REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1475 of 2000

IRARU HOLDINGS LIMITED …… PLAINTIFF

VERSUS

CANADIAN FOODCRAINS BANK …… 1ST DEFENDANT

TRANSAMI (KENYA) LIMITED

(now known as SDV TRANSAMI (K) LTD. …… 2ND DEFENDANT

SOCIETE GENERALE DE SURVEILLANCE (SGS)

KENYA LIMITED ……..….. 3RD DEFENDANT

R U L I N G

1. The Application before Court is the Plaintiff's Notice of Motion dated 22 February 2008! It is brought under the provisions of **sections 3A, 63 (e)** and **80** of the *Civil Procedure Act* as well as under the old **Orders XLIV Rules 1, 2 and 3 (2)** and **L Rule 1** of the *Civil Procedure Rules*. The Plaintiff seeks Orders for the Court to review and/or set aside the order of my learned brother Azangalala J. made on 5 December 2007. The Court is also requested to award that the Plaintiff do pay a reasonable amount to the first and third Defendants by way of costs for their counsel's attendance in court on 5 December 2007. The Court is also asked to order a stay of taxation of the third Defendant's Bill of Costs dated 29 January 2008 or, in the alternative, to make such other interlocutory Orders as it may deem just and expedient.

2. The Plaintiff based its Application on 5 grounds as follows:

"1) That on 5th December 2007 an order for costs including fees for getting up trial was awarded to the 1st and 3rd Defendants against the plaintiff. The said order was issued by this Honourable court on the basis that as at 5th December 2007 the suit was ready for trial. However it is now apparent that that assumption was erroneous in that:

(a) Issues had not been agreed upon by the parties to the suit and no order had been made by this honourable court concerning the determination or adoption of issues in this suit as provided for under the Civil Procedure Rules.

(b) The third Defendant served the plaintiff with its list of documents under Order X Rules 11 AND 11A of the Civil Procedure Rules in the afternoon of 21st November 2008. According to Order X Rule 11 (2) and 11A (2), the plaintiff was obliged to respond to the said List of documents within 14 days of service of the said list of documents. The fourteen days were due to elapse on midnight of

5th December 2007. Therefore, at the time of the hearing of the suit, discovery had not been completed and no hearing would have taken place until the process of discovery is complete.

(c) As at the date of hearing, an application dated 28th November 2007 for transfer of proceedings and records of the 1st class Magistrate's court in Criminal Case No. 7354 of 1997 at Milimani Commercial Courts was pending and had not been heard and determined as at 5th December 2007. The hearing of the suit would not have proceeded before the crucial application is heard and determined.

(d) No witness summons had been issued to the Defendants to summon witnesses and no witness appeared on the Defendants behalf on 5th December 2007".

2) THAT the Defendants counsel had by correspondences dated 16th November and 20th November 2007 been informed that the plaintiff's counsel had gone overseas for studies and an adjournment would be sought by a counsel holding his brief on 5th December 2007.

3) THAT the true position of the suit and the circumstances that led to the absence of the plaintiff's counsel were not properly explained to court or disclosed by the Defendant's counsel and if the same had been explained and disclosed the court would not have ordered for the Defendants to be awarded getting up fees and would have awarded, if minded to, only costs of the day.

4) As a consequence of the Order made on 5th December 2007, the third Defendant has drawn a bill of costs amounting to Kshs.2,510,173/= and has insisted in its correspondence to be paid a sum of Kshs. 2,166,666/=. Unless the said order is reviewed or set aside, the plaintiff may end up paying such an astronomical sum of money to the Defendants for a day's appearance of a suit that, as is now apparent, was not ready for hearing which would amount to a gross miscarriage of justice and unjust enrichment. Under schedule VI of the advocates remuneration Order 2006 an advocate is entitled to a sum of Kshs.6,720/= (lower scale) and Kshs. 10,080/= (higher scale) for an attendance in court for a whole day.

5) THAT it is only fair and just that the said Orders sought in this application be granted as prayed".

3. The Application is supported by the Affidavit sworn by one **Ann Kajuju** dated 22 February 2008. The deponent details that she is a director of the Plaintiff Company and duly authorised to swear the Affidavit on its behalf. She noted that her advocates on record had advised her that the hearing of this matter had been scheduled to take place on 5 of December 2007 but Mr. Njiru Boniface who was the counsel representing the Plaintiff was out of the country pursuing his Master's degree in Amsterdam. Such fact had been communicated by letter to the Defendants' advocates. The deponent had been advised that when the matter came up for hearing, an adjournment was duly applied for but seriously objected to by the advocates for the third Defendant. The adjournment had been granted but with the condition that the Plaintiff do pay the getting-up fees which were to be agreed between the parties or taxed if not agreed. Miss. Kajuju then detailed four reasons as to why the matter was not ready for trial as at 5 December 2007. She went on to say that following the learned Judge's Order, the third Defendant had proceeded to file a Bill of Costs for taxation in the amount of Shs. 2,510,173/-. The deponent detailed that she expected that the learned Judge in adjourning the hearing of the suit could not have possibly expected such a large sum to be raised by way of getting - up fee. It was for that reason that she prayed the Court to award a reasonable amount to be payable by the Plaintiff to the first and third Defendant by way of costs for their counsel's attendance in court on the day in question – 5 December 2007. She also asked that the taxation be stayed pending this Court's Ruling in connection with the above.

4. Grounds of Opposition were filed by the advocates for the third Defendant on 6 March 2008. They detailed that the Plaintiff's said application did not establish grounds for review but were seemingly grounds of appeal. The third Defendant went on to say that the Plaintiff had not satisfied the conditions as per **Order XL1V Rules 1, 2 and 3 (2)** of the old *Civil Procedure Rules* now **Order 45 Rules 1 and 2**,

Civil Procedure Rules, 2010. The Plaintiff had not shown any new or important matter of evidence which was not available at the time that the Court made the Order and it had not shown any error apparent on the face the record. Consequently the third Defendant could see no reason why an order for review should issue. Further, there had been a delay in bringing the Plaintiff's application before court which had not been explained. The third Defendant detailed that it had made discovery and was preparing for trial and that the absence of the Plaintiff's advocate at the hearing of the original application now requested to be reviewed, did not constitute a sufficient reason therefore. Finally, the third Defendant had not been aware of the Plaintiff's application dated 28 November 2007 as the same had not been served upon it.

5. The Plaintiff, again through **Ann Kajuju,** filed a Supplementary Affidavit with the leave of the court on 26th of May 2008. The deponent detailed that the Advocates on record for the Plaintiff had advised that as the client, it could not be punished for the mistake of Counsel who had not been present at the time that the application now being reviewed, was heard. She noted that the certified copy of the Ruling had been applied for by the Plaintiff's advocates on record that was only issued on 16 January 2008. The present application before court had been filed on 22nd of February 2008 which was not, in the view of the deponent, an inordinate delay. She had also been advised by the advocates on record that a party may not apply for a review of this Court's Order without attaching a certified copy thereof. Consequently it was imperative that a certified copy of the Court's Ruling was obtained.

6. The third Defendant filed its submissions on 9 February 2010. It entirely relied on the Grounds of Opposition filed on 6 March 2008. It emphasised that the grounds being raised by the Plaintiff in support of its Application, were not grounds for review but, strictly speaking, grounds of appeal. It referred this Court to the case of **Humphrey Maina v. Telepost Investments Cooperative Society & Anor. HCCC No. 263 of 2004 (unreported)** as well as **Touring Cars (K) Ltd. v Munkanji (2000) 1 EA 261**, **Hassan Karim & Co. Ltd v. Africa Import & Ward Central Corporation Ltd (1960) EA 396 and Shah v. Dharamchi (1981) KLR 560**. The third Defendant submitted that the Plaintiff's Application before court was premature in that the Judge's Order made on 5 December 2007 was that the costs payable to the third Defendant were to be taxed if not agreed upon. To date there had been no taxation and the recourse available to the Plaintiff was to challenge the third Defendant's Bill of Costs and if it was dissatisfied with the decision of the taxing officer, then the Plaintiff would be at liberty to file a reference in this Court. The third Defendant submitted that there had been no new matters raised or put forward to merit a review of the said Order of 5 December 2007. The Court was referred to the case of **Lowe & Company v. Banque Indosuez Nairobi Civil Appl No. 217 of 1998 (unreported).** It also noted that there had been inordinate delay in bringing the application and referred the court to the case of **John Francis Muyondi v. Industrial & Commercial Development Corporation & Anor. Civil Appeal No. 67 of 2004 (unreported)**. In the third Defendant's view, the absence of the Plaintiff's advocate at the hearing before court on that day did not constitute "other sufficient reasons" for review – see **Omari v Otundo Kisumu Civil Appeal No. 195 of 2001 (unreported)**. Finally, the third Defendant submitted that the issue of costs is purely in the discretion of the trial judge. In this case, the Judge had evaluated all the facts before him and found that the third Defendant had sufficiently prepared for the hearing of the suit scheduled for the day in question. He used his discretion to allow the adjournment requested by the Plaintiff but on the condition that the Plaintiff should pay the third Defendant's costs of the day including getting-up fees.

7. The Plaintiff in its submissions filed on 17 February 2010, set out in detail the two provisions of the law under which its Application was brought being **section 80** of the *Civil Procedure Act* as well as **order XLIV Rule 1 (1)** of the old *Civil Procedure Rules*. It also set out the provisions of **section 27 (1)** of the *Civil Procedure Act* as well as **sections 1A and 1B** thereof. More importantly, the Plaintiff set out the provisions of the *Advocates Remuneration Order, 1997 Schedule VI (2)* as follows:

"2. FEES FOR GETTING UP OR PREPARING FOR TRIAL

In any case in which a denial of liability is filed or in which issues for trial are joined by the pleadings, a fee for getting up and preparing the case for trial shall be allowed in addition to the instruction fee and shall not be less than one third of the instruction fee allowed on taxations:

Provided that –

(i) This fee may be increased as the taxation officer considers reasonable but it does not include any work comprised in the instruction fee;

(ii) No fee under this paragraph is chargeable until the case has been confirmed for hearing, but an additional sum of not more than 15 per cent of the instruction fee allowed on taxation may, if the judge so directs, be allowed on taxation may, if the judge so directs, be allowed against the party seeking the adjournment in respect of each occasion upon which a confirmed hearing is adjourned;

(iii) In every case which is not heard the taxing officer must be satisfied that the case has been prepared for trial under this paragraph".

The Plaintiff then listed what it termed the indisputable facts relevant to its Application and noted the disparity between advocate's fees for attendances before Court as against getting-up fees which it maintained were too high. For the third Defendant's advocates to charge Shs. 2,500,000/-for a few minutes attendance before Court was injudicious.

8. However it appeared that the Plaintiff's principle argument was that the suit was not ready for hearing on 5 December 2007 at all. There was a pending Application before Court dated 28 November 2007 which had not been heard. Further, a list of documents had been served on the Plaintiff's advocates on 21 of November 2007 and the period prescribed within which the Plaintiff was obliged upon, if it had any difficulty with the production of any of the documents before court, had not expired as at the date of the hearing. Again, the issues for determination had not been settled and no direction therefore given by the Court. Consequently, it was the Plaintiff's submission that as the suit was not ready for hearing on 5 December 2007, the Defendants were not entitled to any getting-up fees on that day.

9. Further, the suit had not been confirmed for hearing and the Plaintiff submitted that according to the proviso (ii) of Schedule VI (2) of the Advocates Remuneration Order 1997, no fee under that paragraph was chargeable until the case had been confirmed for hearing. It maintained that the normal procedure (at that time) at the Milimani Commercial Court was to confirm the hearing of cases at call over. There was also a practice direction issued by the Presiding Judge that no suit should be confirmed for hearing where there was a pending application on the Court file and where discovery had not been concluded. The Plaintiff also maintained that to allow the costs claimed by the third Defendant, would amount to unjust enrichment as costs by their nature are compensatory. Finally, the Plaintiff submitted that in its opinion the words "sufficient cause" as used in **Order XLIV** could be liberally construed as to achieve the same results as **sections 1A and 1B** of the *Civil Procedure Act*. It asked the Court to be of the view that the Order of the Judge made on the 5 December 2007 may lead to an unjust and unfair result which this Court should obviously review.

10. It appears to me that the Plaintiff's use of the word "may" lies at the crux of this matter. As pointed out by the third Defendant's submissions, its Bill of Costs has yet to be taxed. As it stands at the moment, there is no telling what the Taxing Officer, who would tax the Bill, would reduce the amount detailed therein after having heard arguments from the advocates for the parties along the lines of the Plaintiff's submissions herein. As the third Defendant submitted, if the Plaintiff was dissatisfied with the finding of the Taxing Officer then it has an option to file a reference before this Court. In my opinion, by this Application, the Plaintiff has jumped the gun.

11. Be that as it may, this Court must still make a determination as regards the Plaintiff's Application dated 22nd of February 2008 in relation to my learned brother Azangalala's Order of 5 December 2007. I have perused the Court's record in that regard. It is clear therefrom as to when the date of 5 December 2007 was taken. The file came before Azangalala J. on 18 July 2007 with Mr. Amadi appearing for the Plaintiff and Miss Malik for the second Defendant as regards the hearing of a Notice of Motion dated 27 November 2006. A hearing date for that application was fixed for the 4 October 2007. However, there is no record of the file coming before court on that date. The next record on the Court file is for the 5 December 2007.

12. However, looking back on the Court file I note that in response to an invitation from Messrs. Hamilton Harrison & Mathews, the hearing date of the 5th December 2007 was taken by consent on 1 February 2007 wherein the Plaintiff's advocates' firm was represented by a Mr. Joseck. It is quite clear to me therefore that the Plaintiff was not only aware of the hearing date of 5 December 2007 but had also consented to it. As regards the point raised by the Plaintiff, that it had to respond to a List of Documents which had been filed immediately before the hearing date of 5 December 2007, I have observed on the Court file that a copy of the same was filed on 19 November 2007. The Plaintiff would have had 16 days to respond to that List of Documents which, in my opinion, would have been time enough for any objection that it may have had to the documents that the advocates for the third Defendant were intending to produce at the hearing. It is also interesting to note from the Court file that a Statement of Issues was filed on 3 December 2007 signed by the advocates for the first Defendant and the advocates for the third Defendant but not the Plaintiff's advocates. As regards the submission that there was still an Application filed but undetermined, I would confirm that the Plaintiff filed a Chamber Summons on 28 November 2007 seeking to transfer the file in respect of *Criminal Case No. 7354 of 1997* from the Magistrate First Class (City Hall) and that the same be allowed in as part of the proceedings in this suit. Interestingly, the Plaintiff made no mention of such application when appearing before Court on the hearing date of 5 December 2007. There was no indication to Court whether the Plaintiff intended to pursue the application or otherwise.

13. I have detailed all the above in reference to the Court file's record so as to understand the position that faced my learned brother Azangalala J. when he had to adjudicate upon the request for an adjournment of the hearing on 5 December 2007. On that day, Mr. Muragara for the third Defendant rigourously opposed the adjournment application. He was supported by Mr. Makori holding brief for Mr Odera for the first Defendant. In response, Ms Chepkwony holding brief for Mr. Njiru stated that this was the first time that the matter was coming for hearing. Mr. Njiru would complete his Masters' degree programme in April 2008. The Ruling of Azangalala J. reads as follows:

"I reluctantly allow the application for adjournment the same is allowed on terms that the plaintiff pays C. A. F. and the counsel for the 1st and 3rd defendants' adjournment costs which costs shall include a getting up fee to be agreed, if not taxed and the same to be paid before the Plaintiff can take a hearing date."

14. The old **Order XLIV Rule 1 (1)** provided as follows:

"1. (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".

The third Defendant cited before Court a number of cases which had bearing on the Plaintiff's Application before this court. The Plaintiff would seem to have hung its hat not on the discovery of a new and important matter or evidence since 5 December 2007 nor on the account of some mistake or error apparent on the face of the record. The Plaintiff maintains that the review is justified in relation to the words in the Rule **"or for any other sufficient reason"**. It would have this Court accept that these words open the Pandora's box as regards the overriding objective of the *Civil Procedure Act* and the Rules made thereunder. It referred particularly to **sections 1A and 1B** of the Act in this regard. With respect, those sections have nothing to do with reviewing the Order of a Judge when using his undoubted right of discretion in arriving at a Ruling whether it be on the question of an adjournment of a hearing or indeed for any other reason. Those sections embody the O^2 principle in relation to facilitating the just,

expeditious, proportionate and affordable resolution of civil disputes.

15. Of the cases cited by the third Defendant before Court, I take most comfort from the **Omari** case (supra) where the Court of Appeal sitting at Kisumu had this to say:

"The third, that is, 'any other sufficient reason' which is not analogous to or *ejusdem generis* with the first, in the circumstances, is not available to the appellants as they did not show such a reason. The absence of their advocates at the hearing on 28th June, 1990 is not in our view a sufficient reason to enable the court to review its orders when the absence amounted to taking the court for granted."

So I find in this case. Mr.Njiru had an appointment in Amsterdam for a period of some months to get his Masters' degree. He would seem to have abandoned his legal practice to this end. As a result his client, the Plaintiff, missed its chance before Court and the Order of Azangalala J. is the result. I see no good reason and none has been given by the Plaintiff to change that Order by way of review. I find that the Plaintiff's expostulation as to the case not being ready for hearing, not having been confirmed at the Call-over, the Plaintiff's outstanding interlocutory application dated 28 November 2007 and the third Defendant's List of Documents filed on 19 November 2007, all as a mere smokescreen in an attempt to justify good reason for me to review my learned brother's said Order of 5 December 2007.

16. As a result, I dismiss the Plaintiff's Notice of Motion dated 22 February 2008 with costs to the second and third Defendants. The third Defendant may now set down its said Bill of Costs filed herein on 30 January 2008 for taxation.

DATED and delivered at Nairobi this 4th day of June, 2013.

J. B. HAVELOCK
JUDGE