



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**HCC NO. 488 OF 2014**

**DOHASHE ENTERPRISE LIMITED.....PLAINTIFF**

**VERSUS**

**SPEED CAPITAL LIMITED .....1<sup>ST</sup> DEFENDANT**

**CAREBASE INVESTMENT AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Court is requested through the Notice of Motion of 20<sup>th</sup> April, 2016 to Review the Ruling of 4<sup>th</sup> March 2016 and give Directions on quantum of Interests.
2. Having given due consideration to the Grounds and Affidavit in support of the Application, the Grounds of Opposition and the Rival Submissions, I am resolute that the Application is for disallowing. These are the reasons.
3. In the Plaint presented on 29<sup>th</sup> October 2014, the 2<sup>nd</sup> Defendant is said to be an agent of the 1<sup>st</sup> Defendant who advanced a loan of Kshs.2,699,450/= to the Plaintiff. As collateral for the loan the Plaintiff Company surrendered three(3) Title Deeds to the 1<sup>st</sup> Defendant.
4. That on or about 22<sup>nd</sup> October 2014, the 1<sup>st</sup> Defendant through the 2<sup>nd</sup> Defendant put up an advert for the sale of the three Properties known and described as LR. NO.12506/224 (L.R 46153) AND Mavoko Town Block 3/28536 & 28537 (jointly described as the suit Properties). This aggrieved the Plaintiff who alleged various breaches of the Loan Agreement. For now, it suffices to state that one of the Plaintiffs' complaints was that the 1<sup>st</sup> Defendant had charged excessive and Punitive Interests rates on the loan facility making it impossible for the Plaintiff to service it effectively.
5. The Intervention sought of the Court in the Plaint was for judgement against the Defendants for:-
  - (a) Permanent Injunction against the Defendants/Respondents and or their agents or servants form any further selling, disposing and/or in any other way interfering with the land parcel numbers LR No.12506/224 (I.R.40154) Juja area – Kiambu County and Mavoki Town Block 3/28536 & 28537 Machakos County respectively.
  - (b) Cost of the suit.
  - (c) Interests.
  - (d) Any other relief deemed fit to grant by this Honourable County respectively.
  - (e) Cost of the suit.
  - (f) Interests.
6. Simultaneously with presenting the Plaint, the Plaintiffs filed a Notice of Motion dated 28<sup>th</sup> October 2014 seeking, in the main, an Order of Temporary Injunction to stop the intended sale of the Suit Properties pending the hearing and determination of the suit.
7. The Court record shows that on 7<sup>th</sup> November 2014, the Court postpone the sale for 14 days. Those Interim Orders were extended on 18<sup>th</sup> November 2014. On 22<sup>nd</sup> January 2015, Counsel for the Parties asked Court to give them time to finalize negotiations and for that reason the

matter was fixed for mention on 18<sup>th</sup> March 2015 and order for Status Quo made.

8. On 18<sup>th</sup> March, 2015 Mr. Kirimi for the Defendant informed Court that the Defendant had paid a sum of Khs.1,000,000/= only and the debt was still outstanding. He asked that the Application of 28<sup>th</sup> October 2014 be heard and he was opposed to the extension of Interim Orders. Mr. Muthama who was holding brief for Mr. Meme for the Plaintiff responded as follows:-

“My instructions are limited. Mr. Meme is unwell. He holds postdated cheques for 21.3.2015 and another for 20.3.2015 for Khs.1.4 million. This will clear the debt. Issue of interest will be the only outstanding issue once these cheques clear”.

9. Fast forward to 11<sup>th</sup> May 2015, the Court proceedings are:-

“Court:

I agree. Let the Plaintiff pay whatever interest they concede to be due and we shall try the disputed position of interest. Mention on 10.6.2015”.

10. On 21<sup>st</sup> October 2015, upon hearing a short address of Counsel, Kariuki J. directed;

“The Parties to exchange written submissions on interest and highlight on 27.11.2015”.

11. On 27<sup>th</sup> January 2016 Parties confirmed the filing of written submissions. The Judge delivered a ruling on 4<sup>th</sup> March 2016 and it is that Ruling that I am asked to Review.

12. The thrust of the Application is that contrary to the expectation of the Parties, the Court Ruling was on some other matters and not on the vexed issue of Interest.

13. The Notice of Motion is brought under the Provision of Order 45 Rule 1 of the Civil Procedure Rules which reads:-

(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”.

And although the Ruling I am asked to Review was made by my brother Kariuki J, I have jurisdiction to hear and determine the Motion by dint of the Provisions of Order 45 Rule 2 (2) which reads:-

“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”.

At the time the Motion came up for hearing Hon. Justice Kariuki had been redeployed to the High Court at Kakamega and I am now attached to this Court.

14. It is absolutely clear from the Record that the Ruling of 4<sup>th</sup> March 2016 was **to be** made on the basis of Written Submissions that were ordered by Court on 21<sup>st</sup> October, 2015. On that date the Judge had directed parties to exchange Written Submissions on the question of interest. And this was borne out of the representation made to the Court by the Parties that it was the only outstanding issue. The record of the Court Proceedings I have set out bears this out.

15. And the Plaintiffs current position that the issue of Interest was not the only issue outstanding is contrary to what it unequivocally told Court on 18<sup>th</sup> March, 2015,

“issue of interest will be the only outstanding issue once these cheques clear”.

It is not contested that the cheques cleared.

16. It is common ground that as directed by Court on 21<sup>st</sup> October 2015 both sides made submissions on the question of Interest. Indeed a reading of those submissions confirms this.

17. However, as is apparent from the Tenor and substance of the Ruling, the Honourable Judge chose to connect the issue of Interest with the

Application for Injunction and this is not in doubt from the manner in which he framed the issue for determination;

“Before embarking on the merits of the application, it is of note that prior to the hearing of the application, the Plaintiff offered to settle the principal amounts of Kshs. 3,000,000/= to the 1st Defendant. As per the court record the last and final installment in terms of the principal amount was paid to the 1st Defendant on 27th November, 2015. The only issue therefore left for determination by this court is on the issue of interest and whether the same can be used to grant the temporary injunction sought”.

18. The final Orders of the Judge are even more clearer when he held;

**“The matter should however be listed for hearing at the earliest to expedite the hearing of the same and determine the issue with regard to what interest is owed to the Defendant.**

19. The Judge was saying at least three things:-

- (i) The only matter left for determination was the issue of Interest.
- (ii) The matter would be determined through a hearing.
- (iii) In the meantime the Plaintiff deserved a Temporary Order of Injunction.

20. This is the manner in which the Good Judge answered the parties on the issue of Interest. And I myself think that it was a sensible route to take because the issue as to what Interest is owed to the Defendants is a matter of fact which needs to be proved or disproved by way of evidence. The Judge correctly in my view declined the invitation to determine this factual issue on the basis of Written Submissions only.

21. Let the Parties follow those Directions and list this matter for hearing on the issue of Interest.

22. The Notice of Motion of 20<sup>th</sup> April, 2016 is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 10<sup>th</sup> day of February, 2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Karani for Mulani for Plaintiff

Okeyo for Defendant

Alex - Court Clerk