



Juventud Logistics Limited v Brits Freighters Ltd & another (Civil Suit 016 of 2021) [2022] KEHC 13078 (KLR) (Civ) (31 August 2022) (Ruling)

Neutral citation: [2022] KEHC 13078 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL SUIT 016 OF 2021
A MABEYA, J
AUGUST 31, 2022

BETWEEN

JUVENTUD LOGISTICS LIMITED PLAINTIFF

AND

BRITS FREIGHTERS LTD 1ST DEFENDANT

STANDARD CHARTERED BANK LTD 2ND DEFENDANT

RULING

1. The application before court is dated May 6, 2021. The same sought interim orders to restrain the respondents from selling the property known as Kajiado/kitengela 22518 And Kajiado/kitengela 22519 (“the suit properties”). It also sought to stay the termination notice dated May 3, 2021.
2. The application was brought under Order 40 rule 1 of the *Civil Procedure Rules*, article 159(2) of the *Constitution* and sections 1A, 2B and 3A of the *Civil Procedure Act*. It was supported by the affidavits of Violet N Nguyo sworn on May 3, 2021 and May 21, 2021, respectively.
3. The applicant contended that on December 17, 2020, it entered into a sale agreement with the 1st respondent for the purchase of the suit property at a sum of Kshs 21,850,000/= . At the time, the properties were charged to the 2nd respondent. The 2nd respondent duly gave its consent to the purchase.
4. The applicant approached a financier to obtain a facility in order to purchase the property. The applicant was in the last stages of obtaining the credit facility when the 1st respondent terminated the agreement on May 3, 2021 and the 2nd respondent sought to exercise its statutory power of sale over the suit property.
5. The applicant thus contended that the unilateral termination was in breach of the contract and it sought specific performance in line with the contractual terms.



6. The 1st respondent filed a replying affidavit sworn by Patrick Gitimu on May 24, 2021 in support of the application. In addition to the averments made in the application, it was contended that the 1st respondent terminated the agreement because the 2nd respondent suddenly withdrew its consent to the sale which rendered the sale agreement inoperative.
7. It was also contended that the 2nd respondent's withdrawal of consent breached the agreement as it did not vest the 2nd respondent with any power to revoke its consent without compliance with the termination terms of the agreement.
8. That the intended sale of the suit properties would have clogged the 1st respondent's equity of redemption due to frustration of the contract. That the revocation of consent led to economic loss on the 1st respondent as it had to pay for the advertisement put up by the 2nd respondent.
9. On May 25, 2021, the parties were heard and the court issued directions that the applicant procures an undertaking from its financier to the 2nd respondent within 24 hours of those orders as a prerequisite before the court could suspend the scheduled auction.
10. The applicant complied and on May 26, 2021, the court stayed the scheduled auction of the suit property and directed the applicant to pay Kshs 2,185,000/= to the 2nd respondent by 10:00am on May 27, 2021. The said sum was the deposit of the purchase of the suit property as per the sale agreement entered into between the applicant and the 1st respondent.
11. The remaining issue was the issue of payment of the auctioneers costs which according to the 2nd respondent amounted to Kshs 338,214.60. On June 28, 2021, the court directed the parties to file their respective submissions on the issue of costs.
12. The 1st respondent filed its submissions dated December 17, 2021. It submitted that the 2nd respondent ought to have borne the auctioneers costs. That the applicant's advocate had communicated to the 1st respondent that the purchase would be financed by a financier and that the 2nd respondent was informed that the delays in approval of the facilities had been caused by the effects of the Covid-19 pandemic. That the 2nd respondent was requested for more time but instead unilaterally revoked its consent. That it was the 2nd respondent's action that led to the inevitable termination of the contract and the filing of the instant suit.
13. It was also submitted that the 2nd respondent lacked authority to revoke the contract without complying with the agreement. That only the applicant and 1st respondent had the power to revoke any terms of the agreement and that the revocation contravened the agreement and denied the parties the right to complete the agreement.
14. It was further submitted that the applicant had established that the financing approval was in its final stages. It was thus submitted that the 2nd respondent's decision to engage auctioneers was in bad faith and it ought to have paid the auctioneers fees.
15. The court has considered the pleadings and arguments made by the parties. It is not denied that the 2nd respondent gave its consent for the 1st respondent to sell the suit property by private treaty. It is also not denied that the applicant and the 2nd respondent entered into a sale agreement and that the purchase was to be financed by the applicant's financier, Equity Bank. It is also not denied that there were delays in the approval of the applicant's loan, causing the 2nd respondent to revoke its consent and attempt to exercise its statutory power of sale.
16. In as much as the applicant and 1st respondent submitted that the 2nd respondent did not have power to revoke the consent under the sale agreement, this court notes that the 2nd respondent was not a party



to the agreement and was therefore not bound by the terms therein. The consent that was executed by the 2nd respondent did not however provide for terms of revocation.

17. It is not deniable that the 1st respondent had fallen into arrears and that the 2nd respondent's right to exercise its statutory power of sale had crystallized. However, since the 2nd respondent had consented to the sale of the property by private treaty, it ought to have accorded the 1st respondent an opportunity to see the sale agreement through.
18. In any case, the applicant had communicated to the respondents that it was in the final stages of acquiring approval for the loan facility which was incurred in order to pay the purchase price.
19. Indeed, when the applicant was granted the opportunity to complete the borrowing transaction, it did so within the time-lines imposed by court. The revocation was done unilaterally and prematurely thereby prejudicing the rights of the applicant who had a legitimate expectation in the completion of the sale transaction.
20. Be that as it may, the 2nd respondent cannot also be punished for attempting to exercise a legal right that had crystallized. In light of the special circumstances of this case, the court will attempt to balance justice across all parties and make the following orders: -
 - a. That the auctioneers costs be shared equally between the respondents. Such costs to be agreed within 14 days failing of which they be taxed.
 - b. Although the plaintiff was successful in this matter, however, considering the special circumstances of this suit, each party shall bear own costs.

It is so ordered.

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

A. MABEYA, FCIArb

JUDGE

