



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 786 OF 2002

LA BELLE INTERNATIONAL LIMITED :::::::::::::::::::: 1ST PLAINTIFF

TEJINDER KAUR BIRDI :::::::::::::::::::: 2ND PLAINTIFF

- VERSUS -

FIDELITY COMMERCIAL BANK LIMITED :::::::::::::::::::: 1ST DEFENDANT

ISMAIL M. H. MAWJI :::::::::::::::::::: 2ND DEFENDANT

R U L I N G

1. Before the court is the Plaintiff's application vide **Notice of Motion** dated **11th April 2003** seeking the following orders namely:
 - a. *Spent.*
 - b. *Spent*
 - c. *That this Honourable Court do declare that the Ruling of the Honourable Justice J. N. Khaminwa dated 25th February 2011 and all its consequential orders are a nullity (and/or in effective and the same ought to be set aside.*
 - d. *Costs to this application be in the cause.*
2. The application is supported by the grounds set out therein and also by affidavit of **TEJINDER KAUR BIRDI** dated **11th April 2013** and filed in court on **15th April 2013** and its annextures.
3. The application is opposed by a replying affidavit sworn by **EDWIN KAMAU MAINA** dated 29th April 2013. In addition the Respondents have filed Preliminary Objection dated 5th December 2013 and filed in court on 6th December 2013, and reinforced by a replying affidavit of Mr. Rustan Moti Hira, advocate for the Defendant.
4. In brief the background facts leading to the application are that Defendants/Respondents filed an application by way of Notice of Motion dated 12th August 2008 seeking that the orders of the court issued on 31st July 2009 be reviewed. Those orders of 31st July 2009 were given in an application by the Plaintiffs/Applicants dated 25th February 2009 which sought to set aside the ex-

parte Judgement entered on 11th December 2008 in favour of the Defendant/Respondents. That application by the Plaintiff was successful in that the court issued an order setting aside the said *ex-parte* decree issued on 11th December 2008. It is understood that the said decree was to the effect that:-

- ***The suit stood dismissed.***
 - ***The 1st Defendant was authorized to take possession of the assets of the 1st Plaintiff.***
 - ***The Plaintiffs were at liberty to sell the charged property and proceeds thereof credited to the Plaintiff's account in reduction of their respective indebtedness.***
 - ***The costs of the suit and counter-claim was given to the Defendants.***
5. By the setting aside of the said *ex-parte* Judgement as aforesaid the suit herein stood reinstated. However, being dissatisfied with the order setting aside the said *ex-parte* Judgment, the Defendants/Respondents filed their application dated 12th August 2009 seeking the review and setting aside of the orders issued on 31st July 2009.
6. The Defendants/Respondents aforesaid application for review was ground on the following alleged facts:-
- i. ***There is a mistake and/or error apparent on the face of the record.***
 - ii. ***The Plaintiffs did not apply for orders granted.***
 - iii. ***The Plaintiff's application dated 25th February 2009 and filed in court the same day only sought a stay of execution pending appeal.***
 - iv. ***The court cannot grant orders that have not been asked for and therefore acted ultra-vires.***
 - v. ***In the circumstances the orders of 31st July 2009 be reviewed and set aside.***
7. In rendering its Ruling on the said Defendant's/Respondent's application for review, the court revisited the prayers contained in the Plaintiff's application dated 25th February 2009, and the court established as a fact that indeed the orders that were given to the Plaintiff were as follows;
- 1. ***Application was certified urgent.***
 - 2. ***The matter to be heard inter-partes 3/03/2009.***
 - 3. ***Interim stay be and is hereby granted until 3/03/2009.***
8. On 3/03/2009 there was an order:-
- i. ***That the ex-parte Judgement entered herein on 11th December 2008 be and is hereby set aside wholly except that the Applicant shall pay the thrown away costs.***
9. The court, after perusing the court file found out in its aforesaid Ruling that the orders prayed for in prayer 3 of the Plaintiff's application was for stay of execution of the decree issued on 11th December 2008 pending the hearing and the determination of the Plaintiff's intended appeal against the *ex-parte* Judgement. The court found that the orders purportedly granted:-
- “the result is that the Judgement entered by the court on 11th December 2008 is set aside wholly.”***
- was an error on the face of the record as no such prayer was made by the Plaintiff. The court then allowed the review of the Ruling made on 31st July 2009 and set it aside.
10. The said Ruling was delivered on 25th February 2011 and is the subject matter of this application. The Plaintiffs/Applicants alleged that Justice J. N. Khaminwa who heard the said application

reserved the Ruling to be delivered on Notice, but such Notice was never given to the Plaintiffs or their advocates, yet the Ruling was delivered in the presence of the Defendants and/or their advocates. It is on this basis that the Plaintiffs now seek to declare that Ruling a nullity and of no consequence.

11. Upon perusal of the court file it appears that the Notice from the Deputy Registrar marked “**JKB5**” to the Applicant’s supporting affidavit was not sent to the firm of Kilonzo & Company Advocates then on record for the Plaintiffs herein. The firm of Anil Joshi Advocates, who had previously acted for the Plaintiffs herein, and to whom the said Notice was addressed, could not be traced as indicated on the face of the Notice. Also, the firm of Kilonzo & Company Advocates then on record for the Plaintiffs wrote several letters to the Deputy Registrar inquiring about the date of the Ruling. The said letters were duly received and stamped by the Court Registry but no reply was given. The fact of the said Ruling appears to have been brought to light as far as the Plaintiff is concerned when the Civil Appeal Number 1 of 2004 came up for hearing at the Court of Appeal on 4th February 2013.

12. On the other hand the Defendants have raised a Preliminary Objection and raised the following issues, namely:-

1. ***That this court lacks jurisdiction to entertain the application as filed, as it seeks to amend the order of the Court of Appeal.***
2. ***In the alternative:-***
 - a. ***The Applicant is guilty of contumelious conduct.***
 - b. ***The application is a gross abuse of the court process.***
 - c. ***The application is incurably defective.***

13. In support to those grounds of Preliminary Objection, Mr. Rustan Moti Hira has sworn a replying affidavit wherein he depones that the Applicant was aware of the Ruling in January 2013 that is 14 months ago when he spoke to their advocates and informed him of the situation which was repeated in the Court of Appeal in his presence on the 4th February 2013 that is 13 months ago. By that information, the advocate ought to have applied for review under and by virtue of provisions of Order 45 of the Civil Procedure Rules.

14. Mr. Hira further submitted that in view of the conduct and behavior of the Plaintiff it is proper that they make provisions for security of the outstanding sum by either bank guarantee or depositing the same in an escrow account with the Defendant.

15. On his part Mr. Ndege for the Plaintiffs submitted that the pertinent issues for determination by this Court is as follows:-

- i. ***Is a Ruling/judgement pronounced in court without Notice to the parties of any effect?***
- ii. ***Does the court have inherent power to declare such Ruling/Judgement as a nullity and or ineffective?***
- iii. ***Are the Plaintiffs/Applicants entitled to the orders sought?***

16. On the first point, Mr. Ndege drew attention of this court to Order 21 Rule 1 of the Civil Procedure Rules provides as under:-

“In suits where a hearing is necessary, the court after the case has been heard shall pronounce Judgement in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.”

17. Mr. Ndege submitted that it is crystal clear from the reading of the aforesaid provision of law that Notice should be given to the parties or their advocates before pronouncing Judgement in court. The said provision is couched in mandatory terms. The counsel relied on the **16th Edition of Mulla on Civil Procedure Code, page 2356**, under the subtitle **Notice to Parties**, he states thus:-

“. . . a Judgement delivered without Notice to parties is not a Judgement pronounced within the meaning of the rule. . .”

18. Mr. Ndege submitted that as the said Ruling was delivered without Notice to the Plaintiffs, it cannot operate as a Ruling of the court and it is therefore ineffective.
19. On the second point, Mr. Ndege pointed out that the court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court as set out under Section 3A of the Civil Procedure Act.
20. In the last point, in view of the submission made above (i) and (ii), it is my humble submission that unless the orders sought are granted, there will be injustice caused to the Plaintiffs/Applicants for which there will be no remedy. This court has the power to remedy such injustice in terms of the orders sought.
21. I have carefully considered the application, affidavits and the submission of the parties. I have also considered the Ruling delivered by Lady Justice Khamiwna the subject matter of the current application. I am not sure if the Plaintiffs would be raising any issues to that Ruling had they received the Notice and attended to the delivery of the Ruling. It is clear to me that the Plaintiffs are not attacking the correctness or the integrity of the said Ruling but the process leading to its delivery. In other words, the Plaintiff appears not concerned at all with the finding of the court that it granted an order which it ought not to have granted in the first instance. The issue to raise is this: ***If the Ruling is declared a nullity, and the application is heard afresh is there a likelihood that a different Ruling will be arrived at?*** The answer to that hypothetical question is not necessary now. What is clear is that a Ruling which had serious consequences to the Plaintiff was delivered without the Plaintiff's knowledge, and there is no evidence that a Notice was served upon the Plaintiff. I have the duty to strike a balance which suits both parties i.e., which suits the Defendant as the decree holder, and that which suits the Plaintiff to preserve Plaintiff's right of appeal. In that regard I herewith do set aside the Ruling delivered by Honourable Lady Justice J. N. Khamiwa on 25th February 2011 together with all its consequential orders on the following conditions:-
- a. ***That the Plaintiff shall provide security for the outstanding sum owed to the Defendants by way of either a bank guarantee or depositing the same in escrow account with the Defendants within 30 days from the date hereof.***
 - b. ***If the parties are unable to agree on the exact amount now due the parties shall submit on the issue before this court and the court shall determine the sum now due.***
 - c. ***Each party shall bear their own costs of this application.***

DATED, READ AND DELIVERED AT NAIROBI

THIS 17TH DAY OF MARCH 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Omolo holding brief for Were for Plaintiffs/Respondents

No appearance for Defendants/Applicants

Teresia – Court Clerk