



Kenya Anti-Corruption Commission v Kinyua & 2 others; Njenga (Interested Party); Sumac Microfinance Bank Limited (Objector) (Civil Case 461 of 2007) [2022] KEHC 68 (KLR) (Commercial and Tax) (31 January 2022) (Ruling)

Neutral citation: [2022] KEHC 68 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 461 OF 2007
DAS MAJANJA, J
JANUARY 31, 2022**

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

JOHN FAUSTIN KINYUA 1ST DEFENDANT

JOHNSON J. GITHAKA 2ND DEFENDANT

MBUYU FARMS LIMITED 3RD DEFENDANT

AND

SAMMY MICHUGU NJENGA INTERESTED PARTY

AND

SUMAC MICROFINANCE BANK LIMITED OBJECTOR

RULING

Introduction and Background

1. It is common ground that on 6th September 2007, the Plaintiff filed this suit against the Defendants jointly and severally for recovery of public money allegedly wrongfully and illegally acquired by the Defendants from a public corporation, Reinsurance Corporation. On 7th July 2009, the court entered Judgment in favour of the Plaintiff against Defendants for KES 5,423,183.00 with interest at court rates at 14% p.a. until payment in full together with costs of the suit.



2. In due course, the parties entered into a consent that was adopted as an order of the court on 28th October 2011 where it was agreed that the 1st and 3rd Defendants' shares and/or funds held at Suntra Investment Bank that had been earlier frozen by the court, be unfrozen and shares representing the sum of KES 2,800,000.00 be sold and the proceeds be released to the Plaintiff. The Plaintiff also applied for prohibitory and inhibitory orders against the 3rd Defendant which orders were granted on 22nd July 2015 where the 3rd Defendant was prohibited from dealing in its property known as LR. No. 209/10611/30(IR. 77263) ("the property") for a period of 140 days from the date of the court's ruling.
3. On 26th January 2016, the Plaintiff informed Sumac Microfinance Bank Limited ("the Objector") of its intention to attach the property which prompted the Objector to file an application for joinder as an interested party and for stay of further execution of the decree on the ground that it had a legal charge dated 16th January 2015 as security for a loan facility advanced to the 1st Defendant.
4. On 29th July 2016, the court issued a conditional stay of attachment of the property to the effect that the Objector was to initiate and commence the exercise of its statutory power of sale and that any monies realized at the sale shall first be applied to pay any monies owed to the Objector under the terms of the legal charge and that any surplus was to be remitted to court so as to satisfy the decretal amount including costs and interest. Further, that should the Objector intend to discharge the charge over the property, it shall give a 14-day written notice to the Plaintiff and upon discharge, the orders of prohibition and inhibition made by the court on 22nd July 2015 shall take effect forthwith and attachment shall issue.
5. Following a public auction conducted on 28th October 2016, Sammy Michugu Njenga ("the Interested Party") emerged the highest bidder by offering KES 5,200,000.00. The Objector discharged the charge and through its application dated 7th February 2018 applied to have the prohibition and inhibition orders issued on 22nd July 2015 also discharged to enable the Interested Party register a transfer. The Plaintiff moved the court by an application dated 13th April 2018 seeking to impugn the sale of the property. Consequently, the parties entered into a consent which was adopted as an order of the court on 23rd July 2019 ("the Consent Order") where it was agreed as follows:

"By Consent of the parties, the sale by public auction conducted on 28th October 2016 is set aside for lack of compliance with section 97 of the Land Act.

The Objector shall within 30(thirty) days of today commence the exercise of its statutory power of sale by public auction in terms of the order of Court of 29th July 2016.

The valuation report prepared by the Objectors valuers shall be availed by the Objector to all parties at least 7 days before the sale. All parties to be at liberty to attend and observe the auction."
6. The Interested Party was aggrieved by the Consent Order. Through his application dated 7th October 2019 sought to set it aside and further stop the sale of the property. On 6th May 2020, the court dismissed the application meaning the Consent Order remained in force and the Objector could proceed with the exercise of its statutory power of sale.
7. The Interested Party expressed its intention to appeal to the Court of Appeal by filing a Notice of Appeal. He also filed an application dated 31st August 2020 seeking injunctive orders against the Plaintiff and Defendants from interfering with his quiet possession and enjoyment of the property and an order for stay of proceedings of this suit pending hearing and determination of his appeal. He also



sought a similar order in the Court of Appeal through the Notice of Motion dated 5th October 2020. The court, in its ruling dated 12th March 2021, held in part as follows:

6. The effect of the consent is that it reverses the Applicants purchase of the LR. No. 209/10611/30 and the Objector is now at liberty to dispose it. If that was to happen then the property may well be placed beyond the reach of the Court while his application to preserve it is still pending before the Court of Appeal. In fairness, I think the Court of Appeal should determine the Application when the property is still within the reach of Court. If that were not so then the Application before the Court of Appeal maybe rendered moot and academic.

7. While the Respondents may suffer some loss in the delay in selling the property, that loss has to be weighed against the possibility that the Court of Appeal could be minded to grant an injunction against the sale. Again, that loss can be ameliorated by this Court granting an order on terms.

8. However, as prayer 3 offers sufficient preservation of the property for now, the Court declines to grant prayer 4 which is for stay of these proceedings.

9. The upshot is prayer 3 of the Notice of Motion dated 5th October 2020 is allowed on the following terms:-

- a) The Applicant shall within 14 days furnish to the Respondents an undertaking as to damages in the event that its application for injunction to the Court of Appeal is withdrawn or otherwise fails.
- b) The Respondents are at liberty to apply for the discharge of this order.
- c) Each party to bear its own costs on the application.

8. It is the aforementioned ruling and orders that form the basis of the Plaintiff's Notice of Motion dated 20th May 2021 now before the court for determination. The Plaintiff is asking the court to vacate the said orders made on 12th March 2021 and disallow the Interested Party's application dated 5th October 2020 with costs being granted to the Plaintiff for both applications. The application is supported by the affidavit of the Plaintiff's advocate, Viola Ocharo, sworn on 20th May 2020. It is opposed by the Interested Party through his replying affidavit sworn on 27th July 2021. The Plaintiff has also filed brief written submissions in support of its position.

Analysis and Determination

9. The main issue for determination in the Plaintiff's application is whether the orders of this court dated 12th March 2021 ought to be vacated and the Interested Party's application dated 5th October 2020 dismissed.

10. As stated in the introductory part, the court in the ruling of 12th March 2021 granted an injunction stopping the sale of the property pending hearing and determination of the appeal at the Court of Appeal but declined to stay the proceedings in this suit. In effect, the Interested Party's application dated 5th October 2020 was partially allowed but this does not mean that it was not wholly disposed as is being insinuated by the Plaintiff. I agree with the Interested Party that his application has since been dealt with in full and there is nothing left to determine from that application.

11. It is clear though that the orders of 12th March 2021 were conditioned on the Interested Party furnishing to the Plaintiff and the Defendants, within 14 days, an undertaking as to damages in the event that its application for injunction to the Court of Appeal is withdrawn or otherwise fails. In



as much as the Plaintiff claims that no undertaking has been furnished it, I do not hear it stating the Interested Party's application for an injunction to the Court of Appeal has since been withdrawn or has failed. Therefore, it follows that the Interested Party is not obligated to furnish the Plaintiff with an undertaking at this moment and that there is no default on his part.

12. It is also common ground that the court's orders of 12th March 2021 gave Plaintiff and the Defendants the liberty to apply for the discharge of the said orders which is what the Plaintiff has done. It is my view that the court does not become *functus officio* merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps towards the closure of the file. I am persuaded by the position taken by Otieno J., in *Mombasa Bricks & Tiles Limited & 5 others v Arvind Shah & 7 others MSA HCCC No. 9 of 2011 [2018] eKLR* where he held as follows in respect of the doctrine of *functus officio* after judgment has been rendered:

14. I understand the doctrine, like its sister, the *res judicata* rule to seek to achieve finality in litigation. It is a way of a court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.

15. It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.

16. As was held by the court of Appeal in *Telkom Kenya Ltd vs John Ochanda*, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.

.....

.....I consider that there are several proceedings that can only be undertaken after judgment and not before.

19. The following are just but examples:-

Application for stay

Application to correct the decree

Application for accounts

Application for execution including garnishee applications

Applications for review

Application under section 34 of the Act

20. If one was to accede to the position taken by the judgment debtor that the court is *functus officio* then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice. As far as the application before the court is concerned, the court is well seized of power and jurisdiction to entertain and determine same on the merit and based on materials availed.

13. In this suit, in as much as the court rendered its judgment and issued a decree close to twelve years ago, the parties have still been approaching the court in a bid to ensure compliance and execution of the decree issued. I find that the court has residual powers to facilitate the parties' compliance with the court's judgment and decree, which is what is being done at the moment.



14. It is for these reasons that I reject the Interested Party's position that the court is functus officio after it made the orders of 12th March 2021.

Conclusion and Disposition

15. Having found that there is no default on the part of the Interested Party as he is not obligated to furnish an undertaking to the Plaintiff and the Defendants since the Interested Party's injunction application to the Court of Appeal has not been withdrawn or failed, I dismiss the Plaintiff^{7th} May 2021 with costs to the Interested Party.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.

D.S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Ocharo, Advocate instructed by Kenya Anti-Corruption Commission.

Mr Ngechu instructed by C. W. Githae and Company Advocates for the 3rd Defendant.

Mr Mureithi instructed by Kithinji Marete and Company Advocates for the Interested Party.

