



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 8 OF 2016

PARAGON ELECTRONICS LIMITED.....APPLICANT

VERSUS

INVESTMENTS AND MORTGAGES BANK LIMITED.....RESPONDENT

RULING

1. This Court is asked to review its Ruling of 18th May 2018 and to allow the Applicant to file a fresh Bill of Costs. The prayers are in the Notice of Motion dated 17th August 2018 and said to be brought under the Provisions of Section 80 of The Civil Procedure Act and Order 45 Rules 1, 2 and 3 (2) and Order 51 Rule 1 of The Civil Procedure Rules.

2. Through a Ruling dated 27th September 2016, Hon. Ochieng J. determined this Originating Summons in favour of the Applicant. It would also have Costs of the Summons.

3. A Party and Party Bill of Costs was filed by the Applicant. It was dated 30th November 2016. The Bill was duly argued and on 10th April 2017 the Taxing Officer taxed it at Kshs. 1,204,320/-.

4. Aggrieved by that decision, the Respondent preferred a Reference thereto on 9th June 2017. In the main, the outcome of the Reference would turn on what was the subject matter of these proceedings and therefore its value. A question that Court resolved in favour of the Respondent in a Ruling of 18th May 2018 is as follows:-

“13. If I characterize the dispute in that manner then the value of the subject matter would be Khs.309,000 and not Kshs.75,000,000 which was the loan initially advanced to Paragon. Counsel for the Paragon had before me argued that because of the action of the Bank, the Bank had been deprived of use of its property which had been used as a charge for Khs.75 million. That argument should not, in my view, be used as a basis to claim fees on Khs.75,000,000 because if Paragon had suffered that loss because of the Bank’s conduct then it should have made a Claim for the appropriate Damages.

14. As correctly pointed out by Counsel for the 1&M Bank, one of the objects of Taxation is that a successful litigant ought to be fairly reimbursed for costs it had to incur in presenting or defending litigation (Premchand Raichand Limited & another vs. Quarry Services of East Africa Limited & another [1972] EA 162). Generally, costs are not awarded to punish the loser. The narrow issue presented by the Originating Summons was whether the extra Legal costs being Khs.309,000 was contemplated by the terms of the Deed. To peg the value of the subject matter on the initial loan advanced would be to overly reimburse the successful litigant.

5. That is the decision this Court is asked to review. It is argued by the Applicant that:-

- i) *The Respondent made several misrepresentations that misled the Court;*
- ii) *There has been discovery of new and important matters;*
- iii) *Errors are apparent on the face of the record;*
- iv) *There are other grounds of bad faith, illegality and perjury.*

6. This Court has listened to the rival arguments made by the parties and will start by restating the law in this area (which really is a well beaten path);

a) "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 ground for review."

National Bank of Kenya Limited –vs- Ndungu Njau [1997] eKLR

b) Other than the above circumstances the Rule allows review for "any other sufficient reasons" whose scope has been discussed as follows:-

"I would add that I also agree with the reasoning of Nyarangi, JA that the third head under Order XLIV rule 1(1), enabling a party to apply for 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 in themselves form a genus or class of things which the third, general, head, could be said to be analogous. For these reasons I would allow the appeal to the extent indicated by Nyarangi, JA, with no order as to costs".

Kneller JA in E. Wangechi Kimita –vs- Wakibiru Mutahi [1985]eKLR

A view that expands, rather than fetters, circumstances beyond the confines of the set out grounds.

7. The Applicant asserts that the Respondent misled this Court into believing that the issue in contention was the sum of Kshs 309,000/- being legal fees. The Court in deciding the matter was well aware of the rival positions taken in respect to that matter and this would be demonstrated by paragraphs 11, and 12 of its decisions:-

"It seems to me that while Paragon sought the release and discharge of the securities, the real dispute was whether I&M Bank were justified in holding the securities on the basis of what was said to be outstanding. Both sides were well aware of this Central feature of the dispute. In other words at the very core of the Dispute was whether the Bank was justified in not releasing the security documents for the reason that Kshs 309,000/- was due. In resolving the matter in favour of Paragon, Hon. Justice Ochieng found that Paragon had paid the settlement sum and the legal costs sought by I&M Bank were not contemplated by the Deed of settlement.

It seems to this Court that while the proceedings were about the release of the Securities, the crux of the controversy was whether Kshs 309,000/- was justly due and owing to I&M Bank and if so, whether it would be good reason for the Securities to be withheld."

8. If however the Court arrived at a wrong conclusion then it was not because it was misled but simply because it misconstrued the facts and the law. An issue for Appeal not Review.

9. It is urged that new and important matters have come to light. These are said to have emerged after the Applicant filed some criminal complaint with the police in April 2018. It is in the basis of those issues that the Applicant asserts that some dispositions made by Nina Adisa Madanguda in her further Affidavit of 15th April 2016 amounted to downright falsehood and perjury. This Court need not go into the detail of those matters because it is clear that if the allegations are valid then they may have affected the Ruling of Ochieng J. which the Applicant has not sought to review. This Court's decision on the Reference was a Courts assessment of what the subject matter was in these proceedings as understood by looking at the pleadings and the decision of Ochieng J. If the decision of Ochieng J. is not reviewed then the decision of this Court on the Costs is unlikely to change.

10. The issues raised in respect to the errors on the face are not dissimilar to the arguments on the misrepresentation said to have been made to Court and which this Court has already dealt with. No need to regurgitate!

11. On the question of an alleged contempt of Court in respect to the orders of 15th February 2016 and 27th September 2016, the Court, frankly, is unable to see its relevance to the Reference which the Court determined in the Ruling sought to be reviewed.

12. The impression one gets is that the Applicant holds the position that the Court erred in its decision of 18th May 2018 and should have taken a different view of the matter. But these are issues for Appeal. The matter cannot be revisited by way of review and I have no choice but to dismiss the Notice of Motion dated 17th August 2018, as I now do. Costs to the Respondent.

Dated, delivered and signed in open Court at Nairobi this 9th day of November, 2018.

F. TUIYOTT

JUDGE

Present:-

Bulent Gulbahar for the Applicant

Opakas h/b Ohaga for the Respondent

