



REPUBLIC OF KENYA



**KENYA LAW**

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**Masosa Construction Ltd v SBI International Holdings AG (Kenya) & 2 others (Civil Case 418 of 2015) [2024] KEHC 909 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 909 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**CIVIL CASE 418 OF 2015**  
**A MABEYA, J**  
**JANUARY 30, 2024**

**BETWEEN**

**MASOSA CONSTRUCTION LTD ..... PLAINTIFF**

**AND**

**SBI INTERNATIONAL HOLDINGS AG (KENYA) ..... 1<sup>ST</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAY AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL BANK OF LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before Court is the application by the plaintiff dated 16/2/2023. The same was brought under Article 159 of the Constitution, sections 3, 3A, 63 and 80 of the Civil Procedure Act, section 68 of the Kenya Roads Act 2007, section 104 of the Land Act 2012, Orders 45 and 51 Rule 1 of the Civil Procedure Rules 2010.
2. The application seeks a review of the judgment delivered on 26/8/2022. It was supported by the grounds on the face of it and the supporting affidavit of Eng Maxwell Okemwa Mogerresworn on 16/2/2023. The plaintiff's case is that, on 26/8/2022, the Court delivered a judgment in its favor for Kshs. 350,842,807.79 plus interest of 17% per annum from November 2018.
3. That in the said judgment, the 3<sup>rd</sup> defendant National Bank of Kenya Limited was restrained from realizing its securities for six months from the date of the judgment. It was contended that the plaintiff was barred from executing against KENHA as per section 68(a) of the Kenya Roads Act 2007.
4. That the plaintiff and the 2<sup>nd</sup> defendant, KENHA were engaged in an out of court settlement whereby, the latter had agreed to pay Kshs. 150 million to the bank to offset the plaintiff's outstanding loan. The plaintiff therefore sought a review of the orders of the Court to extend the time within which the bank



- could realize its securities. That the bank would not be prejudiced if the said orders were granted. That the plaintiff stands to lose if the bank sells the charged properties.
5. The 3<sup>rd</sup> defendant opposed the application vide an undated affidavit of Chrispus Maithya. It contended that the plaintiff had been in default of the loan for a period of ten years since 2013. That despite of this, the bank had accommodated the plaintiff as the latter sought to settle its dispute with the 1<sup>st</sup> and 2<sup>nd</sup> defendant.
  6. It was averred that the Court had already stated that it would not be fair to have the bank's rights tied to the payment by KENHA. That the bank was willing to issue fresh notices and the plaintiff had like 175 days to rectify the default. Further, it was averred that the plaintiff had not established the grounds for review.
  7. The 1<sup>st</sup> defendant filed grounds of opposition dated 21/3/2023 where it stated that the plaintiff was not clear in its application the portion of the judgment it wanted to be reviewed or varied. It was also averred that the plaintiff did not meet the test for review.
  8. On its part, the 2<sup>nd</sup> defendant opposed the application vide grounds of opposition dated 24/3/2023. It averred that the test for review had not been met since the plaintiff failed to state the part of the judgment to be reviewed. That the 2<sup>nd</sup> defendant had also filed a notice of appeal with respect to the judgment the plaintiff seeks to review. That the 2<sup>nd</sup> defendant had not abandoned its intention to appeal and had not withdrawn the notice of appeal dated 24/3/2023.
  9. Parties canvassed the application by way of written submissions. The plaintiff reiterated the contents of its supporting affidavit and stated that since it was barred from executing the decree against the 2<sup>nd</sup> defendant, it approached the director general and sought intervention to pay the decretal sum. That the Court ought to adopt a course that would be less prejudicial and there had been sufficient reasons for extension of time.
  10. That section 104 of the *Land Act* empowers the court to make appropriate orders in respect to the remedies and reliefs.
  11. The 3<sup>rd</sup> defendant submitted that the orders sought by the plaintiff would be prejudicial to the bank as it was under an obligation to recover the depositor's sums at the earliest possible opportunity.
  12. I have considered the pleadings, the submissions as well as the authorities cited. The core issue is whether there has been established a proper case for review.
  13. The Court's jurisdiction for review stems from section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. From those provisions of the law, a review would be ordered where there is new evidence that was not available at the time the order or decree was made or passed, where there is an error on the face of the record and for a sufficient cause. Of course, such an application should be made within a reasonable time and without delay for that matter.
  14. The application has sought to review the judgment of this court delivered on 26/8/2022. In the impugned judgment, the Court had suspended the bank's power from exercising its power of sale for a period of six months. The plaintiff seeks to extend the said timeline for a further period of 6 months.
  15. The defendants oppose the application by first challenging the application on the grounds that it was not specific as to the section or part of the judgment which the plaintiff seeks to review. Further, the 2<sup>nd</sup> defendant contended that there was still a notice of appeal on record against the said judgment. With regard to the 3<sup>rd</sup> defendant, it was contended that the bank had been delayed for a period of



approximately 10 years and the Court had correctly put out that its right would not continue to be tied to the dispute between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendant.

16. Based on the circumstances of this case, though not pleaded, the Court can only entertain the application for review based on sufficient reason. In *[Shanzu Investments Limited v Commissioner for Lands](#)* (Civil Appeal No 100 of 1993) the Court of Appeal held that: -

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the *[civil procedure act](#)*: and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

17. While it is not disputed that the judgment delivered on 26/8/2022, the 3<sup>rd</sup> defendant was restrained from realizing its securities for six months since they had commenced to realize its securities in breach of the law. The plaintiff seeks this extension to give time for the talks between the plaintiff and the 2<sup>nd</sup> defendant.
18. There exist competing interests between the plaintiff, 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant. The letter relied upon by the plaintiff is dated 16/12/2022 which is an invitation to a discussion and does not clearly state when the money would be paid. The Court had afforded the plaintiff enough time to regularize its affairs and it notes that it had been more than one year since the judgment was delivered. Even though the plaintiff has not given any guarantee that the 2<sup>nd</sup> defendant would have made the payments within the six months there exists a judgment in its favor. The same judgment cannot be executed as against the 1<sup>st</sup> defendant and it would be in the interest of justice to allow the extension of time.
19. I further note that the facilities that were extended by the 3<sup>rd</sup> defendant were expended in the works that have culminated in the judgment in issue. The 3<sup>rd</sup> defendant attended and was involved in the execution of the works until very late in the day.
20. The monies due under the judgment are yet to be paid but will ultimately be paid and the 3<sup>rd</sup> defendant be paid therefrom accordingly. A delay of a few months may not be so detrimental to the 3<sup>rd</sup> defendant as will be to exercise the statutory right of sale. In the circumstances, I find that this is a proper case for the Court to exercise its discretion to extend time for the plaintiff to settle with the 1<sup>st</sup> defendant.
21. Accordingly, I find the application dated 16/2/2023 to be meritorious and I allow the same. The time is hereby extended accordingly from the date of this ruling.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

