REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION MILIMANI LAW COURTS

CIVIL CASE NO. 219 OF 2013

FIDELITY COMMERCIAL BANK LIMITED……...….PLAINTIFF

VERSUS

GREENWOODS LIMITED…….…….....1ST DEFENDANT

MOYEZ BHANJI…….…….....…...2ND DEFENDANT

SADRUBIN BHANJI…….....……..3RD DEFENDANT

AND

THE MANAGER,

FIDELITY COMMERCIAL BANK OF KENYA,

WESTLANDS BRANCH…….……GARNISHEE

RULING

1. Before the Court are two applications; the first application was dated 29th July 2015 and was brought by the Plaintiff. The second application was dated 14th October 2015 and was brought by the Defendants/Judgment Debtors.

The Plaintiff's Application dated 29th July 2015

2. The first application was brought under the aegis of **Order 23 Rules 1 sub-rules (1), (2) &(3), 2, 3 & 4** of the Civil Procedure Rules. The Plaintiff sought the following orders *inter alia*;

> ***1. THAT the credit in various fixed deposit placements of the 2nd and 3rd Defendants be attached to answer the decree herein together with the costs of this garnishee proceedings.***
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> ***2. THAT Manager, Fidelity Commercial Bank (the Garnishee) do appear before Court to produce the FDR statements of account as at the date hereof for the 1st and 2nd Defendants AND to show cause why the Fixed Deposits should not be liquidated and attached to satisfy the decree together with the costs of these proceedings.***

3. THAT costs of these proceedings be provided for.

3. The application was premised on the ground that judgment was entered against the Respondents on 30th June 2015, and that a decree for the sum of Kshs 3,572,036/- plus interest at Court rate was issued thereon. It was contended that the decretal sums remain outstanding, and that there had been no indication by the Defendants to settle the same. In the supporting affidavit sworn by Stella Mbuli on 29th July 2015, it was deponed to that there were no known assets of the 1st Defendant other than one property that had since been disposed of, and that the 2nd& 3rd Defendants had various fixed deposit accounts held with the garnishee. It was reiterated that the deposits held were substantial and could be attached in settlement of the decretal sum.

4. The application was opposed by the Defendants. In their objection to the application, which the Defendants deemed to be vexatious, frivolous and an abuse of the process of the Court, it was contended that since it was in the Plaintiff's knowledge that the 3rd Defendant was deceased, no suit could be sustained against him, but only as against the deceased's estate or personal representative. It was further contended that the interest rates charged on the facilities borrowed by the Defendants was unreasonable, unconscionable, illegal and fraudulent and that such interest rates had neither been agreed to nor deliberated upon by the parties. The grounds of opposition were in furtherance of the notice of intention to raise a preliminary objection dated 12th October 2015.

5. The Court in considering the application and the merits therein, was persuaded by the Plaintiff to consider the cases of **Agnes Wanjiku Wang'ondu v Uchumi Supermarket Ltd (2008) eKLR**. **Julius M Mugo Muchiri v Wanjoka Njagi (2009) eKLR** and **Kenneth Kimari Kahuro& 2 Others v James Maina & Another (2014) eKLR** for the contention that there was no need for the Plaintiff to substitute or seek to make as a party to the suit the legal representative of the deceased in execution proceedings. They further relied on the cases of **Nitin Properties Ltd v JagjitS Kalsi & Another (1995) eKLR** and **John Harun Mwau v Standard Limited & 2 Others (2006) eKLR** for the contention that a preliminary objection raises pure points of law, verified by an affidavit deponed to by the objector.

6. Under Order 23 Rule 1(1) it is provided that;

> **'A court may, upon the ex parte application of a decree-holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree-holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the "garnishee") to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid'.**

7. The Plaintiff has sought for the accounts held by the Defendant to be garnished under the above stated provisions for the settlement of the decretal sum. The Defendants have not directly reiterated and denied that the decretal sum has not been settled since it was issued against them on 30th June 2015. It would therefore be deemed that there is no denial that the decretal sum has not been settled. However, it was the Defendants' contention that the execution proceedings were being executed against the Defendants, and of which the 3rd Defendant had since been deceased. For this contention, the Defendant reiled upon the determination of the Court of Appeal in **Joseph Ng'ang'a Njoroge v Kabiri Mbiti [1986] eKLR** in which it was held *inter alia*;

> ***"The Defendant has died. Someone should succeed him, and safeguard the property of the estate….The other point is that, there can never be any proceeding against a dead person. A personal representative should have been brought in the suit by the decree holder. The***

proceedings after obtaining judgment were a nullity and the High Court Judge was right in setting aside the proceedings and the orders thereon. I too would dismiss the appeal with costs"

This position was similar to the one held by Mwera, J in **Athman Omar Zuberi v MamsonAsolApinde (2012) eKLR**where the learned Judge held;

"A process could not be effected on a dead person…[A]ll said and done the Respondent without first substituting the Defendant who died on 7/8/2000, any moves made thereafter including the warrants to get possession were invalid."

8. From a reading of both **Athman Omar Zuberi v MamsonAsolApinde** (supra) and **Joseph Ng'ang'a Njoroge v KabiriMbiti** (supra), it is evident that no proceedings would institute or be sustained against a deceased person. However, the instant application seeks for the execution of the decree issued against the Defendant who has failed to settle the decretal sum. Under the provisions of Order 24 Rule 10 of the Civil Procedure Rules, it is provided that the substitution or causing the legal representative of the deceased to be made a party to the suit shall not be effected in the execution of a decree or order. Under the said provision, it reads;

'Nothing in rules 3, 4 and7 shall apply to proceedings in execution of a decree or order'.

Rules 3, 4 and 7 referred to in Rule 10 of Order 23 read thus;

3 (1) ***Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.***

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff: Provided the court may, for good reason on application, extend the time.

4. (1) ***Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit*.**

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

7 (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) ***The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.***

9. The cases cited by the Defendant of **Athman Omar Zuberi v MamsonAsolApinde** (supra) and

Joseph Ng'ang'aNjoroge v KabiriMbiti (supra) are distinguished. They did not fall within the ambit of Order 24 Rule 10 of the Civil Procedure Rules, and in which the circumstances of the instant application fall. In this instance, what was pending was the execution process, whilst in the cited cases, the matters were still proceeding. In execution proceedings, the provisions of Order 24 Rules 3, 4 & 7 are precluded, and the Plaintiff, or Defendant or any other party as the case may be, is entitled to proceed with execution proceedings without substituting or making a party to the execution the legal representative of the deceased.

10. In **Agnes WanjikuWang'ondu v Uchumi Supermarket Ltd** (supra) it had been held that;

> ***"So clearly the requirement for substitution in Order 23 Rule 4 (3) does not apply to proceedings in execution of an order as was the case before the lower Court."***

Visram, J (as he was then) in allowing the appeal from the lower Court further reiterated that;

> ***"While the above rule states that it should not ordinarily be necessary to make them parties to the suit, it does not say that they cannot be made parties to the suit. So, in appropriate circumstances, the personal representatives can and should be allowed to be enjoined in the suit."***

11. Mshila, J was of a similar opinion when in **Kenneth Kimani Kahuro & 2 Others v James Maina& Another** (supra) he held that;

> ***"The above section provides that a decree-holder may directly pursue the legal representatives of the deceased judgment debtor or a person who has intermeddled with the estate of the deceased without proceeding to enjoin these aforementioned parties to the proceedings. In essence, there is no need for substitution in cases where the judgment debtor dies."***

12. The section referred to in the ruling of Mshila, J is Section 37(1) of the Civil Procedure Act which reads;

> **Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.**

The interpretation of Section 37(1) of the Civil Procedure Act, as read together with Order 23 Rule 10 of the Civil Procedure Rules was that with the demise of a judgment-debtor, it was not mandatory, although it would be considered in appropriate circumstances, for the decree holder to substitute the deceased party with his legal representative. As was stated in **Agnes WanjikuWang'ondu v Uchumi Supermarket Ltd** (supra), and further in **Julius MugoMuchiri v WanjokaNjagi** (supra), it is not that legal representative cannot be made a party to the execution proceedings in the event of the demise of a judgment-debtor, but that such substitution would be considered by the decree holder as whether the same would constitute appropriate circumstances for them to be made such party, and that the failure to be made such party on application by the decree holder does not abate the suit, nor render the execution process invalid.

13. In consideration of the foregoing, the application by the Plaintiff is meritorious and the same be allowed as prayed for in terms of prayers (2) and (3) thereof plus costs.

The Defendants' Application dated 14th October 2015

14. In the Defendants' application they sought the following orders *inter alia*;

> ***1. Spent***
>
> ***2. THAT this honourable Court be pleased to vary and/or review the judgment delivered by the***

Honourable Justice F. Gikonyo on 30th June 2015 which allowed the Plaintiff's application dated 4th September 2013 and entered judgment as prayed for in the plaint.

3. THAT this honourable Court be pleased to set aside, vary and/or review the consequential decree which places the interest rate at 21% per month with effect from 1st March 2013 and do direct that the same be charged at a reasonable court interest rate.

4. THAT this honourable Court be pleased to order stay of any impending process of execution that may be carried out by the Plaintiff/Respondent pending the inter-parties hearing of this application.

5. THAT this honourable Court be pleased to order stay of any impending process of execution that may be carried out by the Plaintiff/Respondent pending the hearing and determination of this application.

6. THAT the costs of this application be provided for.

15. The application was premised on the grounds that the rate of interest charged following the determination of an application by the Plaintiff on 30th June 2013 by Gikonyo, J was unconscionable, uncontractual and manifestly high, and that, the Defendants therefore stand to suffer substantial loss in the event that the Plaintiff proceeds with the execution of the decree. It was the Defendants contention that the rate of interest was not agreed upon, and that by the Court issuing the orders as it did, the Plaintiff would proceed to execute on a fictitious, illegal and fraudulent interest rate to the dire detriment of the Defendants. It was further alluded to that the Plaintiff could not proceed with execution of the decree as against the 3rd Defendant who passed away on 18th September 2015 and that therefore any execution proceedings should be against his estate and/or legal representatives. The application was further supported by the affidavit of MoyezSadrubinBhanji sworn on 14th October 2015, and in which the deponent reiterated the contents of the grounds of the application.

16. In opposing the application, the Plaintiff filed its replying affidavit dated 14th October 2015. Therein, it was deponed to that the Defendants had filed a Notice of Appeal on 13th July 2015, and that by filing such notice, the Defendants' were barred from seeking a review of the same. In reiterating that the instant application was unmerited, incompetent and an abuse of the process of the Court, it was deponed to that the garnishee proceedings had been frustrated by the Defendants, and that, the death of a party to the suit was inconsequential during, and with regards to, execution proceedings.

17. The Defendants seek several prayers; (1) for the variation and/or review of the ruling of Gikonyo, J dated 30th June 2015 and (2) the stay of execution pending the hearing and determination of the instant application. No orders were issued by this Court with regards to prayer (2) and although it could not be established whether the Plaintiff had proceeded with any execution proceedings, there was still pending before the Court the notice served upon the garnishees, since the Plaintiff sought for the garnishment of the Defendants' accounts in settlement of the decretal sum. It could therefore be assumed that there are no execution proceedings taking place.

18. Turning to the main issue for review and/or varying the orders issued by Gikonyo, J on 30th June 2015, the Defendants relied upon two grounds; (1) that the rate of interest charged was manifestly high, unconscionable and illegal and (2) that with the demise of the 3rd Defendant, no suit could be commenced or sustained against him, including execution proceedings. With regards to the issue of demise of the 3rd Defendant, the Court has conclusively dealt with the same at paras. 8-12 above herein, and would not seek to belabor itself further on the matter. What remains, therefore, is for the Court to consider the ground (1) as raised by the Defendants.

19. On 30th June 2015, Gikonyo, J delivered his ruling on the application to strike out the Defence filed by the Defendants. In his rendition, the learned Judge extensively and expansively dealt with the issues

raised by the Defendants herein as with regards to the rate of interest. Without seeking to reiterate the contents here, the learned Judge deliberated conclusively with regards to the issue of interest, and considered and applied authoritative case law, including, but not limited to, the oft stated case of **D T Dobie & Co. Ltd v Muchina (1982) KLR 1**. The instant application seeking review, the Defendants relied on the provisions of Sections 1A, 1B, 3A, 63(e) and 80 of the Civil Procedure Act, as wells as Orders 45 Rules 1 & 2, and 50 Rule 6 of the Civil Procedure Act.

20. The substantive law under Section 80 of the Act, and the procedural law in Order 45 rules 1 & 2 of the Rules, give the Court the necessary parameters for consideration in an application for review. Under the aforementioned Section 80, the Court is empowered, pursuant to the provisions of Section 63(e), to make any orders that it deems fit to meet the ends of justice. Order 45 Rule 1(1)(a) & (b) reads;

> **(1) Any person considering himself aggrieved—**
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> **(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.**

21. For the court to consider an application for review, it has to consider that (a) there is the discovery of new and important matter or evidence, (b) there was a mistake or error apparent on the face of the record and (c) any other sufficient reasons. The instant application fails to meet the pre-condition of (a) and (b) and therefore falls under the ambit of condition (c). The reasons adduced by the Defendants was that the rate of interest charged was manifestly high, unconscionable and illegal, and that in any event, the execution proceedings could not execute against a deceased party.

22. The issue of rate of interest rate being manifestly high was dealt with by Gikonyo, J in his ruling on 30th June 2015. For the Defendants to seek a review of the same at this juncture, would be tantamount for the Court sitting on appeal. Further, the Defendants admittedly filed a Notice of Appeal, clearly indicating their intention of seeking to appeal the decision of Gikonyo, J. In the Court of Appeal case of **Francis Origo& Another v Jacob KumaliMunagala [2005] eKLR**, it was held *inter alia*;

> ***"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction."***

23. The Defendants had opted to take a decision of appealing the decision of the learned judge's decision by filing the Notice of Appeal on 13th July 2015. Thereafter, they sought in the instant application to review the same decision that they had earlier wanted to impugn in appeal . It seems to the Court that the Defendants have not made up their mind on the course that they want to pursue, or that they seek to shop for a forum that they deem would be best suitable for them. This may be deemed to be tantamount to an abuse of the process of the Court. The Defendants cannot, and should not, be allowed to whimsically and capriciously make applications without due consideration of the overriding objectives of the Court. Further, it has been reiterated in **National Bank of Kenya Ltd v Ndung'uNjau Civil Appeal No 211 of 1996** as was in the case of **P. N. EswaraIyer v The Registrar 1980 AIR 808; 1980 SCR (2) 889**, review of a decision is a serious step, and that the Court would be reluctant, in the absence of glaring or apparent error or omission on the face of the record, to consider such application.

24. The Defendants have not been able to establish any of these conditions, or any other sufficient reason that the Court would consider in granting of such application. In the latter case of **P. N. EswaraIyer v**

The Registrar (supra), it was held that;

> ***"A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and over- ruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use. We regret to say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as passport. Nothing which we did not hear them has been heard now except a couple of rulings on points earlier put forward. Maybe, as counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality."***

25. In consideration of the foregoing, the application by the Defendants for review is found to be unmeritorious and the same is dismissed with costs awarded to the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 2nd Day of December, 2015.

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C. KARIUKI

JUDGE