



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & AZANGALALA, JJ.A.)

CIVIL APPEAL NO. 192 OF 2013

BETWEEN

KENYA NATIONAL ASSURANCE

COMPANY (2001) LIMITED.....APPELLANT

AND

UCHUMI INSURANCE BROKERS LIMITED.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Nambuye, J.) dated 20th May, 2009

in

H.C.C.A. No. 2148 of 1987)

JUDGMENT OF THE COURT

[1] The appellant, ***Kenya National Assurance Company (2001) Limited***, is aggrieved by and has appealed against the ruling of the High Court at Nairobi (***Nambuye, J., (as she then was)***), delivered on 20th May, 2009, dismissing its application for review of the learned Judge's earlier decision dated 7th March, 2008. By that decision, the learned Judge declined to discharge the appellant from all obligations to the respondent, ***Uchumi Insurance Brokers Limited***. The appellant had alleged, before the learned Judge, that it had paid the decretal amount in full. The appellant had further sought release of 78,750 Kenya Commercial Bank shares which it had deposited in court as security for the due performance of the decree in favour of the respondent.

BACKGROUND

[2] The respondent sued the appellant in ***Nairobi HCCC No. 2148 of 1987***, claiming unpaid commissions and the appellant, on its part, sued the respondent in ***Nairobi HCCC No. 1946 of 1987***, for sums owed to it as premiums for a period which is not in dispute. The suits were consolidated and heard together by ***Githinji, J., as he then was***, who found for both the appellant and the respondent in various sums. The amount awarded to the respondent was Kshs. 11,111,840.68 and the sum awarded to the appellant was Kshs. 4,224,746.50. Both sums were awarded together with costs and were to attract interest at court

rates. Since the respondent's award was larger than that of the appellant, the learned Judge ordered that the sum awarded to the appellant be set off from the amount awarded to the respondent pursuant to the then **Order XX1 (now Order 22) rule 14 (1) (b)** of the **Civil Procedure Rules**.

[3] The appellant was aggrieved and appealed to the Court of Appeal in **Civil Appeal No. 140 of 1994**. That appeal was withdrawn when the parties reached an agreement that as at the time of the withdrawal, the appellant was to pay the respondent Kshs. 7,197,964.30 in full and final settlement of all claims between them. In its application before **Nambuye, J.**, dated 7th October, 2005, the appellant claimed to have paid the said sum, hence its prayers for discharge and release of its shares held as security.

[4] After considering the appellant's application, the submissions of learned counsel for the parties, the authorities cited and the law, the learned Judge, on 7th March, 2008, came to the conclusion that the sums due to the respondent had not been paid in full. In the learned Judge's view, the appellant's claim that it had paid sums on behalf of the respondent pursuant to a garnishee order made in **Nairobi HCCC No. 1644/87**, was not justified. Consequent upon that finding, the learned Judge held that the outstanding sums would attract interest at 16% per annum and costs subsequent to the compromise aforesaid. The learned Judge then ordered that accounts be taken with liberty to apply given to each party.

REVIEW APPLICATION

[5] The appellant was dissatisfied with those findings but did not appeal against the same. However, on 2nd October, 2008, the appellant took out a motion on notice under **Order XLIV (now Order 45), rule 1** of the **Civil Procedure Rules** and **sections 3A and 80** of the **Civil Procedure Act**, praying that the said orders of **Nambuye, J.**, of 7th March, 2008, be discharged, set aside and/or vacated and that the court orders that the shares deposited as security be released. The appellant further sought orders with respect to the issue of accounts and costs.

[6] The application was supported by, among other things, an affidavit sworn by one, **Mrs. Tabitha Mwaniki**, the appellant's Principal Legal Officer/Company Secretary. In it, she deposed, *inter alia*, that Kshs. 2,643,211.95 was paid by the appellant pursuant to garnishee proceedings in **HCCC No. 1644 of 1987** and an application to set aside the said order was dismissed by **Pall, J.**, (*as he then was*), on 27th November, 1995; that the said payment was properly documented which documentation was through an oversight was not brought to the attention of the learned Judge when she considered the appellant's earlier application.

[7] In a replying affidavit sworn by **Boniface Kinandu Mathenge**, the respondents managing director, the following issues were raised in response: that the application was *resjudicata*; that it was incompetent and wanting in clarity; that the appellant's indebtedness to the respondent was in excess of Kshs. 24,802,267.40 which was beyond the security furnished by the appellant; that the issues raised were outside the purview of review and that the alleged payment of the decretal amount was not supported by acknowledgement receipts and bank debits/statements.

DECISION ON REVIEW - APPLICATION

[8] **Nambuye, J.**, heard the motion. In her view, the matter before her was not *resjudicata* and further that even though the application was wanting in form, she declined to strike it out because striking out would not resolve the dispute which had been raging between the parties for a prolonged period.

[9] The learned Judge determined that the appellant had sought review for "*any other sufficient reason*" under the then **Order XLIV (now Order 45) rule (1)** of the **Civil Procedure Rules**. After considering the material which was placed before her, the learned Judge concluded that the appellant's motion did not meet the threshold stipulated under the review provisions of the **Civil Procedure Rules**. That was notwithstanding her finding that **Pall J's** ruling in the garnishee proceedings in **HCCC No. 1644 of 1987**, was final as regards the sums paid therein by the appellant. In the view of the learned Judge, the sums initially claimed by the judgment creditors, Kenya Bureau of Standards against the judgment debtor (*the*

respondent), of Kshs.1,436,963.55 and the amount paid by the garnishee, (*the appellant*), could not be reconciled. The learned Judge had some doubt as to how the figure of Kshs. 2,643,211.15 paid by the appellant was arrived at. In her own words:

"This Court has not traced among the documents

exhibited a variation of that decree to the figure of Kshs.2,643,211.15".

[10] The learned Judge then continued as follows:

"This is the information that this Court, has been called upon to use to determine whether the defendant/applicant's indebtedness to the plaintiff/respondent had been fully discharged and by reason of this had this court been presented with this information at the time it made its orders of 7th March, 2008, it would have arrived at a different conclusion and therefore the end result would have been an order releasing the deposited shares as opposed to an order declining to release the same".

[11] In the end, the learned Judge still held that there was discrepancy in the amount in the decree which was the basis of the garnishee proceedings of Kshs. 1,436,963.55 and the amount which the appellant claimed to have paid of Kshs.2,643,211.15, which discrepancy the appellant had not explained. The learned Judge further found no proof of receipt of the said sum of Kshs.2,643,211.15 by Kenya Bureau of Standards.

[12] Whilst the learned Judge found that ***Pall, J.***, had observed that the garnishee order had been satisfied, she nevertheless observed that ***Pall J's*** order had not mentioned any specific sums and how the same had been acknowledged. The learned Judge required the appellant to demonstrate payment of the said sum by production of a receipt and furnishing explanation from the Judgment creditor on how the sum had almost doubled. In her own words:

"It is the opinion of this Court that had the applicant proved how the decretal sum due under the Garnisheeproceedings had been increased and satisfied, that indeed this had been duly paid, [it] the court would have proceeded to make appropriate orders to bring the litigation to an end without interfering with Githinji, J's orders as it has not been moved procedurally to review and/or vary the same. But it would have been appropriate to declare the decree satisfied and order closure of the proceedings in the interest of justice to both parties".

The learned Judge then proceeded to dismiss the appellant's review application with costs.

THE APPEAL

[13] The appellant was aggrieved and lodged the appeal before us - premised upon three principal grounds namely; that the learned Judge erred in law and in fact in finding that there was no proof of payment of Kshs. 2,643,211.15 when such proof was availed on a balance of probabilities; that the learned Judge erred in law and in fact in requiring the appellant to explain how the amount in the garnishee order was arrived at while fully aware of the ruling of her colleague ***Pall, J.***, who had found that the garnishee order had been satisfied and that the continued retention of the KCB shares as security violated the provisions of ***sections 26, 45 and 46*** of the ***Insurance Act***.

SUBMISSIONS

[14] When this appeal came up before us for hearing on 24th November, 2016, the appellant was represented by learned counsel ***Mr. Munyalo***. There was however, no appearance for the respondent who had been duly served through its advocates,

M/s Mwagambo & Okonjo. The appeal therefore proceeded ex-parte under ***Rule 102 (2)*** of the Court Rules.

[15] In his submissions before us, **Mr. Munyalo** gave a background of the dispute between the parties and highlighted the above three issues. Learned counsel emphasized that despite the finding of **Nambuye, J.**, that there was no proof of payment of the sum of Kshs. 2,643,211.15, the contrary was the position as there was acknowledgment of the payment by the judgment creditor and its advocates, backed by a bank statement confirming the payment.

[16] It was also learned counsel's further contention that **Nambuye, J's** colleague, **Pall, J.**, had heard an application seeking the setting aside of the garnishee order and had dismissed it and confirmed the order. In learned counsel's view, the issue of payment by the appellant pursuant to the garnishee order was settled by **Pall J.'s** order and could not be revisited by the learned Judge. In re-opening the issue, the learned Judge, according to **Mr. Munyalo**, erred as she could not sit on appeal against her colleague's ruling.

[17] On the issue of the legality of retaining the said shares as security, learned counsel contended that as the shares belonged to the appellant's Life Fund, they should not have been offered as security in view of the provisions of **sections 26, 45 and 46** of the **Insurance Act**.

ANALYSIS AND DETERMINATION

[18] The appellant's application for review before **Nambuye, J.**, was pursuant to **section 80** of the **Civil Procedure Act** and **Order XLIV** (now **Order 45**) **rule 1** of the **Civil Procedure Rules**. For an applicant to successfully obtain an order of review, he must demonstrate:

(a) 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 when the decree was passed or order made;

(b) on account of some mistake or error apparent on the face of the record;

(c) for any other sufficient reason.

And of course the application for review should be lodged without unreasonable delay.

[19] We have considered the record, the grounds of appeal, the submissions of learned counsel for the appellant and the law. This appeal, in our view, turns on the narrow issue as to whether the appellant furnished proof of payment of Kshs. 2,643,211.15 which was part of the decretal sum due to the respondent but which was allegedly paid by the appellant to Kenya Bureau of Standards who were the Judgment creditors in a suit the latter filed against the respondent, being **HCCC No. 1644 of 1997**. The appellant claimed to have paid the said sum pursuant to a garnishee order made against it in the said suit.

[20] The learned Judge found:

"that the applicant [had] demonstrated that it was an error for the court, to decline to order release of the security deposited because the result of the application for setting aside the garnishee orders had not been known. The error [arose] because in fact the said application had been dismissed way back in 1995".

[21] So, it is plain that the learned Judge was satisfied that review was available to the appellant on the basis of an error apparent on the face of the record. The reasons why the learned Judge, in the end, declined to review her ruling were two fold. Firstly, because in her view, the appellant had not explained how the figure in the garnishee proceedings rose from Kshs. 1,436,963.55 to Kshs. 2,643,211.15 and secondly, because, according to her, the appellant had not proved such payment by production of a receipt or by affidavit evidence from Kenya Bureau of Standards, the Judgment creditor in **HCCC No. 1644 of 1987**.

[22] The learned Judge in requiring the appellant to furnish an explanation as to how the figure in the

garnishee proceedings rose from Kshs.1,436,963.55 to Kshs.2,643,211.15 in, our view, and with all due respect, misdirected her enquiry. The appellant was merely a garnishee and not a party to the proceedings leading to the issuance of the garnishee order. A garnishee, according to Black's Law Dictionary - Ninth Edition, is:

"a person or institution (such as a bank) that is indebted to or is bailee for another whose property has been subjected to garnishment".

In this case, the appellant, at the time of the garnishee proceedings, happened to be indebted to the respondent who was then liable to Kenya Bureau of Standards in certain sums. Once the garnishee order was served upon the appellant, it had a duty to comply with the order since it was indebted to the respondent. We see no basis upon which the appellant could have challenged the sum claimed in the garnishee order. In our view, the respondent as the judgment debtor, was in a better position to challenge the sum in the garnishee order as it stood to benefit if the sum claimed was proved to be excessive. Besides, the respondent was a party to the suit giving rise to the garnishee order and had the requisite locus to challenge the figures in that order.

Our conclusion on this issue is that the appellant had no onus to explain how the figure in the garnishee proceedings rose from Kshs.1,436,963.55 to Kshs. 2,643,211.15 and the learned Judge, with all due respect, misdirected herself in requiring such explanation from the appellant.

[23] Turning now to proof of payment of the said sum of Kshs. 2,643,211.15, it is plain that the appellant did not avail a receipt of the same from Kenya Bureau of Standards nor did it file an affidavit sworn by the said judgment creditor confirming such payment. However, we wonder whether a receipt is the only satisfactory means of demonstrating payment. We do not think so. Nor is an affidavit. The appellant placed the following material before the learned Judge in support of its claim that it had paid the said sum:

1) A letter dated 20th April, 1995, from the advocates for Kenya Bureau of Standards M/s Oraro & Rachier Advocates forwarding to the former cheque number 35882 for Kshs.2,643,211.15 from Kenya National Assurance.

2) A National Bank of Kenya pay-in-slip dated 26th April, 1995, vide which the said cheque was deposited.

3) A Kenya Bureau of Standards National Bank of Kenya bank statement indicating when the said cheque was credited to the former's account.

4) A letter dated 17th July, 1995 from Kenya Bureau of Standards addressed to the Deputy Registrar of the High Court - Nairobi, confirming receipt of the said sum of Kshs. 2,643,211.15 paid by the appellant.

5) A letter dated 26th March, 2008 from M/s Oraro & Company Advocates addressed to the Principal Legal Officer/Company Secretary of the appellant, confirming receipt of the cheque for Kshs. 2,643,211.15 in favour of Kenya Bureau of Standards from the former advocates of the appellant M/s Hamilton Harrison & Mathews Advocates.

[24] Copies of all the above documents were exhibited by ***Mrs. Tabitha Mwaniki*** in her aforesaid affidavit sworn on 30th September, 2008, in support of the appellant's application for review. Save for the letter of 20th March, 1995, the learned Judge made no reference to the rest of the documents. ***Kenya Bureau of Standards*** was represented in its claim against the respondent by a firm of advocates who, as the above documents demonstrated, unnequivocally acknowledged payment of the said sum. That was not all. ***Kenya Bureau of Standards***, by its letter dated 17th July, 1995, confirmed to the Deputy Registrar of the High Court, Nairobi, payment of the said sum of Kshs. 2,643,211.15.

[25] Given those documents which were before the learned Judge, it puzzles us that the issue of payment of the said sum of Kshs. 2,643,211.15 would remain clouded in the mind of the learned Judge for her to require production of a receipt or the filing of an affidavit by Kenya Bureau of Standards.

[26] That is not the end of the story. Before the learned Judge was the ruling of **Pall, J.**, dated 27th November, 1995. That ruling was made long after the appellant had made the payment of Kshs. 2,643,211.15 and Kenya Bureau of Standards had acknowledged receipt of the same. **Pall, J.**, in his said ruling expressly stated that

"the garnishee has already paid in obedience to the court order". Notwithstanding this express finding, against which there was no appeal, the learned Judge (**Nambuye, J.**), seemed to doubt that finding. In her own words:

"As regards payment of the same to the garnishee order beneficiary, indeed Pall, J. as he then was made an observation that the liability had been satisfied, but did not mention how much had been paid, and how this had been proved as no receipt was mentioned. Since this was one of the reasons as to why the release order was declined by this Court in its ruling of 7th March, 2008, it was imperative upon the defendant/applicant to demonstrate proof of payments by production of receipt".

[27] **Pall J's** ruling was not being challenged by any party. There was therefore no basis to discount the learned Judge's finding. In appearing to doubt **Pall J's** ruling, **Nambuye, J.**, clearly erred. In our view, she clearly exceeded her jurisdiction when she took steps to apparently correct **Pall J's** ruling when she demanded further proof of a payment which **Pall, J.**, had accepted. The two learned Judges at the time of making those orders were of concurrent jurisdiction and **Nambuye, J.**, could not sit on appeal against **Pall, J's** ruling. We therefore agree with the appellant, that in view of **Pall's J's** ruling, the learned Judge erred in requiring the appellant to explain the amount in the garnishee order and further requiring production of evidence of payment of the same.

[28] We have considered the background to this dispute leading to the applications before **Nambuye, J.**, and the rulings she made thereon including the ruling on the application for review. Like the learned Judge, we have come to the conclusion that the appellant demonstrated that there was an error apparent of the face of the record because **Pall, J.**, had conclusively determined that the appellant had paid the amount in the garnishee order. But unlike the learned Judge, we find that there was no necessity for further proof of payment of Kshs.2, 643,211.15 as the learned Judge ordered. Besides **Pall J's** ruling, the appellant, as observed above, demonstrated, beyond peradventure, that it had paid the said sum to the respondent's judgment creditor, **Kenya Bureau of Standards**. The appellant was, accordingly, entitled to a review of **Nambuye, J's** ruling of 7th March, 2008. Given our view of the matter, we find no necessity to consider the appellant's 3rd cluster of grounds of appeal regarding the legality of the continued holding of the appellant's shares as security.

[29] If the learned Judge had appreciated the documents referred to above and the ruling of **Pall, J.**, she *"would have proceeded to make appropriate orders to bring the litigation to an end"*. The learned Judge further observed that if the appellant had demonstrated payment of the sum under the garnishee proceedings:

" it would have been appropriate to declare the decree satisfied and order closure of the proceedings in the interest of justice to both parties".

[30] We have come to the conclusion that evidence of payment of the sum under the garnishee proceedings was before the learned Judge in abundance as demonstrated above and review should have been ordered. In the end, we allow this appeal, set aside the ruling of the learned Judge dismissing the appellant's application for review dated 30th September, 2009. We substitute therefor an order allowing the said application and order that:

1) The orders of Nambuye, J., made and issued on 7th March, 2008 as well as all consequential orders arising therefrom be and are hereby set aside.

2) The 78,750 Kenya Commercial Bank shares deposited in court as security pursuant to the order of the High Court made and or issued on 12th March, 1995, be are hereby released to the appellant forthwith.

3) As the court may have contributed to the delay in bringing this dispute to a close, we order that each party bears its own costs of the appeal and those of the High Court.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of February, 2017.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR