REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCICAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 359 OF 2015

(Formerly Eldoret HCCC No. 7 of 2015)

TURBO HIGHWAY ELDORET LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

SYNERGY INDUSTRIAL CREDIT LIMITED.....DEFENDANT/APPLICANT

RULING

1. The Notice of Motion dated **29th October, 2015** was filed herein on 30th October, 2015 pursuant to Sections**1A, 1B, 3A** and **80** of **the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 45 Rule 1(1),** and **Order 51 Rule 1** of **the Civil Procedure Rules, 2010**for the following orders:

> **1. (Spent)**
>
> **2. That the Ruling and Order by the Hon. Justice G.K. Kimondo, dated 16th March, 2015 restraining the Defendant/Applicant from attaching and selling fourteen (14) motor vehicles as more particularly itemized in the said court order be reviewed, lifted, discharged and/or set aside.**
>
> **3. That the costs of the application be provided for.**

2. The grounds upon which the application has been brought have been elaborately set out in the Notice of Motion. In Summary the Defendant/Applicants case is that;

> **1. Way before the inception of this suit, and throughout these proceedings, the Plaintiff/Respondent's conduct as a debtor, has always been geared towards frustrating the performance of the various Hire Purchase agreements relative to the subject motor vehicles, as evidenced by its failure to honour the monthly payments.**
>
> **2. That having obtained the interim injunction on 16th March, 2015 the Plaintiff/Respondent has failed to take any steps to prosecute the application dated 13th March, 2015 of otherwise progress the suit.**
>
> **3. That the Plaintiff/Respondent is also vandalizing, wasting and selling the securities pledged to the Defendant/Applicant thereby rendering this claim nugatory.**

4. That it has since been established by the Defendant/Applicant that the Plaintiff/Respondent is in serious financial constraints in the two winding up causes, namely High Court Petitions Nos. 32 of 2015 and 37 of 2015 have been filed against it by Safepak Limited and Commercial Bank of Africa Limited, respectively; and that should the causes succeed, the securities pledged to the Defendant/Applicant risk being sold off.

3. In support of the application the Plaintiff/Applicant relied on the affidavit sworn on 29th October, 2015 by **JACOB MEEME** and the annexures thereto.

4. In response to the application the Plaintiff/Respondent contended vide the Replying Affidavit sworn by **Amit Aggarwal** on **6th November, 2015** that the application was misplaced as it was not founded on true facts. The Defendant/Respondent raised issues of accounts contending that the Defendant/Application is intent on saddling it with a debt that was continuously accruing inspite of the repossession and sale of **Motor Vehicle Registration No. KBV 500 L** on the instructions of the Defendant/Applicant.

5. It was further averred in the Replying Affidavit that since the subject motor vehicles are used in the daily business operations of the Plaintiff/Respondent, it would be illogical for the Plaintiff to vandalize them as alleged; and that in any event the motor vehicles are comprehensively issued to cushion both the Plaintiff/Respondent and the Defendant/Applicant from such risks as were alleged by the Defendant/Applicant.

6. The Plaintiff/Respondent further contended that its intention has always been to expeditiously conclude the application dated 13th March, 2015, but that this has not been the case due to circumstances beyond its control, including the motion by the Defendant/Applicant for the transfer of the suit from the High Court at Eldoret to this Court.

7. The Plaintiff/Defendant denied that it is unable to meet its financial obligations as alleged and while conceding to the institution of the two winding up causes, it was its contention that the same have neither been heard nor determined to warrant the conclusion that it cannot meet its financial obligations.

8. The Plaintiff further conceded that it entered into a mutual arrangement with the Defendant/Respondent for the sale of four of the subject Motor Vehicles with a view of off-setting the outstanding debt, but contended that this decision was purely based on what made economic sense as opposed to pressure arising from liquidity problems.

9. The Plaintiff/Applicant thus urged for the dismissal of this application with costs to pave way for the prosecution of its application dated **13th March, 2015.**

10. The Court has carefully considered the grounds and relevant provisions of the law under which the Notice of Motion dated 29thOctober, 2015 has been brought. The Court has also perused the pleadings and proceedings todate as well as the written submissions filed by Learned Counsel.

11. The brief background is that this suit was filed in the High Court at Eldoret on **13th March, 2015** for, inter alia, a **Declaration** that the proclamation made on **14th January, 2015** by **Eshikhoni Auctioneers** on the subject motor vehicles is null and void. The Plaintiff/Respondent contemporaneously filed an application for a temporary injunction vide the Notice of Motion of even date. The Court record shows that on the basis of that application, the Court **(Kimondo, J)** issued an *exparte* injunction order restraining attachment and sale of the 14 motor vehicles pending the hearing of the application *inter partes*. That application is yet to be *heard inter partes.* It is thus on the basis of the foregoing that the Defendant/Applicant has now moved the Court for review of Justice Kimondo's order dated **16th March, 2015** on the basis of the grounds set out in paragraph 2 herein above.

12. The grounds upon which an order of the Court may be reviewed is set out in **Order 45** of the **Civil Procedure Rules,** which provides as follows;

"(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 way 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, 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."

13. The above provisions were restated in the case of ***Muyodi –vs- Industrial & Commercial Development*** **Corporation & Another (2006) 1 EA 243** where the court held thus:-

"For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay"

14. Granted the circumstances of this case, the question of delay cannot arise. Nevertheless, it is noted with concern that there is no allegation in the grounds raised in support of the Notice of Motion that there has since been discovery of new and important matter to warrant the review sought. Indeed in their first ground, the Defendant/Applicant placed reliance on conduct **"way before the inception of the suit and throughout these proceedings."**Not even the two Winding Up Causes have been touted as new or important matters in the Notice of Motion, and for good reason, for it is evident on the face thereof that they were filed a few months before the instant Notice of Motion. Hence, with the exercise of due diligence, they are matters that could have been ascertained with promptitude.

15. In **Rose Kaiza v Angelo MpanjuKaiza [2009] eKLR,** the Court of Appeal rendered itself thus with regard to what amounts to new and important matter:

''An application for review under *Order 44 r 1* must be clear and specific on the basis upon which it is made. The motion before the superior court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is

"…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……."

The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by *Mulla* on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726, thus:

"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important *evidence* that

entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

Clearly therefore, the subsequent filing of the winding up causes would hardly afford the Defendant/Application cause for seeking review of the court of 16 March 2015.

16. It was not alleged either that there is an error apparent on the face of the record, or that there is some other sufficient cause for review that is analogous to the two conditions mentioned herein above. With all due respect to Learned Counsel, this is an application that ought to have been pursued under **Order 40 Rule 7 of the Civil Procedure Rules,** given the grounds put forward and the authorities cited in support. In the premises, my considered view and finding is that the application as presented is unmeritorious.

17. The foregoing notwithstanding it is to be noted that the application was also filed pursuant to sections which mandates the Court to administer justice in an efficient, just and proportionate manner. Indeed **Article 159** of the Constitution of Kenya requires that justice be administered without undue regard to procedural technicalities. Accordingly the Court is duty bound to give due consideration to the preponderance of the evidence availed and decide whether it would be in the interests of justice to keep the order of **16th March, 2015** in force as urged by the Plaintiff/Applicant.

18. First and foremost, it is worth mentioning that the order of **16th March, 2015** was specifically and carefully worded and appropriate parts thereof underlined by the Learned Judge for emphasis. It reads thus in part:

"I am also satisfied from the deposition of Amit Aggarwal that the Plaintiff stands to suffer prejudice if the suit vehicles are attached. I order that the application be served upon the defendant forthwith for hearing inter partes on 25th March, 2015. Pending that hearing interpartes, a temporary injunction for 14 days only is granted restraining the defendant from attaching or selling the 14 vehicles listed in paragraph b) 1-14 of the notice of motion…"

19. Clearly therefore, the temporary order was intended to last for only 14 days till **30th June, 2015**. It is noted however that the said interim orders were extended on **25th March, 2015** and **19th May, 2015** till **17th June, 2015** when the application was scheduled for *inter partes* hearing. The application could not however be heard on **17th June, 2015** owing to the supervening application by the Defendant for the transfer of the suit. Thus upon that application being granted, the Court again extended the interim orders indefinitely.

20. The question that arises is whether the order of **16th March, 2016** which was issued exparte for 14 days only was capable of extension as aforesaid beyond that specified period, and whether the same is validly inforce. This is because **Order 40 Rule 4 (2)** of **the Civil Procedure Rules** provides that;

"An exparte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by order of the Court for a period not exceeding fourteen days."

21. In the instant matter there have been about three extensions, each of which was for more than 14 days. There is also no indication that the Defendant/Applicant herein consented to those extensions.

In **Omega Enterprises (Kenya) Limited Vs Kenya Tourist Development Corporation & 2 Others [1998] eKLR** the Court of Appeal had occasion to express itself on the effect of a situation such as the foregoing and held thus:

"…the exparte order made by the Learned Judge was made without jurisdiction since the maximum period for the validity of the interim order was exceeded…the said order must be without any legal basis and hence null and void."

22. In the above case, the Court of Appeal took the position that such an order would be incapable of effect, and in so holding, was guided by the decision of **Lord Denning in Macfoy Vs United Africa Company Limited [1961]3 ALLER 1169** in which it was stated thus:

> ***"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."***

23. In the result, whereas the Defendant/Respondent failed to make a good case for review pursuant to **Section 80 of the Civil Procedure Act** and **Order 45 Rule of the Civil Procedure Rules**, it is evident that the order of **16th March, 2015** is for all purposes and intents null and void to the extent that it was extended beyond its period of validity. It is so ordered.

Costs of the application to be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13th DAY OF MAY, 2016.

OLGA SEWE

JUDGE