



Chebiegon v Thabiti Finance Co. Ltd (in liquidation Through its Liquidator Kenya Deposit Insurance Cooperation) & another (Commercial Suit E094 of 2022) [2023] KEHC 18224 (KLR) (Commercial and Tax) (23 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E094 OF 2022
DO CHEPKWONY, J
MAY 23, 2023**

BETWEEN

DAVID KIPROP CHEBIEGON PLAINTIFF

AND

**THABITI FINANCE CO. LTD (IN LIQUIDATION THROUGH ITS
LIQUIDATOR KENYA DEPOSIT INSURANCE COOPERATION) 1ST
DEFENDANT**

SPORTLIGHT INTERCEPTS AUCTIONEER 2ND DEFENDANT

RULING

1. This Ruling relates to the Notice of Motion Application dated July 25, 2022 filed under Order 40 Rule 7 and Order 51 Rule 1 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act* in which the Applicant seeks:-
 - a. to set aside the orders granted on April 20, 2022 and issued on April 28, 2022.
 - b. Costs of the application to be borne by the Plaintiff
2. The Application is supported by the Affidavit of Mr Julius Cherutich, an officer of the 1st Defendant sworn on July 25, 2022, wherein he has set the following grounds in support of the application;
 - a. The Plaintiff filed an application dated March 22, 2022 seeking to stop the 1st Defendant herein from selling all that property known as L R No Baringo/Perkerra-101/204 in exercise of its statutory power of sale.



- b. The application was given a mention date for directions for April 20, 2022 and a mention notice duly served on the 1st Defendant on March 30, 2022 to that effect.
 - c. When the application came up for mention on April 20, 2022, the application was allowed.
 - d. The 1st Defendant avers that the application was irregularly allowed on a date when the application was not coming up for hearing and the 1st Defendant was condemned unheard.
 - e. The 1st Defendant further avers that the Plaintiff deliberately failed to inform the court in its application on the existence of a charge in this matter;
 - f. The 1st Defendant avers that the subject property is charged vide a charge dated February 17, 1984 a fact which the Plaintiff deliberately and wilfully withheld.
 - g. The 1st Defendant further avers that it has issued all the requisite statutory notices in exercise of its statutory power of sale.
 - h. Given that there is no dispute that the Plaintiff is indebted to the 1st Defendant with the sum due being Kshs 25,956,764.95 and the 1st Defendant avers that it should be allowed to exercise its statutory power of sale.
 - i. A party seeking an equitable remedy such as the injunctive orders granted by the court, must be honest and candid and the same being an equitable remedy, he who comes to equity must come with clean hands.
 - j. Orders should not be used to economically oppress another party or deny justified payment of an outstanding loan and the orders granted are extremely prejudicial and serve only to oppress the 1st Defendant economically.
 - k. It is thus in the interest of justice that the application be determined and the orders sought granted.
 1. The 1st Defendant states that on March 30, 2022 it was served with Mention Notice for the date of April 20, 2022 on March 30, 2022. But since it is a public institution it is required to issue a tender for legal services under procurement laws which process was concluded after the court date. It holds that it did not have a representative on the Mention date hence the court allowed the application without its participation and has urged the court to allow its application.
4. The Plaintiff filed its Response through his Replying Affidavit sworn on September 29, 2022. He holds that the application dated March 22, 2022 was filed seeking to stop the Defendants from selling all that property known as L.R Baringo/Perkerra-101/204 “the suit property” which the court granted vide court orders issued on April 28, 2022. He holds that the Mention Notice was duly served upon the Defendants but they failed to enter appearance, file a response or appear in court hence the court allowed the application.
 5. According to the Plaintiff, the dispute relates to a loan facility issued by the 1st Defendant who instructed the 2nd Defendant to repossess the loan security hence the filing of the application for injunction. The Plaintiff states that since the Defendants did not file any response to the application, the court was justified to allow the application and therefore the present application should be dismissed with costs as it is only meant to delay the hearing of the main suit.
 6. On September 22, 2022, the court directed the parties to file their submissions in respect to the application which they obliged. In its submissions, the 1st Defendant raised the following six issues for determination;



- a. Whether the application is properly before the court.
 - b. Whether the court should consider setting aside the injunction orders in place.
 - c. Whether the 1st Defendant is legally exercising their statutory power of sale over the suit property?
 - d. Whether the Plaintiff has met the threshold for the grant of a temporary injunction, when can a court stop a mortgagee from exercising its statutory power of sale?
 - e. Whether the Plaintiff is deserving of the injunctive orders,
 - f. Whether a dispute in the exact amount of sums owed to the 1st Defendant is sufficient reason to issue an injunction restraining the 1st Defendant from exercising their statutory power of sale?
7. On his part, the Plaintiff raised four issues:-
- a. Whether the 1st Defendant's application merits the order sought to set aside orders granted on April 20, 2022 and issued on April 28, 2022.
 - b. Whether there was material non-disclosure by the Plaintiff on its application dated March 22, 2022.
 - c. Whether the 1st Defendant had complied with the strict provisions of the Land Act before it advertised the subject property for sale by public auction.
 - d. Whether the orders issued on April 28, 2022 merited the grant for interlocutory injunction as prayed.

Analysis

8. Having considered the application, the Replying Affidavit, the court has also read through the respective submissions filed by the parties and finds the issues for determination can be summarised as follows:
- a. Whether the Application has merits to warrant the setting aside of the orders issued on April 28, 2022?
 - b. Whether the Plaintiff deserves the injunctive orders sought.

Whether the Application has merits to warrant the setting aside of the orders issued on April 28, 2022 to be set aside?

9. The Application is filed pursuant to Order 40 Rule 7 of the Civil Procedure Rules which provides; -

Order for injunction may be discharged, varied, or set aside [Order 40, rule 7.]

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”



10. The wordings of Order 40 Rule 7 of the Civil Procedure Rules are in discretionary and not mandatory terms. The Court of Appeal in the case of *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede* (1982-1988) KAR page 1036, held that:
- “The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties.
11. In this case, the 1st Defendant states that one of the grounds upon which it seeks to set aside the orders of April 24, 2022 is because the application was allowed on a date which was meant for Mention for Directions and not hearing of the same. It also states that due to its nature as a public institution it had not finalised the tendering process to obtain legal services by the time the matter was in court. It is worth-noting that the application is dated March 23, 2022 and the following day March 24, 2022, this Court ordered that the application be served upon the Defendants and a response to be filed within 14 days thereof.
12. The application and the court order of March 24, 2022 were duly served upon the 1st and 2nd Defendants on March 30, 2022 and March 31, 2022 respectively and an Affidavit of Service was filed to that effect to confirm that both Defendants had acknowledged receipts of the pleadings by stamping on them. It is also worth-noting that the 1st Defendant has not substantiated its claim that it had to initiate the tendering process to procure legal services which it had not finalised by the time the matter was coming up for mention.
13. It is trite that a court does not issue orders in vain. The Court of Appeal in the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] e KLR held the following;
- “We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not...”
14. In view of this, it is this Court’s humble view that the Defendants ought to have complied with the court’s orders issued on March 24, 2022 by either filing their response(s) to the application, or attending court and even sending a representative to hold brief and explain their absence and status in the matter. Having considered their Replying Affidavit and submissions coupled with the Affidavit of Service filed herein, it is clear that reason advanced by the 1st Defendant for their non-attendance, is not sufficiently substantiated to warrant the orders issued on March 24, 2022. It cannot be assumed that the court and the other parties would know about the tendering process to procure legal services was the cause of their failure to attend court or send representation with an explanation.
15. However, the court has taken into consideration the timeous act of seeking to set aside the orders issued on April 20, 2022, coupled with the jealously guarded right to fair trial and invokes the provisions of Article 159(2)(d) of the *Constitution* which provides:-
- “Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution
- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—



- (d) justice shall be administered without undue regard to procedural technicalities;

And Section 3A of the [Civil Procedure Act](#) which states:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

16. This is with the sole aim of administering justice and according the parties an opportunity to be heard on merit with regard to the issues raised as between them.
17. In the upshot, the application dated July 25, 2022 succeeds in part in the following terms:-
- a. The orders (b), (d) and (f) issued on April 20, 2022 be and are hereby set aside
 - b. The application dated March 23, 2022 is hereby reinstated for interparties hearing in terms of prayers No.(3), (6) and (7).
 - c. Orders issued in terms of prayers No.(2) and (4) of the application dated March 23, 2022 to remain in force pending hearing and determination of the said application.
 - d. Mention on June 16, 2023 before the Presiding Judge of the Commercial and Tax Division for further directions/reallocation.
 - e. Notice to issue upon the Defendants and or their counsel.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 23RD DAY OF MAY, 2023.

D. O. CHEPKWONY

JUDGE

