



**Pegasus Kenya Limited v African Banking Corporation Limited & another (Civil Case E195 of 2021) [2023] KEHC 2591 (KLR) (Commercial and Tax) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2591 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E195 OF 2021  
JWW MONG'ARE, J  
MARCH 29, 2023**

**BETWEEN**

**PEGASUS KENYA LIMITED ..... PLAINTIFF**

**AND**

**AFRICAN BANKING CORPORATION LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**IMPACT INVESTMENT LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The application before me is brought by the 1<sup>st</sup> defendant/applicant against the plaintiff /respondent under section 1A, 1B and 3A of the *Civil Procedure Act*, order 45, rule 1 and 2 of the *Civil Procedure Rules, 2010* and all other enabling sections of the law.
2. The application is dated March 18, 2022 and is supported by a replying affidavit Faith Nteere, the Legal Manager of the 1<sup>st</sup> defendant.
3. The applicant seeks to have the honourable court review and vary the orders it issued on December 16, 2021 in the following matter;
  - a. To allow the 1<sup>st</sup> respondent to issue notices over the property known as LR No 209/10669/5
  - b. To allow the 1<sup>st</sup> respondent exercise its statutory power if the property known as LR 209/10669/5 is not redeemed within the period allowed under the law.



4. The application is premised on the following grounds:-
  - a. *Vide* a notice of motion dated April 15, 2021, the plaintiff herein filed an application under certificate of urgency seeking temporary order against the applicant jointly and severally restraining them from selling , transferring, disposing and / or dealing with property known as LR 209/10669/5 South B pending the hearing and determination of the suit.
  - b. On December 16, 2021, this honourable court delivered a ruling allowing the said application, the import being that the 1<sup>st</sup> defendant herein was barred from exercising its statutory power of sale for the reason that the plaintiff was not served with statutory notices prior to the advertisement of the suit property for public auction.
  - c. The 1<sup>st</sup> defendant in reliance to the ruling of December 16, 2021, is willing to issue the plaintiff with the necessary mandatory statutory notices before exercising its statutory power of sale.
  - d. It is therefore just for this honourable court be pleased to revise, review its ruling delivered on December 16, 2021 which faulted the 1<sup>st</sup> defendant failure to issue the plaintiff with the necessary statutory notices, and subsequently, the 1<sup>st</sup> defendant prays that the court expressly orders for issuance of the said notices as a remedy.
  - e. It is also fair that the court in granting the said prayer issues a conditional order that the bank upon issuance and expiry of the statutory notices, is at liberty to exercise its power of sale on the property LR 209/10669/5 South B in the event that the loan amounts are not settled.
  - f. That this honourable court has inherent power to make such orders for the ends of justice.
5. The application is supported by an affidavit sworn by Faith Nteere, the Legal Manager of the 1<sup>st</sup> defendant/applicant of March 18, 2022 and a supplementary affidavit by said Legal Manager sworn on September 25, 2022.
6. The application is opposed and the plaintiff / respondent has filed a replying affidavit of Adan Haji Issack sworn on May 12, 2022. The 2<sup>nd</sup> defendant did not file any documents either in support or opposition to this application.
7. Both parties filed written submissions to the application and also made oral highlights of their submissions.
8. Having read and evaluated the submissions made before me and heard the counsels for the parties, I note that the order that this honourable court issued on the December 21, 2021, was premised on the court's reasoning that the plaintiff, by making a substantive investment towards purchase of the suit property, had acquired rights over the property and were therefore entitled to a notice if the 1<sup>st</sup> respondent was minded to proceed with its exercise of its statutory power of sale under the law.
9. I further note that the court did acknowledge that the banks interest as chargee supersedes or overrides the plaintiffs interest as purchaser but also noted that the bank, having consented to the sale between the plaintiff and the 2<sup>nd</sup> defendant by private treaty, was aware of the plaintiff's interest in the suit



property and should have notified it of its intention to dispose the property before proceeding to advertise it for sale.

10. From the affidavit sworn by the applicant's Legal Manager, Ms Faith Nteere, the applicant seeks for the court to review its orders and vacate the order of injunction to allow the 1<sup>st</sup> defendant/applicant to issue the plaintiff with the mandatory statutory notices in order to be able to proceed with the realization of the security since the 2<sup>nd</sup> defendant has since neglected its obligation to service the loan and as such, the loan continues to accrue interest and currently stands at Kshs 112,000,000.
11. The 1<sup>st</sup> defendant/ applicant is apprehensive that if the situation continues unabated the property will not be adequate to clear the outstanding loan and the bank will be left with a large chunk of the loan unpaid.
12. On its part the plaintiff/ respondent argue that the 1<sup>st</sup> defendant had intended to appeal the said orders of the court but instead has withdrawn its notice of intended appeal and chosen to come back to the same court to seek a review instead.
13. The plaintiff argues that the application for review is incompetent as the same has been brought in contravention of order 45 rule 1 which envisions that a review to a ruling or decree by the same court can only be done if there is:-

- a. A discovery of new and important matter or evidence subsequent to the court issuing its orders which has emerged.

The plaintiff submits that no new facts have been advanced by the applicant to warrant a review of the court's orders.

- b. Secondly, the plaintiff states that the only other reason why a court would review its own orders is if there was a mistake or an error apparent on the face of the record.

The plaintiff submits that no such error has been identified or canvassed before the court to warrant a review of the said order.

13. Having listened to the arguments of both parties and perused the court record herein, I note that the orders of the court herein granting an injunction were issued on the December 16, 2021. Order 40, rule 6 of the *Civil Procedure Rules* states as follows;

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

14. The above provisions have been buttressed by the courts in very many decisions. In the case of *Nguruman Ltd v Ian Bonde Nielsen & 2 others* (2014) eKLR, the Court of Appeal held that:-

“Without going into the details, we with respect agree with the submissions of all learned counsel that the object of introducing rule 6 in the 2010 rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various mechanization to delay the disposal of the suit.”



15. Further, In the case of *Erick Kimingichi Wapang'ana & another v Equity Bank Limited & another* (2015) eKLR, the Court of Appeal held that:-

“Order 40 rule 6 was made in clear cognizance of the preceding rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months “unless”, as the rule provides, for any sufficient reason the court orders otherwise. . . . .in this case, there was no subsequent order extending the injunction.”

15. Further, I note that since obtaining the injunctive relief, the plaintiff has not made any attempt to prosecute its suit and since then it is now over 12 months since the order was issued by the court. Neither has evidence been placed before me to confirm any sufficient reason why this order should continue to exist since there is no activity from either the plaintiff or the 2<sup>nd</sup> defendant who is the rightful owner of the debt herein towards redemption of the loan outstanding.

16. In my considered opinion, I find that the order of injunction herein lapsed by operation of the law after the expiry of twelve months from December 16, 2021 and as such there is nothing before this court to be varied or reviewed as prayed by the applicant.

17. That being the case, the 1<sup>st</sup> respondent is at liberty to proceed and exercise its statutory power of sale in the mode that is allowed by law as there is no fetter before this court to that right.

18. The upshot of the above findings is that this application before this court is allowed with costs to the applicant. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>th</sup> DAY OF MARCH 2023**

**J.W. W. MONGARE**

**JUDGE**

**In the presence of:-**

Mr. Mugisha for the 1<sup>st</sup> defendant/applicant

Mr. Ogechi For the Respondent

Sylvia- court Assistant

