REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 423 OF 2015 (OS)

IN THE MATTER OF FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT

AND

IN THE MATTER OF THE JUDGMENT ENTERED ON 15TH OCTOBER 2014

(HON. A.A. NCHIMBI JUDGE) IN THE HIGH COURT OF TANZANIA IN

DAR ES SALAAM COMMERCIAL CASE NO. 98 OF 2014

BETWEEN

UNITED BANK OF AFRICA

(TANZANIA) LIMITED.....APPLICANT/JUDGMENT CREDITOR

VERSUS

METRO PETROLEUM

TANZANIA LIMITED……1ST RESPONDENT/JUDGMENT DEBTOR

BILL KIPSANG ROTICH…….2ND RESPONDENT/JUDGMENT DEBTOR

FLORENCE CHEPKOECH…..3RD RESPONDENT/JUDGMENT DEBTOR

PREMIUM PETROLEUM

CO. LIMITED……..4THRESPONDENT/JUDGMENT DEBTOR

FAMILY BANK LIMITED……..…GARNISHEE/INTERESTED PARTY

RULING NO. 2

1. The application before me is for the review, variation or setting aside of the orders made on 4th February 2016.

2. The Judgment-Debtors asserted that the effect of the orders made on 4th February 2016 was to determine the Originating Summons before it had been accorded a hearing *interpartes.*

3. The applicants pointed out that they were yet to file any Replying Affidavit, whilst the respondent was yet to seek Directions on how the Originating Summons were to be heard and determined.

4. Thirdly, the applicants indicated that the Application dated 31st August 2015 had only sought prohibition orders pending the hearing and determination of the Originating Summons. Therefore, when the court proceeded to give orders which enabled the respondent to execute the Foreign Judgment, it had gone beyond what had been sought.

5. In particular, the applicant took issue with the following orders which were made by the court;

1. "That if the bank had to realize the security, and there remained a surplus payable to the Chargors, it is hereby ordered that such surplus be held by the Garnishee, to the order of the Applicant.

2. That if the surplus exceeds the judgment debt, the Applicant would only be entitled to such portion of the surplus as is required to satisfy the decree.

3. That the costs of the application be and are hereby awarded to the Applicant,"

6. When the above orders were made prior to the registration, in Kenya, of the Foreign Judgment, the applicant submits that that was an error on the face of the record, which therefore calls for review.

7. The continued existence of the orders in question was said to be exposing the Applicants to substantial loss and damage, as the respondent and the Garnishee may proceed to sell the security on the strength of the said orders.

8. Meanwhile, if the orders were reviewed, as requested that the respondent, the Garnishee and the Interested Party would not be prejudiced at all.

9. This application was prompted by the fact that on 25th April 2016, the respondent had issued a Notice of Intention to sell by public auction, the suit property **L.R. No. 209/8193/2, RIVERSIDE DRIVE NAIROBI,** in the event that the Garnishee had no objection to having the respondent take that step.

10. The applicants expressed the view that the Notice of Intention to sell the suit property was orchestrated by the orders made on 4th February 2016, as those orders directed the Garnishee to pay to the Respondent any surplus of any sale proceeds, in the event that the Garnishee realizes the security in issue.

11. When canvassing the application, Mr. Nyachoti, the learned advocate for the Applicants, begun by reminding the court of its power to set aside or to vary such judgments as may have been entered exparte. In support of that submission, the applicant cited **PATEL Vs E.A. CARGO HANDLING SERVICES LTD [1974] E.A 75,** wherein the court of Appeal stated as follows;

"The court has a very wide discretion under Order 9A, Rule 10 which states;

‘Where judgment has been entered under this order the court may set aside or vary such judgment upon such terms as are just’.

There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just”

12. The court of Appeal also explained the principles to be followed, saying;

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules".

13. It is evident that the authority cited by the applicants addressed the situation in which there was already a judgment on record, and if such a judgment was entered *exparte.*

14. When it is borne in mind that the applicants’ primary complaint was that the court was yet to register the foreign Judgment, I hold the considered view that the authority cited by the applicants was distinguishable from the case at hand.

15. A party cannot seek to set aside a judgment which he says has not yet been granted. Yet the defendants made the following submissions;

“5. Your Lordship, indeed the foreign judgment herein has not yet been registered and as such, execution of the said judgment, as would be the consequence of compliance with the court order, could not take place subject to section 8 of the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43 of the Laws of Kenya, and this is indeed a further error on the face of the record that needs a review.”

16. If, as the defendant said, the Foreign Judgment had not been registered in Kenya, it cannot either be executed or be set aside.

17. The Defendant further submitted as follows;

“It is apparent and we indeed appreciate that for an Application seeking review on this basis to succeed, the error must be readily discernible and/or clearly evident from the face of the record without much probing or elaborate explanations.”

18. So, when the defendants asserted that there were errors apparent on the face of the record, what did that mean" They provided an answer by giving the following quotation from the Court of Appeal’s decision in **NYAMONGO & NYAMONGO ADVOCATES Vs KOGO [2000] KLR 3017;**

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record.”

19. In this case, the defendants state that there was no Foreign Judgment which had already been

registered in Kenya. But the defendants also talk about the execution of such a judgment, through the execution of the orders complained about. In effect, the defendants' position is not clear.

20. In the case of **NATIONAL BANK OF KENYA LIMITED Vs. NDUNGU NJAU CIVIL APPEAL NO. 211 OF 1996,** the Court of Appeal expressed itself thus;

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established."

21. I find that the defendants have failed to demonstrate the self-evident error or omission which would call for review.

22. If the court erred by determining the substantive Originating Summons, by issuing final orders at an interlocutory stage, that would be an erroneous decision.

23. But, in reality, the court did not determine the Originating Summons. The record of the proceedings shows that on 21st September 2015, when the matter was before me, all the parties were duly represented.

24. On that date, the plaintiff asked for a Prohibitory Order to issue, with a view to preserving the only asset which the applicant is aware of, as belonging to the defendants.

25. Both the defendants' and the Garnishee opposed the application.

26. After giving consideration to the submissions, the court ordered that the property which was the subject matter of the application, be preserved. This is how the order was worded;

"It is further ordered that until 27/10/2015 the property which is the subject matter of the application shall be preserved. In other words, the registered owner of the said property will be restrained from transferring it or encumbering it, save to the extent to which it is already charged to the Garnishee."

27. When the matter was next in court on 27th October 2015, the respondents asked for 14 days to file their Replying Affidavit.

28. At that time, the court was told that there was a Ruling which was expected at the High Court of Tanzania, in respect of an application by the respondents, who were seeking to upset the judgment in **HCCC No. 98 of 2014,** *(a Tanzanian Case).*

29. This court allowed the respondents 10 days to file and serve their Replying Affidavit.

30. Meanwhile, after taking into account the information that the Ruling in the Tanzanian court was scheduled for 30th October 2015, this court fixed the 16th of November 2016 as the hearing date for the application. In the meantime, the interim orders were extended.

31. On 16th November 2015 the application was canvassed. Both the applicant and the Respondents informed the court that the suit property was charged to the Garnishee.

32. Amongst the submissions made by the respondents was that;

“The obligations between the Respondents and the Garnishee have not been placed before this court, so that the same can be protected, if this court were to make orders".

33. At that point, the Applicant responded thus;

“As the Garnishee is not denying the possibility of a surplus, that means that there would be a surplus available to the applicant.”

34. It is within that context that the court decided to issue orders which would not prejudice the Garnishee, as it holds a registered charge over the suit property. By virtue of the charge, the Garnishee’s legal rights over the property would rank in priority over any subsequent claims, such as those that Applicant claimed.

35. In recognition of the fact that chargee was entitled, in law, to realize the security if the borrower defaulted in servicing the loan, the court was alive to the possibility that the Garnishee could, if it became necessary, take steps to realize the security.

36. Therefore, although there was a need to preserve the suit property, I could not erect a hurdle in the path of the Chargee.

37. But, at the same time, I took into account the possibility that if the Chargee realized the security said to be worth Ksh. 120,000,000/-, there would in all probability, be a surplus after the Chargee recovered the loan *(which was said to be about Ksh.31,000,000/-).*

38. It is in that context that the court held that if the Chargee exercised its statutory powers of sale, any surplus should not be released to the Chargors, until the claim by the Applicant was addressed.

39. The orders made on 4th February 2016 were made after the court had given a hearing to the parties. It was an interlocutory order, made in relation to the application to preserve the property.

40. The orders did not give to the applicant, **UNITED BANK OF AFRICA (TANZANIA) LIMITED,** any authority to realize the security held by **FAMILY BANK LIMITED.**

41. By their letter dated 25th April 2016 the law firm of **M M & N** Advocates said;

“**We note that two orders were granted regarding the above property. The first order protected the property from sale, while the second one ordered that any surplus amount be held to our client’s credit"**.

42. Even by the above-quoted understanding expressed by the applicant, there cannot have arisen a power conferred upon the Applicant to sell the property in issue.

43. It is also noted that, in any event, the Applicant had made it clear to the Garnishee, that if there was no objection by the said Garnishee, to the applicant’s intention to sell the property through public auction, the Applicant would;

“…commence that process by an application to the court.”

44. In effect, the letter dated 25th April 2016 did not constitute a threat by the Applicant to sell the property. The most that they planned to do, and only if the Garnishee did not have an objection, would

be the bringing of an application to the court, to thereafter enable it to commence the proposed process of public auction.

45. I therefore find no merit in the Applicants' submission that if the orders made on 4th February 2016 were not reviewed or set aside, the Respondent and the Garnishee may proceed to sell the security on the strength of the Ruling dated 4th February 2016.

46. In the result, the application dated 6th May 2016 is dismissed, with costs to the Judgment creditor.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of December 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mwangi & Miss Amimo for Applicant/Judgement Creditor

Nyachoti for 1st Respondent/Judgement Debtor

Nyachoti for 2nd Respondent/Judgement Debtor

Nyachoti for 3rd Respondent/Judgement Debtor

Nyachoti for 4th Respondent/Judgement Debtor

No appearance for Garnishee/Interested Party

Collins Odhiambo – Court clerk.