Court committed errors of law.

11. In the case **REPUBLIC V PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 2 OTHERS [2018] eKLR** the Court stated when a review can be granted as follows:

***"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."***

12. The Defendant, if it was of the view the Court committed an error in law in granting summary Judgment should have filed an appeal. This is what the Court of appeal in the case **PANCRASST SWAI VS KENYA BREWERIES LIMITED [2014] eKLR** stated:

***"The appellant's right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the Court was wrong either on account of wrong application of the law or due to failure to apply the law at all.***

***In National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported)) this Court, with respect, correctly held:***

***"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. I (sic) will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More (sic) can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review."***

***"... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own Judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.".....***

We think Bennett J was correct in **Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557** when he held that:

***“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”***

On the same point, the authors, *Chittaley & Rao in the Code of Civil Procedure (4thEdn) Vol.3, pg 3227* in explaining the distinction between a review and an appeal have this to say:

***“A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.”***

*It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which Court decisions that ought to be examined on appeal would be exposed to attacks in the Courts in which they were made under the guise of review when such Courts are factus officio and have no appellate jurisdiction.”*

13. Although the above quote of **Pancras Case (Supra)** is long-winded it however well explains when a party can seek appeal and when it can seek review. It is because the Defendant has failed to bring its application, dated 20<sup>th</sup> August 2019, within the provisions of Order 45 Rule 1 of the Rules, that it fails. The Defendant is seeking to appeal against the Order of this Court. It is dismissed with costs.

#### **NOTICE OF MOTION DATE 26<sup>TH</sup> AUGUST 2019**

14. The Defendant by this application seeks the setting aside of the decree Nisi Order by which the Court Ordered the attachment of the proceeds of the Defendant’s bank accounts in satisfaction of the decree herein. The Defendant seeks that after the Garnishee Nisi is set aside the Garnishee proceedings be heard *de novo* with its participation.

15. The affidavit in support of the application was sworn by Abdikadir N. Osman.

16. He deponed that Defendant’s bank account No. 1107800056 is an account where development project funds are banked. He gave those projects as Garissa Sewerage Project, Isiolo Water Sanitation, Water Harvesting Project, Drought Mitigation Programme and Water for Schools Project. The Defendant attached a document entitled Ministry of Water & Sanitation. According to the Defendant and relying on that document entitled Ministry of Water & Sanitation, the funds in the above mentioned bank account are not for use to satisfy the Judgment hereof but that they are for use for execution of public projects.

17. The Garnishee, Kenya Commercial Bank Limited, Garissa Branch (KCB), through its Branch Manager deponed that the bank account to which the Garnishee Nisi was directed were not holding the Defendant’s funds. Instead the bank gave the correct bank accounts of the Defendant which accounts have a credit balance of Kshs. 377,599,005.08. the Garnishee stated it has no claim on those funds but sought its costs of this matter.

#### **ANALYSIS**

18. The Defendant by the present application seeks to be given audience to oppose the Garnishee Nisi issued hereof. Order 23 Rule 1 of the Rules provides as follows:

***“1 (1) A Court may, upon the ex parte application of a decree- holder, and either before or after an oral examination of the Judgment- Debtor, and upon affidavit by the decree holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the Judgment-Debtor and is within the jurisdiction, Order that all debts (other than the salary or allowance coming within the provisions of Order 22, Rule 42 owing from such third person (hereinafter called the “Garnishee”) to the Judgment-Debtor shall be attached to answer the decree together with the costs of the Garnishee proceedings; and by the same or any subsequent Order it may be Ordered that the Garnishee shall appear before the Court to show cause why he should not pay to the decree- holder the debt due from him to the Judgment Debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.”***

The Court in the case **MENGICH T/A MENGICH & CO ADVOCATES & ANOTHER VS JOSEPH MABWAI & 10 OTHERS [2018] eKLR** considered the provision of that Rule and had this to say:

***“.....being a Garnishee application, the only proper party to be Garnisheed is the Bank. The rest of the Respondents are improperly enjoined in the application since they are not holding any money capable of being Garnisheed nor has it been alleged they hold any funds either individually or jointly. There is nothing to show that they are indebted to a Judgment Debtor as the law requires.”***

19. The proper party, in Garnishee proceedings, is the party indebted to the Judgment Debtor, as in this case the bank. An applicant to the Garnishee proceedings need only prove that there is in existence a decree which has not been satisfied. The Garnishee Order cannot be issued against salary or allowance. That seems to be the extent to which the Court will consider in granting Garnishee Orders. Although Order 23 Rule 1 provides that a Judgment Debtor may be examined orally it does, in my view, seem that such examination is related on whether or not the decree has been satisfied.

20. The Garnishee (KCB) indicated by affidavit evidence that it holds the funds in the bank account on behalf of the Judgment Debtor, the

Defendant. The Defendant presented a very unsatisfactory document by which it sought to show that the funds in its bank account were earmarked for other projects and not the decree holder's project. Interestingly though is that the decree holder's project, for the Defendant, was entitled Garissa Sewerage. That is one of the projects the Judgment Debtor indicated the funds in the bank are earmarked for.

21. There is no basis, in my view, brought forward by the Defendant/Judgment Debtor why the decree Nisi Order should be set aside. Consequently the application dated 26<sup>th</sup> August is dismissed with costs.

**NOTICE OF MOTION DATED 14<sup>TH</sup> AUGUST 2019**

22. This application is filed by the Plaintiff decree holder. The Plaintiff seeks the Order of Garnishee Nisi be made absolute.

23. The Garnishee (KCB) has confirmed the Defendant's bank account as having a credit balance. The Garnishee has also confirmed it has no claim over that credit balance, other than its costs hereof.

24. Having made the finding that there is no merit in the Defendant's applications of 20<sup>th</sup> and 26<sup>th</sup> August 2019 there is no basis for not to grant Orders of Garnishee absolute as sought by the decree holder.

**CONCLUSION**

25. The Orders that commend themselves to me in respect to the applications are:

**a. The Notice of Motion applications dated 20<sup>th</sup> and 26<sup>th</sup> August 2019 are dismissed with costs to the Plaintiff.**

**b. The Notice of Motion dated 14<sup>th</sup> August 2019 is granted as follows:**

**i. The Garnishee Nisi issued by this Court on 16<sup>th</sup> August 2019 is hereby made absolute and accordingly Kenya Commercial Bank Limited Garissa Branch is hereby commanded to pay forthwith to the Plaintiff hereof Kshs. 133,720,116.20 plus further costs and interest from the Defendant's bank account No. 110780056.**

**ii. Kenya Commercial Bank Limited Garissa Branch is awarded costs in this matter to be paid by the Defendant which are Kshs. 25,000 which costs it is hereby permitted to deduct from the Defendant's bank account, at its branch, account no. 1107800056.**

**iii. The Plaintiff is awarded costs of the Notice of Motion applications dated 14<sup>th</sup>, 20<sup>th</sup> and 26<sup>th</sup> August 2019, to be paid by the Defendant.**

**DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>TH</sup> day of NOVEMBER, 2019.**

**MARY KASANGO**

**JUDGE**

***Ruling Read and Delivered in Open Court in the presence of:***

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT