



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 2496 OF 1997

FIRST NATIONAL FINANCE BANK LIMITEDPLAINTIFF

VERSUS

UNIVERSAL APPARELS (EPZ) LTD.1ST DEFENDANT

AHMED AFTAB2ND DEFENDANT

RUBINA AHMED3RD DEFENDANT

RULING

1. The Defendants have filed a Notice of Motion as before this Court dated 8th May 2013. The same is predicated upon **Order 20 rule 14, Order 21 rule 17, Order 22 rule 49 (a) and Order 51 rule 1** of the *Civil Procedure Rules, 2010*. The heading to the Application also refers to **sections 1A, 1B, 3A, 34 and 63 (e)** of the *Civil Procedure Act* as well as *Article 159* of the *Constitution*. The Application seeks orders that the Plaintiff be directed to furnish a comprehensive account of all monies received towards the settlement of the Decree herein. It also seeks for an audit to be conducted in order to establish whether the amount decreed herein together with interest, costs and incidental expenses has now been fully paid. Should there be any excess, the Defendants ask that the same may be refunded to them. Further they pray for the lifting of the Prohibitory Order as issued against L. R. No.9104/179, Whispers Avenue, Nairobi (hereinafter “the suit property”).
2. The Application before Court was brought on the following grounds:

“a) Interlocutory Judgment against the Defendants was entered on 13th November 1997 for US Dollars 342,415 with compound interest at court rates together with costs assessed at Kshs. 297,624/60.

b) The Decretal amount of US Dollars 342,415/95 at the then prevailing exchange rate of 64.0667 translated into a sum of Kshs. 21,937,459/00.

c) The Defendants made payments equivalent to the sum of Kshs. 4,781,552/00 and the Plaintiff encashed a performance bond from Kenindia Assurance Co. on 02/12/2008 for the sum of Kshs. 54,377,095 in further payment of the Decretal sum

and which sum the Plaintiff had opted to pursue in a different suit being HCCC 874 of 2002 First National Finance Bank Ltd vs. Kenindia Assurance Company Ltd.

d) The Plaintiff has ended up overcharging the Defendants by acts of unilaterally varying the interest rates from that decreed by court and by mischievously and haphazardly interchanging the currency from dollar to Kenya shillings and vice versa in such a way as to further deprive the Defendants of funds.

e) In addition, the Plaintiff has debited large amounts from the 1st Defendant's Account held in its bank without any justification, consent or authority from the Defendants.

f) The Plaintiff was paid costs in full but has claimed and received more costs than sanctioned by court.

g) The Defendants are entitled to receive amount that have been paid in excess of judgment debt and the Plaintiff should not be unjustly enriched from the excess payment.

h) The 2nd and 3rd Defendants are prejudiced by the continued existence of a prohibitory order on their property L.R. No. 9104/179 Whispers Avenue, Nairobi when the debt that gave rise to the prohibitory order has been fully paid.

i) This court has in a previous ruling by the Honourable Justice Azangalala (as he then was) indicated that the outcome of an appeal lodged against the judgment in HCCC 874 of 2002 First National Finance Bank Ltd vs. Kenindia Assurance Company Ltd would have a bearing on the execution in this matter and having succeeded in recovering the Decretal sum in HCCC 874 of 2002, the Plaintiff should now release the Defendants from the Judgment Debt.

j) The Plaintiff has persistently refused to address queries regarding the accounting and payments of the Judgment Debt despite numerous requests to do so".

3. The Defendants' said Application was supported by the Affidavit of **Ahmed Aftab** sworn on even date. That Affidavit recorded the proceedings before this Court that had gone on before, dating back to the interlocutory judgement obtained by the Plaintiff against all the Defendants for the sum of US dollars 342,415/95 on 13th November 1997, together with compound interest at 12% per annum and costs assessed at KShs 297,634/60. The deponent also referred to an associate suit filed by the Plaintiff as against Kenindia Assurance Company Ltd. based on a Performance Bond that the latter company had issued as security on 2nd September 1996. Judgement had been entered against the said Assurance Company but was overturned on appeal. However the monies that had been deposited as security for the Appeal in the amount of Shs. 54,377,095/- were paid to the Plaintiff along with the Shs 4,781,552/- paid by the Defendants to the Plaintiff. Taking such sums into account, Mr. Aftab maintained that the Plaintiff had been overpaid to the tune of Shs. 17,293,188/26. The deponent then went on to recount details of correspondence had with the Plaintiff by the Defendants' advocates on record at the time and attached 5 schedules to his Supporting Affidavit detailing the separate accounts maintained with the Plaintiff bank. The latter had been repeatedly requested over 10 years to provide the Defendants with full details of the accounts but to no avail. The deponent noted that on 28th April 1998 the Plaintiff had obtained a Prohibitory Order over the suit property which had not yet been discharged and he requested this Court so to do.
4. The Plaintiff filed Grounds of Opposition on 7th June 2013. Such detailed as follows:

"1. THAT the Defendants' Notice of Motion Application dated 8th May, 2013 is incompetent, bad in law, fundamentally defective and ought to be dismissed with costs.

2. **THAT the reliefs sought by the said Application contravene and/or contradict the provisions of the Civil Procedure Rules, 2010.**

3. **THAT the reliefs sought are contradictory, unfounded and misleading in material aspects both in fact and law.**

4. **THAT the current Application is an ill-advised attempt and/or effort by the Defendants meant to fraudulently use the Court process to review orders of the Honourable Court made in other cases without availing those files to the Honourable Court.**

5. **THAT the current Applicants have failed to disclose material facts regarding HCCC NO. 874 of 2002 and Civil Suit No. 1129 of 1997 and which are likely to answer all the allegations of the Defendants.**

6. **THAT all the issues raised in the current Application had previously been responded to in HCCC NO. 1129 of 1997.**

7. **THAT the Defendants have failed in their duty of candour to the Honourable Court by deliberately failing to disclose all material facts, failing to make a full and frank disclosure, deliberately distorting and/or twisting relevant and material information and withholding and/or suppressing relevant material and facts on the issues presented before the Court.**

8. **THAT the current Application seeks to achieve ulterior motives, is ill intentioned/ mala fides and an attempt to abuse the Honourable Court's process in blatant disregard of the principle of *ex dolo malo non oritur action*".**

5. The Replying Affidavit of the Plaintiff was sworn by its Legal Officer **Mary Omullo** on 16th July 2013. The Affidavit commenced by saying that the deponent had been advised by the Plaintiff's advocates on record that the Defendants' Application before Court was fundamentally defective and an ill-advised attempt to use the Court process with intent to bar the Plaintiff from demanding from them the outstanding loan amount, accrued interest and other charges. The deponent maintained that the Plaintiff had supplied the Defendants with accounts and such had been relied upon by the Defendants in the Affidavit in support of the Application. In their demand for an audit, the Defendants had not proposed an expert to conduct verification and/or audit the said accounts. Ms. Omullo pointed to how the Defendants seemed to be intent upon misleading the Court as the Performance Bond issued by Kenindia Assurance Company Ltd as exhibited to the Affidavit in support of the Application detailed a figure of Shs. 25 million not Shs. 54,377,095/-. The Replying Affidavit continued in the same vein, continually attacking the Affidavit in support of the Application maintaining that the Defendants were manipulating the figures in order to have the Court believe that they had settled the decretal sum in this matter. In order to back up her assertions, Ms Omullo annexed to the Replying Affidavit copies of documents filed in this case, **HCCC No. 874 of 2002** and **HCCC No. 1129 of 1997** as well as copies of the Account Statements for the first Defendant up to and including 9th July 2002.
6. Leave was given for the third Defendant to swear and file a Further Affidavit dated 14th August 2013. The deponent thereof maintained that the Replying Affidavit failed to address the pertinent issues raised in the Defendants' Application more particularly materials or documents that could justify the Plaintiff's continued attachment of the suit property. The deponent pointed out that there had never been any loan advanced to the first Defendant herein, only a Letter of Credit facility. It seemed that the Plaintiff had also not comprehended the Defendants' Application before Court which was seeking an account of monies received in or towards settlement of the Decree herein. This is not the same as supplying a copy of the first Defendant's Statement of Account. The deponent noted that consultations had taken place with the most recent enquiry to that end being in March 2012. The Plaintiff had failed to respond to the Defendants' approaches in that regard. With reference to the issue as to the nomination an expert, the deponent noted that he had

obtained the services of Messrs. C. M. Maingi & Co Certified Public Accountants to assist him in the figures detailed in the Affidavit in support of the Application. The Plaintiff had not challenged or denied the receiving of the sum of Shs. 54,377,099/- from Kenindia Assurance Company Ltd nor indeed that it had received the sum of Shs. 2,786,375/- as AMT received from Prime Bank. The Defendants were not challenging the Decree herein but the amount paid thereunder.

7. The Defendants' submissions as regards their Application before Court were filed herein on 18th October 2013. They drew attention to the contents of both Affidavits in support of the Application as well as the contents of the Replying Affidavit. As regards the legal basis for the Application, the Defendants pointed to **section 34** of the *Civil Procedure Act* which detailed that all questions relating to the execution, discharge or satisfaction of a Decree should be dealt with by the Court executing the Decree. Similarly, under **Order 21 rule 17** the Court was clothed with the power to give Orders and directions for the taking of accounts. Further, under **Order 22 rule 49 (a)**, if the decretal amount is certified by the Court to have been fully paid, then any attachment shall be withdrawn and may be so proclaimed by the Court. The Defendants commented as to the Statements of Accounts as annexed to the Replying Affidavit maintaining that such did not amount to the taking of accounts by a Court merely provision of bank statements. The Defendants pointed to payments for legal fees of Shs. 300,000/- on 17th October 1997 as well as a further payment of Shs. 186,232/55 on 3rd December 1998. The Defendant submitted that the annexure to the Replying Affidavit was no more than a jungle of unrelated papers and the bank statements supplied were unclear and unhelpful.
8. The Plaintiff's submissions were filed herein on 22nd November 2013. They opened by maintaining that the Application before Court did not seek any relief capable of adjudication. It noted that the Application premised that in the absence of a comprehensive account as demanded by the Defendants, there could not be an audit or verification as to whether the Decree had been satisfied or otherwise. The Plaintiff submitted that the Application was jumbled and confused and it reiterated the cardinal rule that, in drafting Orders sought before Court, such must be clear and unambiguous. To this end it referred to the cases of **De Leu v Muteshi (1995-1998) 1EA 25** and **Gatharia K. Mutitika v Baharini Farm Ltd (1982-1988) 1 KAR 863**. In this latter case the Plaintiff quoted from the finding of the Court:

“.....in so far as possible a person should know with complete precision what it is they are required to do or abstain from doing and should be as definite, clear and precise in its terms as possible, so that they may be no reason or excuse for misunderstanding or disobeying it; and when practicable, it should plainly indicate to the defendant all of the acts which he is restrained from doing, without calling on him for inferences about which persons may well differ.”

9. In this regard, the Plaintiff attacked prayers 1 and 2 of the Application as being ambiguous and confusing as well as having no foundation in law. As a result, the Plaintiff submitted that this Court had little option but to strike out the two prayers and that having been effected, the rest of the relief sought would have no basis. It referred to the well-known case of **Macfoy v United Africa Co. Ltd** as per **Lord Denning**:

“An act that is void is a nullity. It is automatically null and void without more ado... and every proceeding which is founded on it is also bad and incurably bad. You cannot make something out of nothing and expect it to stay there. It will collapse.”

Thereafter, the Plaintiff maintained that the Application had failed to disclose a number of material facts and sought to achieve an ulterior motive. The Application, more particularly the affidavits in support, as well as the Defendants' submissions, all contained scandalous, irrelevant and oppressive averments.

10. I have carefully perused the Defendants' Application before Court more particularly the prayers sought, in an effort to understand just where the Plaintiff is coming from in its surprisingly robust assertion at the supposedly ulterior motive of the Defendants. I am of the view that the prayers sought are very clear. This case is now 17 years old. What the Defendants are saying is that it is

about time for the parties to know where they are at in terms of monies paid or otherwise towards the settlement of the Decree dated 13th November 1997 and issued on 18th November 1997. The last meaningful proceeding before this Court was a Notice of Motion seeking for an Order lifting the Prohibitory Order above referred to. My learned brother **Azangalala J.** ruled, dismissing that Application, as long ago as the 27th October 2004. The Statement of the Account of the first Defendant as annexed to the Replying Affidavit herein has a final date of 9th July 2002 – nothing since. What the Defendants are saying is that since then, payments have been made for which credit has not been given by the Plaintiff. That may or may not be so but, in my opinion, cannot just be shrugged off by the Plaintiff who, in its Replying Affidavit has not even bothered to tell the Defendants or indeed this Court, what monies are still owed in respect of the settlement of the Decree. Then there is no reference to **HCCC No. 874 of 2002**. According to the miscellaneous documents annexed to the Replying Affidavit, that was a case between the Plaintiff and the said Kenindia Assurance Company Ltd in which summary judgement was entered as against the Assurance Company in the amount of Shs. 34,208,710/20, which the Court understands, was subsequently set aside on appeal. However, the Defendants herein were not parties to that case so how can they be expected to know what transpired? Were any monies paid by the Assurance Company to the Plaintiff and, if so, did such relate to and reduce the amount of the Decree herein? What transpired in the proceedings as between the second Defendant herein (as Plaintiff) and the Plaintiff herein as regards **HCCC No. 1129 of 1997**? These are all matters which the Court has sympathy with the Defendants and that need be investigated.

11. **Section 34** of the *Civil Procedure Act* reads as follows:

“34. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge of satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceedings under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

***Explanation* – For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit”.**

In my view, there is justification in the Application before this Court for the provisions of **section 34** to be utilised in order for this Court to ascertain the true position to date as regards payment and/or settlement of the Decree herein. **Order 21 rule 17** as read with **section 34** details as follows:

“The court may, either by the decree direct an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account the books of accounts in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised.”

If after taking of accounts, the Court is satisfied that the Decree herein has been settled in full, then the provisions of **Order 22 rule 49 (a)** of the *Civil Procedure Rules* would come into play so far as the lifting of the Prohibitory Order as against the suit property is concerned. That is a matter which must be left to the Court’s discretion.

12. As a result of all the above, I direct that the Deputy Registrar of this Court, upon a date to be fixed

before her by the parties herein, will take accounts in accordance with the provisions of **Order 21 rule 17** as set out above. In so doing, the Plaintiff will be required to provide a complete set of bank statements to date of any or all of the Defendants' accounts either held at this time or to have been in existence at the filing of this suit and since closed. Those statements will be backed up, as far as possible, with documentary evidence of the debits and credits (including interest charged) as well as charges made as against the accounts e.g. legal fees. Further, the Honourable Deputy Registrar shall take into account and refer to the proceedings in the two suits associated with this one before Court being **HCCC No. 874 of 2002** and **HCCC No. 1129 of 1997**. Orders accordingly, costs of the Application to the Defendants.

DATED and delivered at Nairobi this 14th day of May, 2014.

J. B. HAVELOCK

JUDGE