



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 68 OF 2010

MIDDLE EAST BANK OF KENYA LIMITED.....PLAINTIFF

-VERSUS-

RAYMOND THOMAS DUNNET.....DEFENDANT

HAWK EYE VILLAS MANAGEMENT LIMITED.....THIRD PARTY

RULING

[1] Before the Court for determination is the Plaintiff's Notice of Motion dated **8 September, 2015** and filed in Court on **14 September 2015**. That application was filed by virtue of the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, as well as **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. It seeks for the following orders:

[a] That the Court be pleased to release to the Applicant the sum of **Kshs. 1,500,000/=** deposited in Court in **April 2013** by the Third Party.

[b] That the costs of this application be costs in the cause.

[2] The application was hinged on the grounds that on the **7 June 2010**, the Plaintiff made a Request for Judgment, whereupon a default judgment was entered herein against the Defendant on **28 June 2010** for the decretal amount of **Kshs. 4,164,764.13**. The Defendant then took out Third Party proceedings against **Hawk Eye Villas Management Limited** (the Third Party herein) on the basis that the Third Party was the actual beneficiary of the loan. Thereafter, a Settlement Agreement was negotiated between the Plaintiff and the Third Party in which the Plaintiff agreed to accept **Kshs. 4,500,000** from the Third Party; and that any outstanding amount was to be recovered from the Defendant. It was therefore the contention of the Plaintiff that it was never their agreement that it would receive the said amount of **Kshs. 4,500,000** from the Third Party in full and final settlement of this suit; nor was the payment intended to release the Third Party as a Guarantor of the Defendant from any residual liability to it. According to the Plaintiff, it was at liberty, by dint of the Settlement Agreement, to claim the balance of the decretal sum together with interest accrued thereon from the Defendant.

[3] It was further the contention of the Plaintiff that, pursuant to the Settlement Agreement aforementioned, it received **Kshs. 2,000,000/=** from the Advocates of the Third Party on **9 December 2011** and **Kshs. 1,000,000/=** on **24 January 2012**, making a total of **Kshs. 3,000,000/=** in reduction of the decretal sum. Thus, according to the Plaintiff, the balance of **Kshs. 1,500,000/=** and interest thereon is

still outstanding. The Plaintiff added that, although an attempt was made by the Third Party to unilaterally vary the original Judgment and Decree of the Court as well as the Settlement Agreement by purporting to have paid the balance of **Kshs. 1,500,000/=** in full and final settlement of the entire debt, it (the Plaintiff) was not a party to any such arrangements. It is in light of the foregoing that the Plaintiff moved the Court for orders that the sum of **Kshs. 1,500,000**, deposited in Court by the Third Party, be released to it in partial satisfaction of the balance of the decretal sum.

[4] The grounds aforestated were explicated in the Plaintiff's Supporting Affidavit, sworn on **8 September 2015** by **Dhirendra Rana**, the Managing Director of the Plaintiff. Annexed to that Affidavit was a letter dated **31 May 2012**, among other letters marked **Annexure DR-1**, confirming the payment of **Kshs. 3,000,000/=** by the Third Party; and asking for the payment of the balance of **Kshs. 1,500,000/=**. The letter further indicated that if the balance was not paid on or before **15 June 2012** then it would attract interest at the prevailing non-facility interest rate of 35% per annum until fully settled.

[5] The application was opposed by the Third Party vide a Replying Affidavit sworn by **Shelagh Hawkins** on **23 November 2015**. It was confirmed thereby that the Third Party deposited the sum of **Kshs. 1,500,000** in Court, after the Plaintiff refused to accept the said payment in settlement of the balance of the decretal sum of **Kshs. 4,164,764.13**. It was further confirmed that, by then, the Third Party had already paid the Plaintiff the sum of **Kshs. 3,000,000** in two instalments on **9 December 2011** and **24 January 2012**, respectively. It was further conceded by the Third Party that it had filed an application dated **29 March 2013** for orders, *inter alia*, that it had satisfied the decretal amount herein and was no longer indebted to the Plaintiff; but that the said application was dismissed by the Court.

[6] It was also reiterated by the Third Party that, in a Replying Affidavit sworn by **Raymond Thomas Dunnet** which had been filed by the Defendant in response to its application dated **29 March 2013**, it was revealed that the Plaintiff had debited the Defendant's account with an amount of **Kshs. 1,313,250/=**; and therefore that the total sum already paid to the Plaintiff in respect of the Decree stood at **Kshs. 4,313,250/=**; and therefore that the decree had been fully settled. Thus, the contention of the Third Party was that, had it been made aware that the Plaintiff had debited the Defendant's account with the aforesaid sum of **Kshs. 1,313,250/=**, it would not have deposited the sum of **Kshs. 1,500,000/=** in Court, granted that the decree had already been satisfied by the time the deposit was made.

[7] The Third Party further opposed the application on the ground that it was intent on appealing the Court ruling of **30 January 2015**; and that it had already filed a Notice of Appeal in that connection. A copy of the Notice of Appeal was annexed to the Replying Affidavit as Annexure "**SH-2**". Thus, it was the posturing of the Third Party that its appeal would be rendered nugatory should the sum deposited in Court be released to the Plaintiff, noting that the main issue for determination in the appeal is whether the Third Party had fully satisfied the decree. The Third Party therefore posited that the release of the deposit to the Plaintiff would result in overpayment by the Third Party and the Defendant, as the total sum paid would be **Kshs. 5,813.250/=**, which would be way in excess of the decretal sum. The Third Party accordingly urged that it would be in the interest of justice and fairness that the amount deposited in Court be so held until the determination of the appeal.

[8] In reply, the Plaintiff filed a further affidavit on **26 February 2016** sworn by **Dhirendra Rana**, by which it denied the foregoing assertions by the Third Party. In particular, the Plaintiff denied that the debit of the Defendant's account on **3 September 2013**, with the sum of **US\$ 15,000**, equivalent to **Kshs. 1,311,000**, settled all the amounts due and owing to it from the Defendant, including interest. The Plaintiff averred that they had also been awarded costs, in respect of which they had a Bill of Costs filed in Court for **Kshs. 192,059/=** pending taxation. The Plaintiff also pointed out that, with regard to the Notice of Appeal filed by the Third Party against the Ruling of the Court made on **30 January 2015**, there was no order for stay of execution of the said ruling pending appeal; and that no such application had been filed in the first place.

[9] The application was canvassed by way of written submissions. The Plaintiff filed their written submissions dated **26 February 2016** on even date while the **Third Party** filed their submissions dated **23 February 2017** on **27 February 2017**. The parties are in agreement that in **May 2008**, the Plaintiff

advanced to the Defendant a sum of **Kshs. 3,500,000/=** at the Defendant's request. The amount was to be repaid by **31 August 2008** together with interest. It is apparent that the Defendant defaulted, whereupon the Plaintiff filed this suit and obtained default judgment on **28 June 2010**. It is further not in dispute that the Defendant took out Third Party proceedings, consequent to which a Settlement Agreement was reached between the Plaintiff and the Third Party, whereby the Plaintiff agreed to accept **Kshs. 4,500,000/=** for the release of the Third Party as the Guarantor; while the balance of the decretal sum, including interest and costs, would be paid by the Defendant. Attempts by the Third Party to assert the posturing that the **Kshs. 4,500,000/=** was in full and final settlement was dismissed by the Court vide the ruling dated **30 January 2015**.

[10] The parties are also in agreement that, pursuant to the Settlement Agreement, the Third Party paid the Plaintiff **Kshs. 3,000,000/=** in two tranches of **Kshs. 2,000,000=** and **Kshs. 1,000,000/=** on **9 December 2011** and **23 January 2012**, respectively. It is also indubitable that the Plaintiff also debited a sum of **USD 15,000**, then equivalent to **Kshs. 1,311,000/=**, directly from the Defendant's account; and that thereafter it deposited the sum of **Kshs. 1,500,000/=** in Court. Thus, the only issue for the Court's determination is whether the **Kshs. 1,500,000** deposited by the Third Party in Court should be released to the Plaintiff as sought by the Notice of Motion dated **8 September 2015**. Apparently, the amount of **Kshs. 1,500,000** had been deposited in Court by the Third Party after the Plaintiff refused to accept the said sum on account that the same had accrued and continued to accrue interest which also needed to be settled.

[11] At paragraph 12 of its written submissions, the Plaintiff presented a calculation of the outstanding amount due to it herein as follows:

[a] Principal Amount	Kshs. 3,572,486.13
[b] Interest on	Kshs. 3,572,486.13 at 25.75%
from 30.11.2009 to 22.07.2010 (date of decree)	Kshs. 592,278.00
[c] Interest on	Kshs. 3,572,486.13 at 25.75% p.a.
from 22.07.2010 to 09.12.2011 (505 days)	<u>Kshs. 1,272,759.35</u>
	Kshs. 5,437,523.49
[d] Less Kshs. 2,000,000/= paid on 09.12.2011	<u>Kshs. 2,000,000.00</u>
	Kshs. 3,437,523.49
[e] Interest on	Kshs. 1,572,486.13 at 25.75% p.a.
from 10.12.2011 to 23.01.2012 (44 days)	<u>Kshs. 48,811.70</u>
	Kshs. 3,486,335.19
[f] Less Kshs. 1,000,000/= paid on 23.01.2012	<u>Kshs. 1,000,000.00</u>
	Kshs. 2,486,335.19
[g] Interest on	Kshs. 572,486.13 from
23.01.2012 to 03.09.2013 (588 days)	<u>Kshs. 237,479.80</u>
	Kshs. 2,723,814.90

[h] Less Kshs. 1,311,000 paid debited from account Kshs. 1,313,250.00

Kshs. 1,410,564.90

[12] From the Plaintiff's computation aforesaid, which computation was not refuted by either the Defendant or the Third Party, it is manifest that as at **23 January 2012** when the second lumpsum payment of **Kshs. 1,000,000/=** was made by the Third Party, the decretal sum had thereby been reduced to **Kshs. 572,486.13**; and that the same was cleared by the debit entry of **Kshs. 1,311,000/=** that was effected on **3 September 2013**. It is further manifest from the computation that interest was charged only on the decretal sum and the balance thereof; and therefore not compounded as was the submission of the Third Party. The interest rate of 25.75% was prayed for in the Plaint, based on the Facility Terms and was adjudged by the Court to be the applicable rate herein. This situation accords well with the holding of the Court of Appeal in **Ajay Indravadan Shah v Guilders International Bank Ltd [2003] eKLR** that:

"...If by their agreement the parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."

[13] It was not the contention of the Defendant or even the Third Party that the agreed rate of interest was illegal. Moreover, contrary to the submissions of the Third Party, there is absolutely no basis for the contention that interest was charged by the Plaintiff after the full payment of the decretal sum.

[14] In the premises, it is manifest that the amount the Plaintiff claims herein is simply the accrued interest now standing at **Kshs. 1,410,564.90**. It is noteworthy too that in its submissions, the Third Party has conceded that the said amount of **Kshs. 1,410,564.90** can be released to the Plaintiff to cover the interest accrued. It is further the Third party's submission that the sum of **Kshs. 89,435.10**, being the difference between **Kshs. 1,500,000** and the aforesaid sum of **Kshs. 1,410,564.90**, should therefore be paid to the Third Party.

[15] From the foregoing, the Court is satisfied that the Plaintiff has laid a basis for the release of the sum of **Kshs. 1,410,564.90** only being the balance of interest due to it, and not the entire amount of **Kshs. 1,500,000/=**. Thus, it is hereby directed that:

[a] Out of the sum of **Kshs. 1,500,000/=** that was deposited herein by the Third Party, an amount of **Kshs. 1,410,564.90** be paid out to the Plaintiff in full and final payment of the interest due to the Plaintiff in respect of the subject loan.

[b] The balance of **Kshs. 89,435.10** be refunded to the Third Party.

[c] Costs of the application be borne by the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY, 2018

OLGA SEWE

JUDGE