



Kingdom Bank Limited (Formerly Jamii Bora Bank Limite v Rapid Communications Limited & 2 others; Sultan Palace Development Limited & another (Interested Parties) (Commercial Case 628 of 2015) [2023] KEHC 21930 (KLR) (Commercial and Tax) (24 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21930 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 628 OF 2015
DAS MAJANJA, J
AUGUST 24, 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

Introduction And Background

1. On 17.02.2023 the court set aside and/or discharged the orders issued on 06.04.2022 in respect to the Plaintiff's ("the Bank") Notice of Motion dated 15.03.2022 for the reason that the Interested Parties were not served with process. The application is now before the court for consideration. The application is made, *inter alia*, under Order 40 Rule 1(b) of the Civil Procedure Rules ("the Rules") and seeks the following orders:

- 1. Spent*
- 2. Spent*



3. That pending the hearing and determination inter parties of the Notice to Show Cause, this Honourable Court be pleased to issue a temporary injunction 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 Property Condominium Numbers CS-AA3-201, CS-AA3-202 and CS-AB2-001 erected on Land Reference Number MN/TIL/ 9203, Kilifi
 4. Spent*
 5. That an order of inhibition under Section 68 of the *Land Registration Act*, 2012 be issued to prevent any further dealings with Apartments Numbers CS-AA3-201, CS-AA3-202 and CS-AB2-001 erected on Land Reference Number MN/III/9203, KILIFI pending the hearing and determination of the Notice to Show Cause.
 6. That an Order do issue 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-AA3-202 and CS-AB2-001 erected on Land Reference Number MN/III/9203, Kilifi to the Applicant within a period of 30 days.
 7. That an Order directing that should 1st, 2nd, 3rd Respondents and the 1st and 2nd Interested Party fail to take all the necessary actions 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/TII/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;
 8. That the costs of this Application be provided for against the 1st, 2nd, 3rd Respondents and the 1st and 2nd Interested Party.
 9. That this Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
2. The application is supported by the grounds on its face and the supporting affidavit and supplementary affidavit sworn on 15.03.2023 and 18.05.2023 respectively by the Bank's Head of Legal, Jackson Kimathi. It is opposed by the Defendants through the replying affidavit of the 2nd Defendant sworn on 20.04.2023 and by the 1st Interested Party through the replying affidavit sworn on 22.03.2023 by its Managing Director, Qin Liang.
 3. It is common cause that this suit was compromised through a Mediation Settlement Agreement entered on 23.08.2017 ("the Mediation Agreement") which was adopted as an order of the court on 07.05.2018 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 (ksh 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 1st 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 (ksh 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.
4. The Bank's application more or less seeks to prevent any dealings in the aforementioned properties as the Bank pursues execution of the decree. It avers that in as much as Transfer and Registration formalities of the properties have commenced, the same have stalled due to the 1st Respondent's claim that they are constrained to remain in possession of the properties based on notification letters dated 26.01.2021 and 27.04.2021 by the Water Resources Management Authority, of an intended gazettelement of LR 209/11609/2-7 and LR 209 /11609/9-17 which the 1st Interested Party purchased from the 2nd Interested Party, as protected areas.
 5. The Bank states that the refusal by the 1st Interested Party to effect transfer of the Property Condominium Numbers CS-AA3-201, CS-AA3-320 and CS-ABS-001 ("the condominium properties") as required under the Novation Agreement dated 09.06.2017 and the Court Order is an action in bad faith and intended to deprive it of its rightful properties and intended to allegedly mitigate losses on a totally different property.
 6. The Bank is apprehensive that the Defendants and the Interested Parties are likely to deal with the condominium properties in a manner likely to deprive it of its due interest and if the orders sought herein are not granted, the Bank stands the risk of losing the condominium properties thereby jeopardizing any chances of recovery of this colossal debt.
 7. The Defendants oppose the application on the ground that there is no material evidence placed before the court to affirm that the Defendants intend to renege on the Mediation Agreement. They however reiterate that the Bank is entitled to the 3 leases in respect of the condominium properties. They deny



being served with the Notice to Show Cause and further state that although the 2nd Interested Party was not a party to this suit, it entered into an agreement as the director to assign the 1st Defendant's interest in the condominium properties.

8. The Defendants contend that there is no apparent threat to transfer the condominium properties so as to deprive the Bank its rights as spelled out in the Mediation Agreement and admit that whereas the 1st Interested Party was not a party to the present suit, it does not deny that the 1st Defendant was not entitled to the condominium properties.
9. The 1st Interested Party opposes the application. It submits that the application is an abuse of court process the Bank has filed application for execution on 21.01.2022 and contrary to the procedure for execution of decrees relating to execution of immovable property set out in Order 22 Rule 48 of the Civil Procedure Rules. It states that the Bank has not taken out a Notice to Show Cause prior to filing the application for execution as the decree, which was issued on 07.05.2018, is more than a year old.
10. The 1st Interested Party further states that the Bank has not met the conditions for grant of injunction against the Defendants and Interested Parties as there is no irreparable injury that the Bank will suffer that cannot be compensated by an award of damages. The 1st Interested Party avers that due to the existence of the Addendum to the Agreement for Sale dated 09.09.2015 which assigned the condominium properties among others, to the 2nd Interested Party; and the tripartite Novation Agreement dated 09.06.2017, which assigned the same to the Bank, neither of which is denied, the Bank's interest in the condominium apartments is secure.
11. The 1st Interested Party asserts that there is no threat that it will transfer the condominium properties to any third party or deal with them in any other way that is likely to be adverse to the Bank and that the Bank has not provided evidence of any such threat. It points out that there is a dispute between itself and the 2nd Interested Party over the condominium properties as the same were assigned to the 2nd Interested Party through an Addendum to Agreement for Sale dated 09.09.2015 as part consideration for the sale and purchase of 15 parcels of land measuring approximately 15 acres in Dik Dik Gardens Kileleshwa and that the 2nd Interested Party warranted in Clause 18.2 (n) of the said agreement that the 15 parcels of land were not situated in a wetland or water catchment area. Further, that if the Water Resources Management Authority raises any issues on the properties with regard to the riparian area, wetland or water catchments area and requires the 1st Interested Party to utilize some portion of the 15 parcels of land, the value of the said portion shall be deducted from the purchase price and shall be pro-rated downwards against the residential units assigned to the 2nd Interested Party.
12. The 1st Interested Party claims that the Water Resources Authority, the successor of the Water Resources Management Authority sent a letter dated 26.01.2021 to the 1st Interested Party indicating that the said authority intends to gazette Dik Dik Gardens wetland in order to protect it from human encroachment/interference and that the Water Resources Authority caused a Public Notice to be published in the Standard Newspaper on 25.03.2021 inviting the public to comment on the proposed declaration and gazettement of Dik Dik Gardens Wetland situated in Kileleshwa area. That in a Management Plan dated July 2020, the Water Resources Authority identified 17 properties for the proposed gazettement as a wetland, 14 of which belong to the 1st Interested Party and that the 3 properties that are the subject of the present application form part of the residential units assigned to the 2nd Interested Party pursuant to the Agreement for Sale and Addendum to Agreement for Sale both dated 09.09.2015. The 1st Interested Party states that the tripartite Novation Agreement dated 09.06.2017, which assigned the 3 condominium properties to the Bank, was made pursuant/subject to the Addendum to Agreement for Sale dated 09.09.2015.



13. For these reasons, the 1st Interested Party states that the 3 condominium properties cannot be transferred to the Bank until the issue with the Water Resources Authority is resolved and that in any event, pursuant to the indemnity from all actions given to the 1st Interested Party by the 2nd Interested Party through Clause 18.3 of the Agreement for Sale dated 09.09.2015, the Bank's cause of action is against the 2nd Interested Party and the Defendants only.
14. The 1st Interested Party further contends that the Bank simply included the 1st Interested Party's name in the present application without making a formal application to join it to the suit or amending the Plaintiff accordingly, contrary to Order 1 Rules 10 (2) and (4) of the Rules and that the Bank's conduct amounts to execution of a Decree against a non-party to a suit, and should not be allowed.

Analysis and Determination

15. The issue for determination before the court is whether the court should grant injunctive relief to the Bank. Before I deal with the matter, I note that the 1st Interested Party had alluded to the technical issue that its name was simply included in the proceedings without making a formal application to join it to the suit or amending the Plaintiff accordingly, contrary to Order 1 Rules 10 (2) and (4) of the Rules which provide as follows:
 - (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
.....
 - (4) Where a defendant is added or substituted, the plaintiff shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaintiff shall be served on the new defendant and, if the court thinks fit, on the original defendants.
16. A reading of Order 1 Rule 10(2) above is clear that the addition of a party such as the 1st Interested Party does not necessarily require a formal application from either party for the said party to be joined in the suit and that a court may exercise its discretion to admit a party as such even in the absence of an application if the joinder is 'necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit'. A further reading of Order 1 Rule 10(4) shows that it is only when a defendant has been added into the suit that the plaintiff is required to be amended. The 1st Interested Party was not added in the suit as a defendant but as an interested party thus, the amendment of the plaintiff, though desirable, is not mandatory. In any case, the 1st Interested Party has been participating in these proceedings after the suit was compromised and even had an application allowed in its favour. It cannot now turn around and claim that it is not supposed to be in this suit as it was improperly added as an interested party. This ground of attack therefore fails.
17. The 1st Interested Party also stated that the present application is *res subjudice* as it seeks to execute the Decree issued on 07.05.2018 and is contrary to established procedure for execution of decrees under the Rules. Under Order 22 Rule 18(1) where an application for execution is made more than one year after the date of the decree, 'the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him'. The Bank seeks to execute the decree issued on 07.05.2018, more than



one year after the decree was issued. Even though the 1st Interested Party states that the Bank is yet to take out a Notice to Show Cause against the Defendants and the Interested Parties, the record indicates that the Bank has applied for a Notice to Show Cause date from the court but the date is yet to be fixed. I hold that there is no infraction of procedure in the manner the Bank has proceeded as it has sought the Notice to Show cause date from the court after filing the application for execution.

18. The more fundamental issue is whether the court can issue the orders of injunction sought in the application bearing in mind that the suit has been resolved through mediation and the court has adopted the mediation agreement as its judgment. While the court has jurisdiction to grant an injunction after judgment in certain cases, I hold that in this case the application is not necessary in light of Order 22 rule 48 of the Rules which provides as follows:
 48. Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all person from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.
19. The rule aforesaid empowers the court to automatically issue a prohibitory order which has the effect of an injunction once the application for execution is lodged. In this case, once the Deputy Registrar is satisfied that no cause has been shown by the Defendants and allows the Bank to proceed with execution, the court will issue a prohibitory order. I therefore do not see the need to issue an injunction in the manner proposed given that the parties accept that the Bank owns the condominiums and what is before the court is execution of the decree based on a mediation agreement. Once the prohibitory orders are issued, the execution is complete and the Bank may proceed to sell the properties. It is also open to the Bank to seek any other or further consequential relief necessary in execution of the decree.
20. Since the issue of the Notice to Show Cause is pending, I do not propose to comment on any other issue that may be raised at the hearing before the Deputy Registrar. What is left is for the parties to appear before the Deputy Registrar for the Defendants to show cause why the decree issued on 07.05.2018 should not be executed.

Disposition

21. I strike out the Plaintiff's application dated 15.03.2022 and direct the parties to appear before the Deputy Registrar on a date fixed for the Defendants to show cause why the decree issued on 07.06.2018 should not be executed. Since the parties have all participated in these proceedings, I dispense with the service of the notice.
22. The costs of this application shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS DAY 24TH OF AUGUST 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

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.

