



Kingdom Bank Limited (formerly Jamii Bora Bank Limited) v Rapid Communications Limited & 2 others; Sultan Palace Development Limited & another (Interested Parties) (Commercial Case 628 of 2015) [2023] KEHC 988 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)

Neutral citation: [2023] KEHC 988 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 628 OF 2015
DAS MAJANJA, J
FEBRUARY 17, 2023**

BETWEEN

KINGDOM BANK LIMITED (FORMERLY JAMII BORA BANK LIMITED) PLAINTIFF

AND

RAPID COMMUNICATIONS LIMITED 1ST DEFENDANT

BENSON NDETA SANDE 2ND DEFENDANT

ANWAR MAJID HUSSEIN 3RD DEFENDANT

AND

SULTAN PALACE DEVELOPMENT LIMITED INTERESTED PARTY

ALBRIGHT HOLDINGS LIMITED INTERESTED PARTY

RULING

1. Before the court is the 1st Interested Party’s Notice of Motion dated 2nd June 2022 made, inter alia, under Order 40 Rule 7 of the Civil Procedure Rules (“Application No. 2”). It seeks to stay execution and discharge the orders issued on 6th April 2022 pursuant to the Notice of Motion dated 15th March 2022 (“Application No.1”). Application No. 2 is supported by the affidavit of its Managing Director, Qin Liang, sworn on 2nd June 2022.
2. By way of background, the Plaintiff (“the Bank”) advanced a credit facility to the 1st Defendant (“the Company”) guaranteed by its directors, the 2nd and 3rd Defendants. Following default by the Company, the Bank filed this suit to recover the outstanding loan amount. In due course the parties resolved



the matter through a Mediation Settlement Agreement entered on 23rd August 2017 (“the Mediation Agreement”) which was adopted as an order of the court on 7th May 2018 on the following terms;

- a. That it is agreed that Rapid Communications Limited, the Defendant owes Jamii Bora Bank Ltd, the Plaintiff a principal sum of Kenya Shillings Seventy-Five Million, Three Hundred and Twenty-Six Thousand, One Hundred and Forty-Five, and Ninety-Seven Cents (Kshs. 75,326,145.97) plus interest.
 - b. That it is agreed that the Rapid Communications Limited, the Defendant and its associated company Albright Holdings Limited in which the Defendant is a Director and Shareholder, have, by a tripartite Novation Agreement dated 9th June 2017 agreed to assign ALL their rights and interest in Property Condominium Numbers CS-AA3-201, CS-AA3-320 and CS-ABS-001 being part of the development erected by Sultan Palace Development Limited on ALL that piece of land situate in the Kilifi District of the Republic of Kenya containing by measurement Seventeen Decimal five One (17.51) hectares or thereabouts and being Land Reference Number MIN/III/9203 which said piece of land with the dimensions abutments and boundaries thereof is delineated on the plan annexed to the Certificate of Title dated 30th September 2015 registered at the Land Titles Registry at Mombasa as Number C.R. 65870/1 and more particularly on Land Survey Plan Number 361651 Held by the Developer as proprietor as lessee from the Government of the said Republic for a term of 99 years from 1^o February 1982 subject however to the revisable annual rent of shillings 347,120/= and to the Act(s) special conditions, Encumbrances and other matter specified in the said Certificate of Title.
 - c. That the Condominiums referred to above shall be sold by Jamii Bora Bank Limited, the Plaintiff, and/or its appointed agents at the values specified in the Valuation Report dated 25th April 2017 by Real Appraisal Limited being Kenya Shillings Seventy-Five Million only (Kshs. 75,000,000.00). The proceeds of the sale shall be utilized towards offsetting the Defendant's indebtedness of the principal sums and the balance, if any, shall be settled within ninety (90) days from the date hereof.
 - d. That Parties to this mediation shall engage in further negotiations with a view to reaching a settlement regarding any interest, costs and expenses that may be due to Jamii Bora Bank Limited after the sale of the Condominiums mentioned in paragraph 2 above and if unsuccessful, the matter shall be referred to court for final determination.
 - e. That Valuation Report dated 25th April 2017 by Real Appraisal Limited and the tripartite Novation Agreement dated 9th June 2017 shall be included in the Mediator's Reports.
3. As is set out in the Mediation Agreement, the Company had, through its associated company, Albright Holdings Limited entered into a tripartite Novation Agreement dated 9th June 2017 (“the Novation Agreement”) where they agreed to assign all their rights and interests in Property Condominium Numbers CS-AA3-201, CS-AA3-320 and CS-ABS-001 (“the subject properties”) being part of the development erected by the 1st Interested Party to the Bank to sell and recover the amount due to it upon successful valuation being done and the balance cleared within 90 days.
 4. Once the Mediation Agreement was adopted by the court and an order issued, the Bank wrote to the Company to initiate the process of transfer of the leases. Since the process was not successful, the Bank filed Application No. 1 seeking a raft of orders including an injunction to restrain the Respondents and Interested Parties from interfering with the subject properties pending the hearing of the application.



Application No. 1 was heard on 31st March 2022 and allowed on 6th April 2022 and the following orders issued:

- (1) That a temporary injunction be and is hereby issued restraining the 1st, 2nd and 3rd Respondents and the 1st and 2nd Interested Party, either by themselves, their agents, servants and /or personal representative from wasting alienating or otherwise interfering or dealing with Properties Condominium Numbers CS-AA3-201, CS-AA3-202 and CS-AB2-001 erected Land Reference MN/111/9203, Kilifi;
 - (2) That a temporary injunction be and is hereby issued restraining the 1st, 2nd and 3rd Respondents and the 1st, 2nd and 3rd Interested Party either by themselves, their agents, servants and / or personal representative from wasting, alienating or otherwise interfering or dealing with property Condominium Numbers CS-AA3-201, CS-AA3-202 and CS-AB22-001 erected on Land Reference Number MN/111/9203, Kilifi;
 - (3) That an Order of inhibition under 68 of the *Land Registration Act*, 2012 be and is hereby issued to prevent any further dealings with Apartments Numbers CS-AA3-201, CJS-AA 3-202 and CSAB2-001 erected on Land Reference Number MN/111/9203, Kilifi pending the hearing and determination of this Application;
 - (4) That an order of inhibition under 68 of the *Land Registration Act*, 2012 be and is hereby issued to prevent any further dealings with Apartments Numbers CS-AA3-201, CS-AA3-202 and CSAB2-001 erected on Land Reference Number MN/111/9203, Kilifi pending the hearing and determination of the Notice to Show Cause.
 - (5) That an Order be and is hereby issued compelling the 1st, 2nd and 3rd Respondents and the 1st and 2nd interested Party, by themselves, their servants or agents or otherwise howsoever to unconditionally take all such actions and to execute any and all such documents as shall be necessary to effect due and effectual transfer of Apartments Numbers CS-AA3-201, CS-AA3202 and CS-AB2-001 erected on Land Reference Number MN/111/9203, Kilifi to the Applicant within a period of 30 days.
 - (6) That an Order be and is hereby issued directing that should 1st, 2nd, 3rd Respondents and the 1st and 2nd Interested Party fail to take all the necessary and execute all the requisite documents in terms of Order (d) above so as to transfer the Apartments Numbers CS-AA3-201, CS-AA3-202 and CS-AB2-001 erected on Land Reference Number MN/111/9203, KILIFI to the Applicant within thirty days of the order, the Deputy Registrar of this Honourable Court shall stand empowered to take the said actions and to execute the said documents at the 1st, 2nd and 3rd Respondents and the 1st and 2nd Interested Party's expense;
 - (7) That the costs of this Application be provided for against the 1st, 2nd, 3rd Respondents and the 1st and 2nd Interested Party.
5. It is the orders of 6th April 2022 that have given rise to Application No. 2 by the 1st Interested Party. Although the 1st Interested Party has raised three broad grounds, for reasons that will be apparent, I will only deal with the main and decisive issue which mainly implicates the Bank. The 1st Interested Party claims it was neither served with Application No. 1 nor was it served with any mention or hearing notices. It states that it only became aware of Application No. 1 when it was physically served with a copy of the extracted orders of 6th April 2022 on 13th April 2022. It further states that the affidavit of service shows service was effected through email but a delivery receipt has not been attached to confirm



service. It argues that while the order of 6th April 2022 was served physically, Application No. 1 done by email which shows mischief.

6. The Bank opposes Application No. 2 through the replying affidavit of its Head of legal, Jackson Kimathi, sworn on 21st June 2022. It contends that the application is anchored on the wrong provisions of law and on false allegations of lack of service. The application was disposed of by way of written submissions.
7. The main issue for determination is whether the court should set aside the orders issued on 6th April 2022 on the ground that 1st Interested Party was not served with court process. The court has discretion to set aside any order or judgment made ex-parte or for non-attendance. This discretion is to be exercised judiciously bearing in mind the facts and circumstance of each case. Our courts have recited the applicable principles in many cases. The general principle was distilled in *Shah v Mbogo and Another* [1967] EA 116 where the court held as follows:

The discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.
8. When the application came up for hearing on 15th March 2022, the court relied on two affidavits of service sworn by a process server, James Mutia, sworn on 17th March 2022 and 31st March 2022. From both affidavits, it is apparent that service was effected of the application and court process was effected by court by email.
9. Service by electronic means through email is accepted as a primary form of service. It is governed by Order 5 Rule 22B of the Civil Procedure Rules which provides for as follows;
 1. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
 2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
 3. Summons shall be deemed to have been served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
 4. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.
10. From the aforesaid provisions, for email service to be considered effective by the court, the deponent of the affidavit of service must demonstrate that the email used for service must be defendant's last used and confirmed email address and second, the delivery receipt must be attached to the affidavit of service. I have looked at both affidavits of service relied on by the Bank to demonstrate that the service was effected and it is apparent that the process server did not disclose the basis of effecting service on the emails said to be those of the Defendants and Interested Parties and the Electronic Mail Service Delivery Receipt was not attached thereto. In the circumstances, I am constrained to hold that the service of process was not effected in accordance with Order 5 rule 22B of the Civil Procedure Rules. Once it is shown that service of process has not been effected, the resulting order must be set aside ex debito justitiae (see *Mwala v Kenya Bureau of Standards* EALR [2001] 1 EA 148).



11. Since the 1st Interested Party has established that it was not served with process, I do not find it necessary to delve into the other grounds proffered in support of the application. Those grounds will be the substantive response to Application No. 1.
12. For the reasons I have set out, I now make the following orders:
 - a. The 1st Interested Party's Notice of Motion dated 2nd June 2022 is hereby allowed.
 - b. The orders issued on 6th April 2022 in respect to the Notice of Motion dated 15th March 2022 be and are hereby set aside and or discharged.
 - c. The Notice of Motion dated 15th March 2022 shall now be set down for hearing.
 - d. Pending the hearing and determination of the application or until further orders of the court, a temporary injunction be and is hereby issued restraining the 1st, 2nd and 3rd Respondents and the 1st and 2nd Interested Party, either by themselves, their agents, servants and /or personal representative from wasting alienating or otherwise interfering or dealing with Properties Condominium Numbers CS-AA3-201, CS-AA3-202 and CS-AB2-001 erected Land Reference MN/111/9203, Kilifi.

DATED AND DELIVERED AT NAIROBI THIS DAY 17TH OF FEBRUARY 2023.

D. S. MAJANJA

JUDGE

Mr Gakunga instructed by Kimani and Michuki Advocates for the Plaintiff

Mr Ogutu instructed by Byron and Partners Advocates for the 1st, 2nd and 3rd Defendants.

Ms Waititu Instructed by Michael, Daud and Associates Advocates for the 1st Interested Party.

Ms Kalsi instructed by Ishi Kalsi and Company Advocates for the 2nd Interested party.

