



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO.1914 OF 1999**

**TAMIL ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**OFFICIAL RECEIVER & LIQUIDATOR OF CONTINENTAL**

**CREDIT FINANCE LTD.....1<sup>ST</sup> DEFENDANT**

**KISAUNI PROPERTIES LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the instant matter, the Plaintiff/Applicant filed a Notice of Motion dated 27<sup>th</sup> November 2017 pursuant to section 80 of Civil Procedure Act; Order 45 Rules 1, 2 and 3(2) and Order 51 of the Civil Procedure Rules 2010 seeking that judgment of Honourable Mr. Justice J.B. Havelock delivered herein on 31<sup>st</sup> July 2014 be reviewed so as to allow the Applicant to execute its judgment and Decree dated 20<sup>th</sup> April 2001 which was partially settled by the 1<sup>st</sup> Defendant/Respondent.

2. The 1<sup>st</sup> defendant on the other hand filed preliminary objection dated 14<sup>th</sup> March 2018 and a cross Notice of motion dated 18<sup>th</sup> June 2018 seeking stay of Notice of motion dated 27<sup>th</sup> March 2017 pending hearing and determination of the cross-Notice of motion; that the plaintiff suit be dismissed in its entirety; that plaintiff's suit be declared null and void ab initio for want of mandatory leave as required under the provisions of section 220 of the Companies Act (chapter 486) Laws of Kenya (now repealed); that the interlocutory judgment entered and final judgment dated 9<sup>th</sup> March and delivered by the Hon. Justice T. Mbaluto (*retired*) had no legal basis for want of leave as required under the provisions of section 228 of the Companies Act; amongst several other prayers.

3. I have perused the Applicant's application dated 27<sup>th</sup> November 2017; the cross-Notice of motion dated 18<sup>th</sup> June 2018 and preliminary objection dated 14<sup>th</sup> November 2018; the Applicant's submissions dated 28<sup>th</sup> September 2018 and submissions by the 1<sup>st</sup> defendant filed on 19<sup>th</sup> July 2018 and all authorities in support thereof. The issues arising thereto for consideration in both applications can be summarized up as follows:-

**a. Whether the Applicant's application dated 27<sup>th</sup> November 2017 meets the threshold for granting orders sought?**

**b. Whether the cross-Notice of motion dated 18<sup>th</sup> June 2018 is meritorious and whether orders sought can be granted?**

**A. Whether the Applicant's application dated 27<sup>th</sup> November 2017 meets the threshold for granting orders sought?**

4. The Applicant seeks orders of review of the judgment of the Honourable Mr. Justice J.B. Havelock, as he then was, delivered on 31<sup>st</sup> July 2014 so as to allow the Applicant execute its judgment and Decree dated 20<sup>th</sup> April 2001 which was partially settled by the 1<sup>st</sup> Defendant/Respondent.

5. The application is brought pursuant to **Order 45 Rule 1, 2 and 3** of the Civil Procedure Rules which provides:-

**Order 45 Rule (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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review. 2. To whom applications for review may be made

[Order 45, rule 2.] (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate. 3. When court may grant or reject application.

[Order 45, rule 3.] (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same: Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation."

6. I have very carefully gone through the reasons relied upon by the Applicant for seeking review in this matter and I have regrettably found no allegation that the review is sought on the ground of discovering of new and important matter or evidence which, after exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order was made on an account of some mistake or error apparent on the face of record or for any sufficient reason. The application on the other hand was filed after 3 years and 7 months since the judgment sought to be reviewed was made. The delay in bringing up this application, I find it to be an inordinate delay. The application for review is required to be made without unreasonable delay.

7. In the instant application, I am not satisfied that the applicant has met the threshold set out for granting orders of review. The applicant in this case if, it was aggrieved by the judgment dated 31<sup>st</sup> July 2014, it should not have waited for a period of 3 years 7 months to seek an order of review. It had the right to appeal against the judgment but did not do so. I find no justification for bringing up this application after such an inordinate delay save to term the application as an abuse of the court process. I find the application to be a non-starter, and without basis.

#### **B. Whether the cross-Notice of motion dated 18<sup>th</sup> June 2018 is meritorious and whether orders sought can be granted?**

8. The facts of the case are not in dispute. Parties are in agreement that interlocutory judgment and final judgment dated 9<sup>th</sup> March 2001 delivered by the Hon. Justice T. Mbaluto (*retired*) was subsequently declared null and void *ab initio* vide a Ruling by Hon. Justice Mohamed Ibrahim; as he then was, date and delivered at Nariobi on 5<sup>th</sup> November 2003; Ruling by Hon. Justice M.K. Ibrahim; as he then was; dated and delivered in Nairobi on 17<sup>th</sup> August 2013; Ruling by Hon. Justice J.B. Havelock (*retired*) dated and delivered at Nairobi on 31<sup>st</sup> July 2014.

9. The Judges who dealt with this matter after interlocutory and final judgment was entered; found and rightly so; that failure on part of the Applicant, to comply with the provisions of section 228 of the Companies Act (*chapter 486*) (*repealed*) Laws of Kenya, had rendered the purported interlocutory and final judgments, decree and all consequences orders to have no legal basis and therefore null and void *ab initio* and unenforceable in law. This therefore means the entire suit is a nullity for want of the mandatory leave required by section 228 of the Companies Act (*repealed*).

10. In view of the above an illegal decree cannot be enforced or sought to be enforced as the Applicant is seeking to do. All judgments, decree and consequential orders issued in this matter, are by virtue of the suit being found to be null and void, and the entire suit being null and void *ab initio* deemed to be non-existing. I find as such that there is no judgment or decree capable of being executed.

11. In chamber summons dated 23<sup>rd</sup> July 2001 by the Defendant/Applicant, Hon. Justice Mohamed Ibrahim, as he then was, in his ruling dated 5<sup>th</sup> November 2013 made the following declarations and holdings *inter-alia*:-

**i. On page 9: "I hold that the interlocutory judgment entered herein and final judgment delivered on 9<sup>th</sup> March 2001 had no legal basis as it did not comply with and violated the mandatory provisions of Section 241(a). It follows that the said judgment and all subsequent orders, decrees and purported execution thereof were null and void *ab initio*."**

ii. On page 14: "I do hereby hold that once again this (the suit) is null and void ab initio. It is a nullity for want of the mandatory leave under Section 228 of the Companies Act."

iii. On pages 14/15: "As a consequence and as indicated above this court would be failing in its duties for functions, as the court with the appropriate jurisdiction to ultimately supervise Companies which have been wound up and those under receivership and interim liquidation and final liquidation to leave this hanging in the air with the potential danger of enforcement of illegal orders and judgment. I am compelled to invoke the Courts inherent jurisdiction and all other enabling powers under the Companies Act and I declare that the judgment herein, decree and all consequential orders are unenforceable in law and execution thereof is stayed."

12. In the same matter, arising out by the plaintiff's Notice of motion dated 23<sup>rd</sup> July 2003 seeking orders that "the 1<sup>st</sup> Defendant/Applicant do pay the Plaintiff/Respondent additional rates, (at the rate of 29.43%) at commercial rates on the balance of decretal amount running from the date of judgment or of decree until payment in full). The Hon. Justice J.B. Havelock (*retired*) in his ruling dated and delivered at Nairobi on 3<sup>rd</sup> July 2011 held:-

".....in my view, there is no question of Ibrahim J. lifting the stay order as per his Ruling of 5<sup>th</sup> November 2003. Further his order as per his Ruling of 5<sup>th</sup> November 2003. Further his declaration that the Judgment herein, decree and all consequential orders were unenforceable, still remains the position to this day.

The up-short of the above is that I find no merit in the Plaintiff's application before Court dated 23<sup>rd</sup> July 2003. In view of the Ruling delivered on 5<sup>th</sup> November 2013, the Plaintiff has no judgment or decree capable of execution. It's application is consequently dismissed with costs to the first Defendant."

13. In this matter all the Judges, who dealt with this matter, after the entry of interlocutory judgment and final judgment of Hon. Justice Tom Mbaluto (*retired*) have clearly pronounced themselves in their rulings, findings, and orders, as I have quoted part of their rulings hereinabove, their rulings and orders remain in force having not been successfully challenged in appeals or reviews. The plaintiff has no judgment as far as the court record stands in which he can seek execution. He can't be heard to say he has had a valid judgment, the suit having been declared null and void *ab initio*. Any benefit of the impugned judgment, is illegal as the suit was by virtue of having been declared null and void deemed dismissed and all judgments and decrees dismissed or set aside. In view of the foregoing the plaintiff's suit having all the time been found to be null and void, I find that the entire suit dismissed and all judgments, decrees and orders consequential thereto set aside.

14. Having said that much, I find that the 1<sup>st</sup> Defendant's/Applicant's application dated 18<sup>th</sup> June 2018 meritorious.

15. The upshot is that the Plaintiff's/Applicant's Notice of motion dated 27<sup>th</sup> November 2017 is without merits and is dismissed with cost to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

16. The cross-Notice of motion of the 1<sup>st</sup> Defendant/Applicant is meritorious and is allowed in the following terms:-

a. The plaintiff's suit against the 1<sup>st</sup> Defendant/Applicant having been declared null and void ab initio is hereby dismissed in its entirety with costs to the 1<sup>st</sup> Defendant/Applicant.

b. The plaintiff's suit herein as against the 1<sup>st</sup> Defendant/Applicant be and is hereby declared null and void ab initio as found in earlier rulings for want of mandatory leave as required under the provisions section 228 of the Companies Act (chapter 486) of the Laws of Kenya (now repealed).

c. That all the judgments, consequential orders and decree, purported execution in pursuance of interlocutory judgment and final judgment pronounced in the matter, are illegal, null and void ab initio and are hereby nullified and set aside.

d. The sum of Kshs. 8,558,942/40 paid mistakenly and erroneously by the 1<sup>st</sup> Defendant/Applicant to the Plaintiff/Respondent, the same stand refundable forthwith by the Plaintiff/Respondent to the 1<sup>st</sup> Defendant/Applicant with interest thereon at court rate from the date of actual payment to the Plaintiff/Respondent until refund in full.

e. The Plaintiff/Respondent be and is hereby permanently restrained from soliciting from and/or executing against the 1<sup>st</sup> Defendant/Applicant for any moneys under the suit.

f. The 1<sup>st</sup> Defendant/Applicant be and is hereby set at liberty to apply for any other or further orders as may be necessary against the Plaintiff/Respondent for enforcement of the foregoing orders in the interest of justice.

g. Costs of the suit and the application to the 1<sup>st</sup> Defendant/Applicant.

Dated, signed and delivered at Nairobi this 22<sup>nd</sup> day of November, 2018.

.....

J .A. MAKAU

**JUDGE**