**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**CIVIL CASE NO.251 OF 1993**

**STANDARD CHARTERED BANK KENYA LIMITED……..…….. PLAINTIFF**

**VERSUS**

**TAIF HOLDINGS LIMITED…….…….. DEFENDANT**

**RULING**

The second defendant applies to this court by way of amended Notice of Motion under order 44 r.1, Order 50 r. 1 of the Civil Procedure Rules and under Section 3A of the Civil Procedure Act asking for a variation of this court order made on 27/4/94 by Mr. Justice Torgbor. That order is referred to in the supporting affidavit of Agla Cameroon sworn on 6/11/96.

The order attached monies belonging to the applicant/2nd defendant in the amount of Kshs.3,361,041.45 together with interest at the rate of 23% p.a. with effect from 1/1/93 until the hearing of the case between the plaintiff and the applicant.

According to that order that amount together with its interest accruing was attached. Before the order the plaintiff used to pay to the applicant interest on this amount at the rate of Ksh.40,000 p.m. and this ought to have stopped with the order, but it did not. The Plaintiff/respondent continued to remit the interest to her monthly in the amount of Ksh.40,000 making payment directly into her account with Barclays Bank of Kenya Ltd. Muthaiga Branch. They paid between May 1994, through 1995 to February, 1996, in that month they suddenly stopped payment but after some complaints by her advocates the plaintiff again resumed payment paying arrears of interest for March and April, 1996 upto July, 1996 when they stopped.

The Plaintiff claims that this stoppage is wrongful. That it should continue because she is an old woman of 78 years and depends on their remittance and she would be hard to put and be on the street. So on humanitarian grounds the bank should go on paying her. Mr. Nagpal, Learned Counsel, for her has advanced several legal grounds in support.

First Mr. Nagpal says stopping payment would be unconscionable. Secondly, that the plaintiff has waived its right to rely on the order of 27/4/94 and thirdly that the plaintiff should be stopped. He quoted several Authorities.

The Plaintiff objected to this relying on the replying affidavit of JANE CHEGE dated 25/11/96. She is Accounts Manager in the Credit Unit of this Plaintiff Bank. She admits there was an order on 27/4/93 attaching the applicant's deposit and she says all along the plaintiff believed mistakenly that the payment had stopped and was surprised when it was informed by its advocates that it was continuing. She denies

any waiver and says payment was made by mistake i.e. in error, which does not contiture a variation.

Mrs. Thongori, Learned Counsel for the plaintiff relied on this affidavit. She says the money was held in a subsidiary account from which the mistaken payment was made. She said review under order 44 r.4 cannot apply as there is no ground shown. The matter he said is properly an appeal matter besides section 3A cannot apply because there are specific grounds existing. No order should be given under order 44 r.4 where there has been such a delay as in this for 2 years. She submitted that once a court order has been made it cannot be varied or changed and there was no authority quoted to the effect that waiver or estoppel can be a ground for review, but Mr. Nagpal countered saying he relied on order 44 r/4 for variation under ground 'On Any Sufficient Reason'.

The issues raised are fairly many but I would endeavour on these facts and arguments to frame issues for this matter as follows:-

First did the conduct of the plaintiff in paying after the order amount to waiver, and or estoppel?

Secondly, did the defendant make this payment by mistake? There was a mistake admitted by the bank but it was a mistake admitted by the bank but it was not shown either in the replying affidavit nor in the argument of counsel. What nature of mistake it was that occasioned this payment for mistaken payment it was admittedly. The law is that money paid by mistake of fact or by reason of ignorance or through excusable forgetfulness of a fact may be recovered, but delay can be a bar.

There was delay here of 2 years but I discount it on the arguments by Mr, Nagpal that the conduct of the plaintiff in making payment all the time until July, 1996 made bringing the matter in November, 1996 was no delay at all. Secondly it is law that such a mistake to support refund must be a mistake as to a fact which if true would make the person pay the money.

(See Bullen & Leakey & Jacobs, 12th Ed. pp 667) ALKENS vs SHORT (1856) 11 T R W. pp 251.

What fact it was not shown in the affidavit of support but again the mistake or correctly if the payee was ignorant of the fact whatever fact it was, they stopped the same payments in February 1996 and more Jane Chege says they were informed by their lawyers upon which there was the said stoppage but then in May they resumed the said payments and even paid up the arrears, from February up to July, 1996. The fact that even arrears were paid. It would appear that defendants signified that even previous payments by them were by implication of their conduct correct payments; so as to say that they would have refunded to that date, because now they were not under any ignorance or of mistake. It is trite law that money paid voluntarily with a knowledge of the facts cannot be recovered as having been paid by mistake.

BILBIE v LUMLEY

(1801) 2 east 469

In my view therefore, there was no mistaken payment and so the plaintiff cannot rely on it and the defendant received it for good. Estoppel would apply here. The plaintiff cannot on the facts stated be allowed to state a contrary stand directly contrary to what he has deliberately represented to be the fact in that by his conduct in keeping up these payments he made the second defendant/applicant believe that she was entitled to that payment notwithstanding the order. The payment represented an existing fact that the payment she was getting would continue. She says so in her affidavit of support. Plaintiff cannot now be heard on it for its truth and made her incur debts. She says in paragraph 13 of her affidavit of support:-

> **"The repeated payments made to me by the plaintiff led me to believe that such payments will continue to be made and relying upon this I incurred various debts and expenses only to find plaintiff stopp ing such payments"**

Mr. Nagpal argued that this amounted to a waiver. He did not however, describe the term but it generally means that where a party leads the other to believe that he would not enforce his right against the other

and that other acts on that promise, he would not be permitted to go back on it.

In the case of CHARLES RICKARDS LTS vs. OPPENHEIM (1950) 1KB 612 Lord Denning said:-

> **"Whether it be called waiver or substituted forberance on his part it does not matter. It is a kind of estopp el. By his conduct he evinced an intention to effect legal rights. That promise was intend to be acted on and was in fact acted on. He cannot go back to it ".**

In order to constitute waiver there must be conduct which leads the other party reasonably to believe that the strict legal rights will not be insisted upon. The whole essence of waiver is that there must be conduct which evinces an intention to affect the legal relations of the parties. If that cannot properly be inferred, there is no waiver.

I think when the plaintiff stopped payment and then after some reasoning repaid it inclusive of the arrears, and when after receiving the court order continued to pay, the inference is really inescapable that the plaintiff did not intend to rely on the court order and had waived it. In those terms there was waiver.

Now the last question is whether all those affected the order made in any way to justify a review. Order 44 r.1 reads:-

> **1. Any person considering himself aggrieved**
>
> **(a) by a decree and who form 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 the decree was panned or the order made r on account of some mistake or error apparent on the face of the record or for any other sufficient reason defies to obtain a review way of the decree or order may apply for a review of judgement to the court which panned the decree or made the order without unreasonable delay".**

Mr. Nagpal stated that the application is based on "ANY OTHER SUFFICIENT REASON" which has to mean what Nyangai J.A. said in Court of Appeal at Nyeri. Civil Appeal No.80 of 1985 WANGECHI KIMITA & DORIS NYAMBURA vs. MUTAHI WAKIBIRO where he said that for any other reason need not be confined to those reasons which would be regarded as analogous or in ejusdem generis to the other two reasons given in the order.

The right of review now seems fairly unlimited. The question Is whether waiver of a court order by decree holder is any other reason fit to cause a review or estoppel operating against decree holder from executing the decree is cause to review a decree as "any other reason" fit for review.

The phrase "for any other sufficient reason" in order 44 r.1 of the Civil procedure Rules was also discussed Mulla in his CODE OF CIVIL PROCEDURE 14th Ed. Vol. III as follows:-

> **"These words must mean that the reason must be one sufficient to the court to which the application for review is made and they cannot be held to be limited to the discovery of a mistake or error apparent on the record".**

It appears that the court although allowed under Section 80 of Cap. 21 to review its order or judgement, as it thinks fit, there must be sufficient reason. Quoting an Indian Case of NARAIN DAS Chiranji LAC (1925) 47 A11 261 Mulla went on to say:-

> ***"For any other sufficient reason are not only very wide in them solus, but were intentionally so made by the Legislature because of the possibility of exceptional cases arising in which obvious in justices would be worked by strict adherence to the terms of the decree as originally passed …….. and should be construed liberally"***

Such discretion must therefore, be exercised with such legal directions as are stated by Mulla. It cannot be any reason. In this case the new situation relating to estoppel and waiver are factors that emerged later after Torgbor J. gave judgment or order. Can such events subsequent to the passing of the order sought to be reviewed by "Sufficient Reason" stated in the rule? I think not. It would fit appeal situation but not a review, besides it is trite law that ground for review must be something which existed on the date of the decision or decree and not subsequent to the date of the decree: (see commentary on the Civil Procedure By R. D. Agarwal pp.G76 Mulla on Code of Civil Procedure, pp. and the case cited) and although these are commentaries on Order 47 r.1 of the Indian Civil procedure, the commentaries are highly persuasive.

The Order of Torgbor J. is therefore, not reviewable and I believe I cannot exercise my direction in favour of the application for review.

The issue of expediency although a requirement of the rule, I found above was not a bar and that it did not amount to atonable delay.

This application under order 44 r.1 (2) as amended ought to have been made to the judge who passed the order sought to be received who was Torgbor J. then, but although it is of Judicial knowledge that Torgbor J. has ceased to be a judge of the High Court, the fact ought to be established and made evident on the face of the record.

I have found existence of estoppel and waiver, put to pronounce the order herein based on either or both would amount to a declaratory order which was not sought by the party applying. To state an order not sought in the pleading is an act the Court of Appeal has emphatically objected to.

AKIWUMI J.A. said in Court to Appeal Civil Appeal No.264 of 1996 that:-

***"A judge has no power or jurisdiction to decide an issue not raised before him "(quoting a previous Court of Appeal Civil Appeal No.154 of 1992 (Sande vs KCC) he said): "In our view to raise issues before a judge is through the pleading and as far as we are aware that has always been the legal position".***

Most of the cases quoted by Mr. Nagpal to which I was referred supported a declaratory order being made but there was no plea for a declaratory Order under Order 11 r.7 of the Civil Procedure Rules. It is a principle of declaratory judgments that the court should only award declaratory judgment on acceptable principles upon which the court exercises its jurisdiction and although this is limited to its discretion, the courts discretion must be exercised according to those accepted principles of law and procedure. This includes the rules cited above by the Court of Appeal.

To stake the ruling on section 3A is not appropriate because there are specific provisions relating to both review and declarations under our procedure and I accept as law the principle enunciated in INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION vs OTACHI 1997 KCR 103, quoted by Mrs Thongori for the respondent that the courts inherent jurisdiction should not be invoked where there is specific statutory provision which would meet the necessities of the case.

On these grounds I feel constrained to dismiss this application which I do with costs to the respondent.

Delivered this 15th day of October, 1997.

**A.I. HAYANGA**

**JUDGE**

**15/10/97**

**Coram: A.I. Hayanga, J**

**Mr. Nagpal Jnr. For Applicant**