



**Mombasa Highway Transport Limited v Gulf African Bank Limited (Commercial Civil Case 95 of 2015) [2022] KEHC 10780 (KLR) (Commercial and Tax) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10780 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE 95 OF 2015**

**WA OKWANY, J**

**JUNE 23, 2022**

**MOMBASA HIGHWAY TRANSPORT LIMITED.....PLAINTIFF**

**VERSUS**

**GULF AFRICAN BANK LIMITED.....DEFENDANT**

**DEFENCE AND COUNTERCLAIM**

**BETWEEN**

**GULF AFRICAN BANK LIMITED ..... PLAINTIFF**

**AND**

**SHINUNA SAID SALIM ..... 1<sup>ST</sup> DEFENDANT**

**MOMBASA HIGHWAY TRANSPORT LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**FAHMI SULEIMAN SALIM ..... 3<sup>RD</sup> DEFENDANT**

**SEIF MOHAMMED SEIF ..... 4<sup>TH</sup> DEFENDANT**

**NASSOR SULEIMAN MBARUK ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling determines the application dated 28<sup>th</sup> June 2021 where the applicant seeks the following orders:-
  1. Spent
  2. Spent



3. Notice to Show Cause be dispensed with and the Plaintiffs Trailer ZD xxxx be sold forthwith by public auction to clear the accumulated storage charges due to Eldoret Auction Centre and Storage Services and any balance after settlement of the storage charges and auctioneer's fees be paid to the Defendant's advocates towards settlement of the taxed costs of Kshs. 679,362.
  4. The properties Subdivision Number 4xxx (Original Number 1002/5) Section, Mainland North and L.R. No. NN/I/1xxx owned by the 4<sup>th</sup> Defendant in the Counterclaim be attached before judgement as security for the decree that may be passed in the suit.
  5. Judgment be entered in favour of the Plaintiff in the Counterclaim against the 1<sup>st</sup> to 4<sup>th</sup> defendants jointly and severally for the sum of Kshs. 22,378,165.33 together with profit at 22% per month from 21<sup>st</sup> April 2021 payment in full together with costs
  6. Costs of this application be awarded to the Plaintiff in the Counterclaim.
2. The application is brought under Order 22 Rules 18(2), Order 39 Rules 1,2,5 and 6, Order 6 Rule 1, Order 40 Rule 6 and Order 51 Rule 3 of the Civil Procedure Rules; and Sections 68 & 69 of the Land Registration Act No. 3 of 2012.
  3. The application is supported by the affidavit of Mr. Lawi Sato and is based on the following grounds:-
    - a. On 24<sup>th</sup> March 2015, Judgement on admission was entered against the Defendants in the Counterclaim for the sum of Kshs. 31,626,532.00.
    - b. The balance of the debt has not been agreed upon and the consent order dated 24<sup>th</sup> March 2015 directed the court to determine the matter.
    - c. of Judgment should be entered in favour of the bank for the sum of Kshs. 22,378,165.33 together with profit at 22% per month from 21<sup>st</sup> April 2021 until payment in full together with costs.
    - d. No payments to settle the balance of the debt have been made since January 2019 and there is no defence to the counterclaim.
    - e. Costs were taxed on 11<sup>th</sup> March 2020 at Kshs. 679,362.00 which have not been paid by the Defendants.
    - f. The outstanding balance lawfully due to the bank is Kshs. 22,378,165.33 together with profit at 22% per month from 21<sup>st</sup> April 2021 until payment in full.
    - g. On 9<sup>th</sup> January 2019, the 4<sup>th</sup> defendant, in a separate transaction, executed a charge in favour of the bank over the properties Subdivision Number 4183 (Original Number 1xxx/5) Section Mainland North and L.R. No. NN/1/1xxx to secure a loan in the amount of Kshs. 15,000,000.00. The loan was never disbursed when it was discovered that he is indebted to the in the present suit.
    - h. The charged properties can be discharged by the 4<sup>th</sup> Defendant hence the need to for an inhibition order and order for attachment to secure the eventual decree as the whereabouts of the motor vehicles that formed part of the security cannot be found.
    - i. The injunctive orders issued on 20<sup>th</sup> December 2018 in respect of the Plaintiffs Trailer ZD xxxx have lapsed by operation of law and it is necessary to urgently attach and sell the trailer by public auction to defray storage charges and settle the taxed costs.



4. The respondents opposed the application through the Grounds of Opposition dated 21<sup>st</sup> July 2021 and the replying affidavit sworn by its Director Mr. Mohammed Seif Mohammed who avers that the prayers sought on the application are not enforceable as the suit has not been heard and determined so as to ascertain the amount due for purposes of an execution. He further states that the defendant's actions amount to contempt of court as they levied execution contrary to the court's directions of 30<sup>th</sup> July 2015. He contends that the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants were never served with counterclaim and that the prayers no. 4 and 5 of the application are not enforceable. They maintain that the defendant has not demonstrated that the plaintiff's suit had been dismissed *limine* so as to warrant the granting of the prayers sought in the counterclaim.
5. Parties canvassed the application by way of written submissions. The main issue for determination is whether the applicant has made out a case for the granting of the orders sought.
6. The applicant's first prayer is that the Plaintiff's Trailer No. ZD xxxx be sold by public auction to clear the accumulated storage charges and to settle the taxed costs of Kshs 679,362. According to the applicant, the injunctive orders issued on 20<sup>th</sup> December 2018 had lapsed by operation of the law and that it was therefore necessary to attach the trailer and sell it by public auction to defray the storage charges.
7. In a rejoinder, the respondents argued that the prayers sought in the application are not available to the applicant as the suit has not been determined conclusively so as to ascertain the actual amount due.
8. Order 40 Rule 6 and 7 of *Civil Procedure Rules* provide that:-
 

“Order 40 Rule 6 - 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.

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.”
9. A perusal of the court record reveals that temporary orders for injunction with respect to Plaintiff's Trailer ZD xxxx were issued on 20<sup>th</sup> December 2018 pending the hearing of the application *interpartes* as follows: -
 

“That pending the hearing and determination *interpartes* an order of temporary injunction is hereby issued restraining the respondents whether by themselves, their agents, employees, servants or any person acting at their behest, from selling disposing off, alienating, or in any other manner interfering with trailer ZD xxxx nor further attaching any of the plaintiff/ applicant's assets.”
10. In *Ochola Kamili Holdings Ltd v Guardian Bank Ltd* (2018)eKLR, Makau J. stated as follows:-
 

“The court is alive to the fact that an interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person's conduct with respect to the matter, pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting the injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are mainly intended to preserve the subject matter with a view to have expeditious determination but not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan.



That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was granted. No court would allow its orders to be used to defeat the ends of justice. Further, by operation of law the order obtained by the plaintiff has since lapsed as 12 months has lapsed since its issuance and no extension has been sought.”

11. In *David Wambua Ngii v Abed Silas Alembi & 6 Other* (2014) eKLR Gikonyo J. observed that:-

“It is important to first deal with the scope and purpose of Order 40 Rule 6 of the *Civil Procedure Rules* on lapse of an injunction. Order 40 Rule 6 of the *Civil Procedure Rule* could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize in a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure.”
12. I have already noted that the interim orders of injunction were issued way back on 20<sup>th</sup> December 2018. The injunction application is yet to be conclusively determined as no final orders have been issued over it. It is clear that the plaintiff has not made any efforts to prosecute its application. Guided by the dictum in the above cited authorities, I find that the interim orders granted on 20<sup>th</sup> December 2018 have already lapsed by operation of the law.
13. On whether the 4<sup>th</sup> defendant’s property should be attached, as security, before judgement, the applicant contended that the 4<sup>th</sup> defendant executed a charge in favour of the bank in a separate transaction over the suit properties to secure a loan of Kshs. 15,000,000.00. The applicant is apprehensive that the charged properties may be discharged unless an order for attachment is issued to secure the eventual decree since the whereabouts of the motor vehicles that formed part of the security is not known.
14. Order 39 rule 5(1) provides as follows:-
  - (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—
    - (a) is about to dispose of the whole or any part of his property;
    - (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.”
18. In *Shiva Enterprises Limited vs Jivaykumar Tulsidas Patel t/a Hytech Investment* [2006] eKLR, it was held that in an application for security before judgment, the applicant must prove that the respondent is about to close shop and that it will suffer great prejudice as a consequence.
19. In the instant case, the applicant conceded that the property it charged was with respect to another transaction. From the record, the dispute between the parties herein relates to a facility extended to the respondents as secured by the suit property. There is no evidence to show that the security that the applicant holds will not be sufficient to service the loan in the event of a default. The applicant has also



not demonstrated that the defendant risks disposing of or removing the said property from the court's jurisdiction. In the nutshell, I find that the applicant is not deserving of the orders sought.

20. The court has also been called upon to determine whether summary judgment should be entered in favour of the Plaintiff in the Counterclaim for the sum of Kshs. 22,378,165.33 together with profit at 22% per month from 21<sup>st</sup> April 2021 payment in full together with costs.
21. The respondent opposed the application while stating that the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants were not served with the counterclaim.
22. Order 13 Rule 2 of the *Civil Procedure Rules* provides that: -

“any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such judgment, as the court may think just.”

23. In the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR it was held: -

“Before the grant of summary judgment the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raised no bonafide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as “subject to liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”

24. I have perused the record, and noted that in the ruling dated 30<sup>th</sup> July 2015, the court directed the parties to agree on the amount due and owing. I note that the parties have not agreed on the amount due and that the same cannot therefore be ascertained for purposes of entering judgement. My finding is that, in the circumstance of this case, the matter should proceed to trial with respect to the issue of the amount due to the claimant. It is my finding that the prayer for summary judgment is premature.
25. In sum, I find no merit in the application dated 28<sup>th</sup> June 2021 which I hereby dismiss with orders that costs shall abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JUNE 2022.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

Mr. Munguti for Kokul for Mombasa Highway.

Ms Wamuyu for Gichuhi for Defendant and Plaintiff in Counter Claim

Court Assistant- Sylvia

