**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROB**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 1914 OF 1999**

**TAMIL ENTERPRISES LIMITED …… PLAINTIFF**

**VERSUS**

**OFFICIAL RECEIVER & LIQUIDATOR**

**OF CONTINENTAL CREDIT FINANCE LTD …… 1ST DEFENDANT**

**KISAUNI PROPERTIES LIMITED …….. 2ND DEFENDANT**

**R U L I N G**

1. The Application before Court is the Plaintiff's Notice of Motion dated 23rd July 2013 brought under the provisions of **Order 9 rule 9** of the *Civil Procedure Rules* as well as **sections 1A, 1B, 3A, 26, 34, 63 (e)** of the *Civil Procedure Act*. The Application seeks Orders that the Defendant do pay to the Plaintiff additional interest at commercial rates on the balance of the decretal amount herein from the date of Decree until payment in full. The Plaintiff puts the commercial interest rate sought at 29.43% per annum. The Application was brought upon the following grounds:

**"1. The Court issued the decree herein on 20th April 2001 for Kshs. 34,852,659.80.**

**2. The Defendant partially settled the decree on 20th December 2001 by paying Kshs. 16,177,152.40 thereby leaving an outstanding balance of Kshs. 18,675,507.40.**

**3. The Defendant obtained a stay against the settlement of the decree herein which stay has since been set aside vide this Court's decision made on the 17th day of October 2012.**

**4. The decretal amount has been outstanding since April 2001 for a period over 12 years and it is only fair that further interest be paid on the outstanding decretal sum for the said period of time.**

**5. The further applicable commercial interest rate be determined and fixed at 29.43% per annum being the original rate of interest applied to the judgment amount herein.**

**6. The Plaintiff/Applicant has been greatly prejudiced and has suffered substantial loss and damage as a result of the Defendants refusal to settle the decretal sum herein for the said period**

**over 12 years.**

**7. It is only fair and just that additional interest be paid to the Plaintiff on the outstanding balance of the decretal sum".**

2. The Plaintiff's Application was supported by the Affidavit of one of its directors one **Bipin Vora** sworn on even date. He noted that this Court had issued the Decree herein on 20th April 2001 in the amount of Shs. 34,852,659.80. He maintained that the Defendant had partially settled the Decree by the payment of Shs. 16,167,152.40 on 20th December 2001 leaving an outstanding balance of Shs. 18,675,507.40. He detailed that the Defendant had obtained a stay as against the settlement of the Decree which had been set aside by this Court's Ruling dated 17th August 2012 but delivered on 17th October 2012. In the Plaintiff's opinion, it would be unjust and unfair for the Defendant to settle the balance of the Decretal amount herein without paying further interest on the same, despite the fact that it had been irregularly and unlawfully holding the said balance for a period of over 12 years now. As a result, the deponent thought that a fair commercial rate of interest would be at 29.43 percent per annum as originally applied to the judgement amount herein.
3. The first Defendant responded to the Plaintiff's said Application through its Senior Principal State Counsel in the office of the Official Receiver one **P. Thoithi Kanyuira** by a Replying Affidavit sworn on 29th October 2013. Apart from detailing that the grounds upon which the Plaintiff's said Application were erroneous and manifestly misleading, the deponent admitted the issuance of the Decree herein for Shs. 34,852,656.80. However, the execution of the Decree was stayed by way of a Ruling delivered by **Ibrahim J.** (as he then was) on 5th November 2003. He had been informed by counsel on record for the first Defendant, that since the Plaintiff had failed to comply with the mandatory provisions of section 228 of the Companies Act by not obtaining leave of this Court to commence any action or proceeding against a Company of which a Winding-up Order had been made, the suit as against the first Defendant was null and void *ab initio*. The deponent had further been informed by counsel on record that he had detected an error apparent on the face of the Ruling dated 5th November 2003 and had filed a formal application for Review on 31st May 2004 to correct such error. That application was ruled upon by **Ibrahim J.** as above but such did not set aside the stay orders issued on 5th November 2003. In fact, Mr. Kanyuira had been informed that the said Ruling delivered on 5th November 2003 still stands to date and has never been vacated, set aside or been interfered with in any manner whatsoever. As a result, the deponent was of the view that the Plaintiff's Application before Court was totally misconceived, erroneous, without any merit whatsoever and was based on a misrepresentation of the actual factual position in so far as the Court record was concerned.
4. Quite apart from the Replying Affidavit, the first Defendant also filed Grounds of Opposition dated 29th October 2013. Such Grounds detailed as follows:

**"1. That the subject application is misconceived and the prayers sought therein are incapable of being granted by this Honourable Court.**

**2. That the Plaintiff/Applicant is deliberately misleading this Honourable Court.**

**3. That there is no valid decree in existence that can be enforced as the said decree upon which the applicant relies was declared unenforceable in law and its execution stayed on the 5th of November 2003.**

**4. The stay referred to in ground 3 hereof has never been lifted or set aside by this Honourable Court.**

**5. As per the Replying Affidavit filed herein".**

5. The Plaintiff's submissions set out an introduction and the facts in brief noting the Decree issued herein dated 20th April 2001 and the part settlement thereof by the first Defendant on 20th December 2001. The Plaintiff submitted that it sought the Court's intervention in this matter in order to have the Defendant settle the balance of the decretal amount (purchase price) together with additional interest. It maintained that such additional interest was legitimate and made in good faith since the value of money, as a result of inflation, was not the same as it was in the year 2001. The Plaintiff noted that the only ground upon which the Defendant had opposed its Application before Court was its perceived view that the Court had not set aside the stay of execution in this case. It was clear that the Defendant was not opposed to the granting of additional interest as sought by the Plaintiff. As the Plaintiff saw it, there were two issues for determination:

**"(a) Did the Honourable Court set aside the stay orders which were previously subsisting in this matter"**

**(b) Is the Plaintiff entitled to the prayers sought in the Application herein""**

The Plaintiff did not dispute that the Court, on 5th November 2003, granted a stay of execution of the Decree herein at the instance of the first Defendant. It is noted that it was aggrieved by the said Ruling and filed a Notice of Appeal together with an application for the typed proceedings before this Court. The first Defendant had also been dissatisfied with the said Ruling and had made application for review thereof. In his Ruling dated 17th August 2012, **Ibrahim J.** at the last paragraph thereof had detailed that he set aside the Orders made in respect of **sections 218, 235 and 241** of the *Companies Act* and the stay order. In the Plaintiff's view it was clear that the learned Judge indeed set aside the Order for stay of execution of the Decree herein. The first Defendant had not challenged that Ruling and, as such, the same was valid and applicable.

6. As to whether the Plaintiff was entitled to the prayers sought in the Application before Court, it noted that Judgement had been obtained in 2001 and the decretal balance of Shs. 18,675,507.40 had remained unpaid for a period of 13 years. As a result, the Plaintiff was moving this Court to exercise its inherent jurisdiction so as to award additional interest on the outstanding decretal amount. In the Judgement herein, the Court had set the Commercial interest rate at 29.43% per annum and the Plaintiff urged the Court to apply this rate on the basis that the same was the original interest rate set by the Court in this matter. To this end, the Plaintiff referred the Court to the well-known case of **Shah v Guilders International Bank Ltd [2002] 1 EA** as regards the Court of Appeal's interpretation of **section 26 (1)** of the *Civil Procedure Act*. It noted that the Court of Appeal had detailed:

**"This Section, in our understanding, confers upon the court the discretion to award and fix the rate of interest to cover three stages…**

1. **the period before the suit is filed;**

2. **the period from the date the suit is filed to the date when the court gives its judgement; and…**

3. **from the date of judgement to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion, fix.**

**We further understand these provisions to be applicable only where the parties to a dispute have not, by the agreement, fixed the rate of interest payable. If by the agreement, the parties have fixed the rate of interest payable, then the court has no discretion in the matter and must enforce the agreed rate unless, it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."**

The Plaintiff requested this Court to exercise its discretion to award additional interest in this matter from the date of judgement to the date of payment of the outstanding decretal sum due.

7. The first Defendant's submissions were filed herein on 16th May 2014. They commenced by referring to the said Ruling of **Ibrahim J.** delivered on 5th November 2003. It maintained that the gist of that Ruling was that the Plaintiff's suit was null and void *ab initio* and that all consequential Decrees and Orders flowing therefrom were stayed. The first Defendant, upon perusing the said Ruling, had realised that the learned Judge had invoked certain provisions of the Companies Act that were not part of the pleadings or submissions of the first Defendant in its application dated 10th August 2001. As a result of this apparent error on the face the record, the first Defendant had made an application for review dated 20th April 2004. The first Defendant detailed that it was important for this Court to look at the prayers of the said Review application which only touched on the issue of the relevant provisions of the *Companies Act* more notably **section 228** thereof. The Review application did not seek an order for the lifting of the stay. In the Defendant's view, a party cannot be granted a prayer that it did not seek or plead for. However, **Ibrahim J.** in his said Ruling dated 17th August 2012 upheld only the operation of **section 228** of the *Companies Act*. In the first Defendant's view the Plaintiff was mischievously taking advantage of an error in the Ruling in an attempt to derive benefit therefrom. It was the first Defendant's submission that this Court was duty bound to protect the rights and interests of the parties before it and to ensure that justice and the rule of law is upheld. A suit could not be held to be null and void together with all the consequential Orders that flow from such a finding and yet allow that execution in the same suit be permitted.
8. I have carefully perused the Ruling of **Ibrahim J.** delivered on the 5th November 2003. The last paragraph thereof reads:

**"I am compelled to invoke the court's inherent jurisdiction and those under Section 218, 235, and of more direct application Section 241 (3) and all other enabling powers under the Companies Act and declare that the judgment herein, decree and all consequential orders are unenforceable in law and execution thereof is hereby stayed."** (Underlining mine).

In his said Ruling dated 17th August 2012, the learned Judge commenced by detailing that the application before him was as regards a review of his Ruling delivered on 5th November 2003 on the grounds that there was an error apparent on the face the record. Having recorded the submissions of counsel for both parties in relation to the said application, the learned Judge detailed as follows:

**"I have carefully after hearing this application and the submissions by counsel gone through the ruling which the 1st defendant prays to be reviewed. The first Defendant argues that there is an error apparent on the face of the record. He submits that the court was to consider the oral application to amend the Chamber Summons Application dated 23.7. 2001 to delete section 241 (1) (a) and (c) of Cap.486 and to replace the same with Section 228 of Cap. 486. According to the Applicant the court should not have delved into the provisions of section 241 of the Companies Act.**

**I agree with the Applicant's counsel that they had amended their application with leave of the**

**Court before me. I accept that this Court invoked other provisions including Section 241 at its instance. In view of the difficulties this has created, I do hereby accept to review which I hereby do the Ruling dated 5th of November 2003. None of the counsels had submitted on the other provisions. I hereby set aside the orders made in respect of sections 218, 235 and 241of the Companies Act and stay order. With this review there is no need for an appeal which will only protract this matter. I also appreciate that no steps were taken to file the record of appeal. The result is that the Application is allowed with no orders as to costs."** (Underlining mine).

9. In my view, the Plaintiff herein is putting great emphasis on the three words: **"and stay order"**. It has taken those words to mean that the learned Judge reversed his decision that the judgement herein, decree and all consequential orders were unenforceable in law as well as lifting his stay order in respect of execution hereunder. I do not agree with the Plaintiff's interpretation of what the Judge said. To my mind of the significant words used in the Ruling of the 17th August 2012 were:

**"The result is that the Application is allowed with no orders as to costs."**

Accordingly it is necessary to look at what the said Application prayed for. Simply put it was:

**"That this Honourable Court do hereby review its Ruling delivered on 5th of November, 2003."**

The Ground upon which the Application was based was equally simple:

**"A) There was an error apparent on the face of the record."**

The said Application was supported by the Affidavit of one **Kennedy Asinuli** sworn on 20th May 2004. That Affidavit reviewed the proceedings before Court and thereafter concluded at paragraphs 8 and 9 the following:

**"8. That none of the parties herein made any submissions touching on the provisions of Section 241 of the Companies Act and the Honourable Court ought not to have delved into the provisions of the said Section. However, this notwithstanding the 1st Defendant and its Advocates had already obtained the Court's leave to commence proceedings by an order given by the Honourable Justice Ransley on the 19th of July, 2001. This fact had not been disclosed to the Court because it was never raised (Annexed hereto and marked 'KA 1' is a copy of the said Order).**

**9. That in view of the foregoing reasons stated herein it would only be proper and just for this Honourable Court to review its ruling delivered on the 5th of November, 2003 to rectify this apparent error on the face of the record".**

10. What then was the learned Judge allowing in his said Ruling dated 17th August 2012" In my opinion, his Ruling concerned what he considered to be an error on the face of the record in relation to the Orders that he had made in respect of **sections 218, 235 and 241** of the **Companies Act** in his said Ruling of 5th November 2003. Each of those sections reads as follows:

**"218. The High Court shall have jurisdiction to wind up any company registered in Kenya.**

**235. (1) The court may appoint the official receiver to be the liquidator provisionally at any time**

**after the presentation of a winding-up pending and before the making of a winding-up order.**

**(2) Where a liquidator (in this Act referred to as an interim liquidator) is so appointed by the court, the court may limit and restrict his powers by the order appointing him.**

**241. (3) The exercise by a liquidator in a winding up by the court of the powers conferred by this section shall be subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers."**

The salient finding of **Ibrahim J.** in his said Ruling of 5th November 2003 was contained in the penultimate page thereof where he detailed:

**"In view of the foregoing, I do hereby hold that once again this suit is null and void ab initio. It is a nullity for Want of the Mandatory leave required under Section 228 of the Companies Act."**

In other words, the first Defendant was successful in its Chamber Summons dated 23rd July 2001 as a result of the Plaintiff herein failing to apply for mandatory leave to file its suit before Court under the provisions of **section 228** of the *Companies Act*. The error on the face of the record as above related to completely different sections of the Act. As a result and in my view, there was no question of **Ibrahim J.** lifting the stay Order as per his said Ruling of 5th November 2003. Further, his declaration that the Judgment herein, Decree and all other consequential Orders were unenforceable, still remains the position to this day.

11. The upshot of the above is that I find no merit in the Plaintiff's Application before Court dated 23rd July 2013. In view of the Ruling delivered on 5th November 2003, the Plaintiff has no Judgement or Decree capable of execution. Its Application is consequently dismissed with costs to the first Defendant.

**DATED and delivered at Nairobi this 31st day of July, 2014.**

**J. B. HAVELOCK**

**JUDGE**