East Africa Development Bank v Ari Limited & 5 others (Civil Case 1 of 2020) [2024] KEHC 11273 (KLR) (Commercial and Tax) (26 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11273 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 1 OF 2020

A MABEYA, J

SEPTEMBER 26, 2024

BETWEEN

EAST AFRICA DEVELOPMENT BANK ..... JUDGMENT CREDITOR

AND

ARI LIMITED ..... 1ST JUDGMENT DEBTOR

RAPHAEL TUJU ..... 2ND JUDGMENT DEBTOR

MANO TUJU ..... 3RD JUDGMENT DEBTOR

ALMA TUJU ..... 4TH JUDGMENT DEBTOR

YMA TUJU ..... 5TH JUDGMENT DEBTOR

S.A.M COMPANY LIMITED ..... 6TH JUDGMENT DEBTOR

RULING

1. This ruling determines two applications, the application for mediation dated 8/11/2023 by the judgment-debtors and the Motion for garnishee orders dated 9/7/2024 by the decree holder.

Application dated 8/11/2023

2. The application was brought under Rules 5, 54 & 56 of the Civil Procedure (Court Annexed Mediation) Rules, Order 46(2), Order 51 of the Civil Procedure Rules sections 1A, 1B, 3A and 59B of the *Civil Procedure Act*, sections 25(2)(b) & (9) of the *Insolvency Act*, section 89(1) of the *Land Act*, article 159(2) of *the constitution* of Kenya.

3. The application sought orders for referral of the dispute concerning the amount payable pursuant to the agreement dated 10/4/2015 to court annexed mediation to be supervised by the Court. It

also sought a declaration to the effect that the decree-holder had violated and infringed the principal debtor's equitable right of redemption. That subsequently, the guarantors be allowed to opt out of the guarantee and indemnity agreement dated 10/4/2015.

4. The application was premised on the grounds set out on its face and the supporting affidavit of RAPHAEL TUJU sworn on 8/11/2023. His testimony was that, the principal debtor had entered into a facility agreement with the decree-holder for USD 9.3 million to expand its business. The facility was secured by several forms of collaterals, including an indemnity and guarantee agreement dated 10/4/2015.

5. However, the decree-holder did not disburse the full amount thereby causing cash flow difficulties for the principal debtor. This hindered its ability to fulfill its obligations under the agreement. Negotiations between the parties ensued to resolve the dispute. Although a settlement agreement was drafted, the decree-holder opted to initiate legal proceedings against the principal debtor in the UK instead of signing it.

6. That while the decree began the recovery process, the principal debtor continued efforts to resolve the matter amicably in order to salvage the project. It reportedly secured a prospective equity partner who had committed in writing to take over the project, restore its profitability and help facilitate the loan repayment. It was contended however that the decree-holder aimed at sabotaging the construction phase of the project and seize the properties.

7. That principal debtor expressed willingness to pay the outstanding amount under the facility and believed that court-annexed mediation would be the most efficient way to resolve the matter. That the decree-holder would not suffer any prejudice since it still held the properties as security.

8. The decree-holder opposed the application vide a replying affidavit sworn by David Odongo on 17/11/2023. He stated that the principal debtor and the guarantors were indebted to the bank and thus, there was no valid dispute to be referred to mediation. That mediation, being a voluntary and non-adversarial process, was not of interest to the bank. That the judgment-debtors were in contempt of three court orders, making them undeserving of any equitable relief.

9. That the issue of the alleged breach of the agreement by the failure to disburse the full amount had already been fully litigated under English law. Furthermore, it was pointed out that there was no dispute regarding the amounts owed, as they were contractually agreed upon. Any further delays would be detrimental to the bank and the judgment-debtors had not demonstrated how the principal debtor would suffer irreparable harm. That the application was meant to hinder the debt recovery process.

10. By a ruling of 26/6/2024, the Court allowed the cross examination of the deponent David Odongo on his replying affidavit sworn of 21/11/2023. The parties filed their respective submissions with respect to the same.

11. The decree-holder submitted that there was no evidence to demonstrate any invalidity or irregularities in the execution of the replying affidavit dated 21/11/2023. The deponent of the affidavit confirmed that he had not provided any evidence to support claims about alleged requests or directions from the decree-holder's legal officer and affirmed that the signature on the affidavit was indeed his own.

12. It was further submitted that the Court was functus officio regarding the matters addressed by David Odongo in his oral testimony because issues had already been adjudicated by the English High Court. Counsel further contended that the statements made under oath were barred by the principles of res judicata and res subjudice, noting that the matter was still pending before the Supreme Court of Kenya.

13. On the part of the judgment-debtors, it was submitted that the validity of the replying affidavit of David Odongo had been raised for the first time. That while Mr. Odongo confirmed signing the affidavits prepared for him, the affidavits appeared to have been executed by someone other than the deponent. That the decree-holder had misled the Court through the said affidavit on several crucial issues and the doctrine of functus officio could not be invoked to correct the resulting injustice. That consequently, neither the doctrine of functus officio nor res judicata was applicable to this case.

Application dated 9/7/2024

14. This application was brought under section 9 of the *Foreign Judgments (reciprocal Enforcement) Act* CAP 43 Laws of Kenya, sections 1A, 1B, 3A, 3 and 63(e) of the *Civil Procedure Act* CAP 21 Laws of Kenya and Order 51 rules 1,3 and 4 of the Civil Procedure rules 2010.

15. The application sought the attachment of all rental income due or accruing to the 1st and 2nd judgment-debtors from the garnishee, Tamarind Management Limited, under the tenancy agreement between the garnishee and the 2nd judgment-debtor. That the said rental income be directed to the judgment-creditor's advocate's bank account as and when it becomes due.

16. In support of the application, the applicant relied on the grounds on the face of it and the supporting affidavit sworn by Ronald Wakhisi Makokha on 9/7/2024. It was contended that in a ruling dated 10/6/2019, the Court granted an order for the recognition, registration, and enforcement of a judgment delivered by the High Court of Justice, Business and Property Courts of England and Wales, Queen's Bench Division Commercial Court between the decree-holder and the judgment-debtors.

17. That a challenge to the said ruling had been dismissed. That the judgment- debtors had refused or otherwise failed to settle the amounts due to the decree-holder. That the outstanding amount include a decretal sum of USD 15,162,320.92, accrued interest on the decretal sum amounting to USD 19,895,301.22, and interim costs of GBP 100,000/-.

18. That the judgment-debtors held an active tenancy agreement with the garnishee, Tamarind Management Limited, over a property known as LR. No 1055/165 Ngong Road, Karen, Nairobi, from which they receive rental income. That the conservatory order granted by the Supreme Court had been dismissed in a ruling dated 6/10/2023.

19. It was contended that the decree-holder did not have access to the financial records of the judgment debtors who were in contempt of court orders issued on 1/3/2020 and 20/3/2020. That the decree-holder believed that the rental income paid by the garnishee to the 1st and 2nd judgment-debtors should be directed towards settling the decretal sum.

20. The judgment-debtors opposed the application vide grounds of opposition dated 11/7/2024. They contended that the application was an abuse of the court process since it altered the status quo granted by the court in the ruling dated 22/11/2023 and confirmed on 21/3/2024. That the application was made in bad faith as it meant to offend the orders of the court regarding the issuance of status quo orders and ought to be struck out.

21. The judgment debtors also filed a replying affidavit sworn by Raphael Tuju on 30/7/2024. They contended that the allegation that they had refused to settle the decretal sum was untrue since they had filed an application dated 8/11/2023 before the court for referral of the dispute to Court Annexed Mediation. That the status quo orders issued by the court on 22/11/2023 remained in place until the hearing and determination of the application for referral to mediation.

22. That the application had not indicated the amount sought to be recovered thereby making the application incompetent. Further, that there was no decree within the meaning of Order 23 of the Civil Procedure Rules capable of being executed. It was further contended that the applicant had not complied with the mandatary provisions of section 94 of the *Civil Procedure Act* and that the amount sought to be recovered was contrary to section 44A of the *Banking Act*.

23. In a rejoinder, the decree-holder filed an affidavit of Ronald Wakhisi Makokha sworn on 7/8/2024. It was contended that at the time of making the garnishee application dated 9/7/2024, the status quo orders were no longer in force. That the orders had lapsed on 26/6/2024 when the judgment-debtors' Counsel failed to attend court and apply for an extension. He further emphasized that the amount to be paid by the judgment debtors was clearly specified in the judgment and orders issued by the English Court on 19/6/2019.

24. That the garnishee application was filed under the provisions of section 9(10) of the *Foreign Judgments (Reciprocal Enforcement) Act*, rather than under Order 23 of the Civil Procedure Rules, 2010.

25. The judgment-debtors submitted that the status quo orders were still in place until the hearing and determination of the application dated 8/11/2023. That the court had not disposed the application for mediation and as such the status quo order was still in place. That the application before Court was defective as it did not comply with section 94 of the *Civil Procedure Act* as no leave was not obtained before commencing execution.

26. It was further submitted that the judgment the decree-holder sought to enforce was for payment of money and it could only be enforced under section 9 of the Foreign Judgments reciprocal Enforcement Act.

Analysis

27. I have considered the pleadings, the oral evidence and the submissions on record. There are two issues for determination, should the matter be referred to mediation and whether a garnishee order should issue. The Court will first consider the application for mediation dated 8/11/2023.

28. The judgment-debtors moved the Court seeking the referral of the dispute to a Court Annexed Mediation. The grounds were that they were desirous of paying the amount due under the facility agreement in order to agree on the amount payable. They blamed the decree-holder in the manner in which it had handled the disbursement of the facility and by failing to disburse the full amount That in doing so, it caused the principal debtor cash flow problems.

29. On its part, the decree-holder contended that there was no dispute before Court for referral to mediation. That the issues raised by the judgment-debtors had already been determined by the Court and thus mediation being voluntary, it was of no interest to the bank.

30. *The Constitution* provides for alternative dispute resolution mechanisms, including mediation, as part of resolving disputes outside the formal court system. As a way of reducing case back log and promotion of amicable settlement, the judiciary introduced Court Annexed Mediation which can be voluntary or be ordered by the court.

31. The jurisdiction of the Court was challenged on account of functus officio, res-judicata and res sub-judice. The Black`s Law Dictionary 8th Edition defines the term functus officio as –

> " having performed his or her office") (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

32. In Raila Odinga & 2 others vs. Independent Electoral & Boundaries Commission & 3 others (2013) eKLR, the Supreme Court of Kenya held that: -

> " A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."

33. On the basis of the foregoing, the doctrine of functus officio bars a Court from revisiting a matter once the final judgment has been delivered on merit. In essence, it means that once a court has delivered a final judgment or order on the merits of a case, it no longer has jurisdiction to revisit or alter that decision.

34. In the present case, the dispute between the parties concerning the facility agreement dated 10/4/2015 was agreed to be adjudicated under the English Law and English Courts. The same was adjudicated upon by the English Court and a judgment delivered. The same was recognized and registered as a judgment of this Court in a ruling dated 13/2/2020. The same was appealed against and the Court of Appeal pronounced itself. The matter is now pending in the apex Court.

35. Once a foreign judgment has been pronounced, it is considered final in the jurisdiction where it is issued and generally it will hold that finality. However, the recognition and enforcement of the same is based on several rules of the country the enforcement is sought. In the present case, the Court considered the factors laid out for recognition and enforcement and allowed the application. The judgment was recognized and registered as such.

36. In this application, the judgment-debtors had asked the Court to refer the matter to mediation. Mid way, they applied to cross-examine Mr. David Odongo who had sworn a replying affidavit in opposition to the application. Mr. Odongo testified that the decree-holder had short changed the principal debtor in the release of the facility. That he had been involved in the tailoring the facility which was to be two tiered. That the decree-holder released the first tranche of the facility but withheld the second tranche which caused the principal debtor to default. That it's the lenders action which had led to the default.

37. That evidence coming from a senior bank official is telling. However, the Court's view of the said evidence is that the same did not support the application before it. That was an invitation to the Court to look into the merits of the case which has already been determined by a competent Court under the facility agreement. The issues raised by Mr. Odongo can only be dealt with the English Court and not this Court. To re-look and pronounce itself on the said evidence would be to re-open a shut case. Given the principle of functus officio, the Courts role herein is limited.

38. On res-judicata, a matter is considered res judicata when it has been conclusively resolved in a prior case. The same issues must be directly and substantially involved in both the current and previous suits.

For res judicata to apply, the parties in both cases must be the same and the earlier decision must have been final and binding.

39. It is undisputed that the parties involved in this case are the same as those in the previous case. The issues concerning the facility were before the English Court which pronounced itself. Therefore, this Court is precluded from revisiting the matter under the doctrine of res judicata.

40. In light of the foregoing, the Court is precluded from considering the merits of the issues raised in the referral application. The issues raised therein and buttressed by the oral testimony of Mr. Odongo point towards the issue of liability or lack of it on the facility agreement. That is an issue which should have been dealt by the English Court. Since the Judgment of the English Court has been recognized and registered, it is a no go zone for this Court.

41. Accordingly, the application lacks merit and is therefore dismissed.

Application dated 9/7/2024

42. This application sought the attachment of all rental income due or accruing to the 1st and 2nd judgment-debtors from the garnishee, Tamarind Management Limited. This is under the tenancy agreement between the garnishee and the 2nd judgment debtor. The decree-holder sought that this rental income be directed to the judgment creditor's advocate's bank account as and when it becomes due.

43. Section 9(3) of the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap. 43 of Kenya provides: -

> " Subject to this section, the rules of court with respect to the attachment of debts due to judgment debtors shall apply to proceedings pursuant to this section."

44. From the foregoing, it is clear that the procedures and rules to be applied are those that are used for attaching debts owed by judgment debtors in domestic cases. It is the Civil Procedure Rules that therefore that are applicable to the enforcement of foreign judgments. The judgment of the Court has not been set aside.

45. The status quo orders that were issued on 22/11/2024 lapsed when the Counsel for the judgment-debtors failed to attend Court and apply for their extension. In that regard, the application for garnishee as an execution process is properly before Court.

46. I have considered the garnishee application. The Lease agreement that is the basis of the garnishee's liability was not produced. The Court cannot tell the term of the lease, the amount payable each month and therefore the extent of the garnishee's liability. Further, it is not clear whether the garnishee was served with the application to appear and admit or deny the debt.

47. For the foregoing reasons, the Court finds that both applications dated 8/11/2023 and 9/7/2024, respectively are without merit and are dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE