



Davetronics Limited v Spire Bank Limited; Ali & another (Third party) (Civil Suit E582 of 2021) [2023] KEHC 18256 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18256 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E582 OF 2021
DAS MAJANJA, J
MAY 26, 2023**

BETWEEN

DAVETRONICS LIMITED PLAINTIFF

AND

SPIRE BANK LIMITED DEFENDANT

AND

SHAROK KHER MOHAMMED ALI THIRD PARTY

SAID MUHIDDIN GATIBARU THIRD PARTY

RULING

1. In the ruling of April 6, 2023, I directed the Defendant to, “show cause on a date fixed why it should not pay the Plaintiff Kshs 12,500,000.00 and judgment entered against it.”
2. The circumstances leading to the order are common cause and can be discerned from the pleadings and depositions. The Plaintiff purchased LR No 7785/259 Runda, Nairobi (“the suit property”) at a public auction on August 21, 2007 when the Defendant exercised its statutory power of sale. The Defendant accepted its bid for Kshs 12,500,000.00 which the Plaintiff paid. The Defendant transferred the suit property to it on November 19, 2007 whereupon it took possession. In January 2008, the Defendant was sued by the third parties in HCCC No 659 of 2009, *Sharok Kher Mobammed Ali and 2 Others v Southern Credit Banking Limited and Another*. The suit was determined by a judgment delivered on December 19, 2018 (“the Judgment”). The court cancelled and declared the charge over the suit property null and void and on that basis declared the sale and transfer of the suit property to the Plaintiff by the Defendant null and void.



3. The Plaintiff filed this suit essential seeking the refund of Kshs 12,500,000.00 together with costs incurred in the transactions. I dismissed two applications filed by the parties by the ruling of April 6, 2023. The first by the Plaintiff seeking judgment on admission and the second by the Defendant seeking to discontinue the suit. In the ruling, I stated as follows:

"(44) While I dismiss the applicant's application for judgment on admission as prayed in the Plaint, I harken back to what I have stated about the judgment in HCCC No 659 of 2007. The findings of the court in that judgment amounts to an issue estoppel. The Defendant cannot deny that the sale agreement and subsequent transfer of the suit property to the Plaintiff was annulled. Since the sale and transfer was annulled by the court, the Defendant cannot deny the transaction and the fact that it now owes the Plaintiff what it paid.

(45) This court is duty bound under Article 159 of the Constitution to exercise justice without technicalities. Further, in applying the overriding objection set out sections 1A and 1B of the Civil Procedure Act, the court must, in exercising its jurisdiction, facilitate just, expeditious, efficient, proportionate and affordable resolution of matters. I therefore hold that in the circumstances and in light of the determination of the court in HCCC No 659 of 2007, no purpose will be served re-litigating whether the Plaintiff is entitled to a refund in light of annulment of the contract by the court. I am of course, conscious of the right of the Defendant to be heard before an adverse action is taken against it. I therefore call upon the Defendant to show cause why it should not pay to the Plaintiff the sum of Kshs 12,500,000.00 and for judgment to be entered against it accordingly."

4. The Defendant has now filed the affidavit of its officer, Caroline Kori, sworn on May 15, 2023. In response to the Notice to Show Cause, the Defendant contends that it has never admitted liability for payment of the Kshs 12,500,000.00 and that the court cannot enter judgment unless the admission is plain, unequivocal and obvious. In this case, it urges, that the court having held that there was no admission cannot enter judgment unless it considers all the issues raised by the Defendant. It points out that it has taken out third party proceedings through the Third Party Notice dated July 19, 2021 and has filed its Amended Defence and Counterclaim dated July 6, 2021 hence it should not be condemned unheard by the court entering part-judgment. It urges that it is necessary for the court to hear the matter in full in order to justice to the parties. It contends that is should not be condemned to pay the Plaintiff without hearing the Defendant and the third parties from whom its seeks to be indemnified.

5. Although the Defendant states that it does not admit liability for the Kshs 12,500,000.00, the circumstances under which it received the said sum from the Plaintiff is not in dispute. This is a matter that has already been adjudicated in NRB HCCC No 659 of 2009 as I have summarized elsewhere. The sale under which the Plaintiff paid the purchase price was set aside because of the fraudulent acts by the third parties. Since the sale, under which the Defendant received the purchase price, was cancelled there is no reason why the Defendant is retaining the Kshs 12,500,000.00 which it ought to have refunded to the Plaintiff.

6. At the end of the day the Defendant has not advanced any reason, legal or otherwise, for holding the Kshs 12,500,000.00 apart from stating that the issues in its defence and third party claim should be heard and determined. The Defendant has no defence to the claim for the Kshs 12,500,000.00 which is really a refund of the purchase price upon failure of the transaction. The other claims in the Plaint



including the interest on the said amount and the other issues raised in the Statement of Defence and Counterclaim shall be determined in the normal manner.

7. Having reached the conclusion that the Defendant has failed to show cause why judgment should not be entered for the sum of Kshs 12,500,000.00, I now order as follows:
 - a. Judgment be and is hereby entered for the Plaintiff against the Defendant for the sum of Kshs 12,500,000.00.
 - b. The balance of the Plaintiff's claim shall be determined in the usual manner.
 - c. The Defendant shall bear the costs of these proceedings.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Ongegu instructed by Ongegu and Associates Advocates for the Plaintiff.

Mr Musembi instructed by Ngeri, Omiti and Bush Advocates LLP for the Defendant.

