



REPUBLIC OF KENYA



**AAR Credit Services Limited v Hussein & 3 others (Civil Suit 197 of 2016)
[2022] KEHC 12437 (KLR) (Commercial and Tax) (5 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12437 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 197 OF 2016
A MSHILA, J
AUGUST 5, 2022**

BETWEEN

AAR CREDIT SERVICES LIMITED APPLICANT

AND

ANWAR MAJID HUSSEIN 1ST RESPONDENT

RAPID COMMUNICATIONS LTD 2ND RESPONDENT

ALBRIGHT HOLDINGS LIMITED 3RD RESPONDENT

SULTAN PALACE DEVELOPMENT LTD 4TH RESPONDENT

RULING

1. The applicant filed a notice of motion dated October 31, 2018 pursuant to section 1A, 1B, 3 and 3A of the *Civil Procedure Act* and order 25 rule 5 of the *Civil Procedure Rules*; The application was supported by the grounds on the face of it and by the sworn affidavit of George Ndonga and the applicant sought orders that;
 - a. The current name of the plaintiff be substituted or changed to FinCredit Limited from AAR Credit Services Ltd in the suit and all orders thereto.
 - b. Suit judgment be entered against the defendants in the following terms:
 - i. The 1st, 3rd and 4th defendants have jointly and severally assigned, executed and delivered sub-leases and completion documents to the 4th defendant to facilitate registration of sub-leases for apartments known as CS-AB2002 in Block 2; CS-AB4-202 in Block 4 and CS-AB2-003 in block 2 all erected on LR No MN/III/92033-Sultan Palace, Kikambala, Kilifi in the name of the plaintiff and delivery of vacant possession of the



apartments to the plaintiff in full and final settlement of the claim in the plaint in this suit.

- ii. The 1st defendant shall pay stamp duty, value added tax and the 4th defendants advocates disbursements and legal costs amounting to Kshs 3,193,680.00 being costs for registration of the said sub-leases for apartments known as CS-AB2-002 in Block 2; CS-AB4-202 in Block 4 and CS-AB2-003 in Block 2 all erected on LR No MN/III/92033-Sultan Palace, Kikambala, Kilifi in favour of the plaintiff within 30 days from the date of the order and in default, the plaintiff shall pay the said amount to the 4th defendant.
 - iii. The 4th defendant shall register and/or cause the registration of sub-leases for apartments known as CS-AB2-002 in Block 2; CS-AB4-202 in Block 4 and CS-AB2-003 in Block 2 all erected on LR No MN/III/92033-Sultan Palace, Kikambala, Kilifi in the name of the Plaintiff and deliver vacant possession of the apartments to the plaintiff within 30 days from the date of payment of Kshs 3,193,680.00 by either the 1st and 2nd defendants or the plaintiff.
 - iv. In the event that the plaintiff pays the said Kshs 3,193,680.00, the 1st defendant shall reimburse the plaintiff the said amount within 30 days of the date of the order hereof and in default, the plaintiff shall execute for recovery of the said amounts against the 1st defendant.
 - v. The 1st and 2nd defendants shall pay the plaintiffs debt collection costs as well as costs of this suit and the 4th defendants costs of the suit whose quantum shall be agreed between parties herein within 30 days of the date of the order hereof and in default thereof, the same be addressed by the hon court.
- c. Costs be paid by the respondents.
2. The applicant stated that in 2018, the plaintiff/applicant changed its name from AAR Credit Services Ltd to FinCredit Limited.
 3. Further, that the claim in the suit against the defendant/respondents is inter-alia for KShs 64,000,000.00 and costs of the suit but the same has been fully compromised. By a ruling and order dated July 29, 2016 and November 10, 2016 respectively, the court ordered *inter-alia* that the defendants do transfer apartments known as CS-AB2-002 in Block 2, CS-AB4-202 in Block 4 and CS-AB2-003 in Block 2, all erected on LR No MN/ILI/92033- Sultan Palace, Kikambala, Kilifi (suit properties) to the applicant within 30 days of the order and in default thereof, the respondents do furnish security sufficient to satisfy the decree that may be passed against them within 60 days from the date of the order.
 4. The said 1st, 3rd and 4th defendant/respondents have in part compliance of the said order jointly and severally assigned, executed and delivered sub-leases and completion documents to the 4th defendant/respondent to facilitate registration of the sub-leases for suit properties in the name of the applicant and delivery of vacant possession of the apartments to the applicant in full and final settlement of the claim in the plaint in this suit.
 5. The said 1st defendant/respondent has however not paid Kshs 3,193,680.00 being Stamp duty, value added tax and 4th defendant/respondents advocates disbursements and legal costs to the 4th defendant/respondents to facilitate registration of transfers/sub-leases in favour of the applicant in fulfilment



of the order of the court of November 10, 2016 despite having undertaken to pay the same within specified period.

6. The 1st, 2nd and 3rd defendant/respondents undertook to pay debt collection fees and costs of the suit to the applicant and indemnify it against any costs incurred in recovery of the principal claim by a deed of settlement and agreement of sale of the suit properties.
7. The suit herein is therefore fully compromised by the order of court dated November 10, 2016 and partial compliance thereof by the respondents and there is nothing left for trial by the court.
8. Efforts to obtain a consent judgment from the respondents have been futile due to their unresponsiveness.

Applicant's Case

9. It was the applicant's submission that in considering an application filed under order 25 rule 5 of the *Civil Procedure Rules*, the court is enjoined to determine whether there has been any agreement, compromise or satisfaction between the parties, or whether the defendant has satisfied the whole or any part of the subject matter of the suit. In that regard therefore, the presence of one of the aforementioned factors adjusts the suit to the extent of the agreement, compromise or satisfaction and the applicant will be entitled to apply for judgment accordingly.
10. Further, that order 25 rule 5 of the *Civil Procedure Rules* provides for two forms/methods of adjustments of suits, the first being by an agreement compromise and the second being by satisfaction. The applicant relied on the case of *AS Sheikh Transporters Limited & another v Barclays Bank of Kenya Limited & 3 others* [2014] eKLR wherein the learned judge while distinguishing the two held as follows:

“Agreement or “consent” of the parties is important in the first category of adjustment of a suit in rule 25 but satisfaction does not require agreement or consent of both parties. In the latter category of satisfaction, conduct of or acts by the defendant in relation to the suit is what is important. That distinction should be drawn in order to understand the complete scheme of things in rule 25.”
11. It was the applicant's position that it is clear from the above that in the first category of adjustments of suits under order 25 rule 5 there must be an agreement or "consent" of the parties, however for the second category which involves satisfaction, the same does not require any agreement or consent of both parties. Further it is most important to note that in the latter category of satisfaction, conduct of or acts by the defendant in relation to the suit is what guides the court in arriving at a decision when faced with an application of this kind. It therefore follows that in deciding applications filed under the aforementioned provisions of law, a distinction should be drawn between the two and the circumstances of each case considered independently in arriving at a decision.
12. This application is premised in the 2nd category being; compromise arising from satisfaction. As set out above, pursuant to a ruling and order dated July 29, 2016 and November 10, 2016 respectively the court ordered *inter-alia* that the respondents transfer apartments known as CS-AB2-002 in Block 2; CSAB4-202 in Block 4 and CS-AB2-003 in Block 2 all erected on LR No MN/III/92033-Sultan Palace, Kikambala, Kilifi (suit properties) to the applicant within 30 days of the order and in default thereof, the respondents do furnish security sufficient to satisfy the decree that may be passed against them within 60 days from the date of the order.



13. In satisfaction of the aforesaid ruling and order, the 1st, 3rd and 4th respondents have jointly and severally assigned, executed and delivered sub-leases and completion documents to the 4th respondent to facilitate registration of the sub-leases for the suit properties in the name of the applicant and delivery of vacant possession of the apartments to the applicant in full and final settlement of the claim as prayed in the plaint in this suit.
14. The applicant added that satisfaction does not require agreement or consent of the parties as it involves unilateral acts or conduct of the respondents to arise and in this case the 1st, 3rd and 4th respondents actions in jointly and severally assigning, executing and delivering sub-leases and completion documents to the 4th respondent to facilitate registration of the sub-leases for the suit properties in the name of the applicant and deliver vacant possession of the apartments to the applicant in full and final settlement of the claim in the plaint in this suit; indeed constitutes compromise of the suit under the aforementioned order 25 rule 5.
15. It was the applicant's submission that the suit herein ought to be deemed as compromised as between the parties and the application herein allowed as prayed. In *Anwar Mabendra Pandya v Business Forms and Systems Ltd & 3 others* [2017] eKLR the Court of Appeal while determining whether the suit was compromised under the aforementioned order 25 rule 5 held as follows;

“For our part, we are in agreement with that statement of the law and the respondents' view that there was a global settlement of the disputes between the parties including compromise of HCCC No 717 of 2009. The agreement was duly signed by all the parties, part-payment of the purchase price has been effected, the 3rd respondent has transferred his shares in the company to the appellant or his nominee, as a result the appellant has become the majority shareholder in the company, and both the appellant and the 3rd respondent have reiterated in the variation agreement their commitment to the full implementation of the agreement.”
16. It was the applicant's contention that despite the 1st, 2nd and 3rd respondents undertaking to pay debt collection fees and costs of the suit to the applicant and to indemnify the applicant against any costs incurred in recovery of the principal claim by virtue of clauses 4 and 8 of the deed of settlement and clause 11.5 agreement for sale respectively they have deliberately neglected, failed and/or refused to settle the same.
17. It therefore follows that the aforementioned deed of settlement having informed the ruling and order and the agreement of sale having resulted from the compliance of the said ruling and/or order, the said deed of settlement and the agreement for sale evince the terms of compromise of the suit herein. This being the case, the application herein is merited and ought to be allowed as prayed.
18. The suit herein being fully compromised in light of the aforementioned ruling and order, the agreement for sale and the deed of settlement, the parties agreed to record a consent in court capturing the foregoing terms. The plaintiff/applicant proceed to prepare the consent as per the foregoing terms and fix the matter for mention for purposes of recording the consent but the respondents have remained unresponsive and failed to attend court when the matter came up.
19. The plaintiff/applicant was constrained to file the instant application herein as indeed the suit herein is fully compromised by virtue of the deed of settlement & the agreement for sale herein; ruling and order dated July 29, 2016 and November 10, 2016 respectively and subsequent satisfaction on account of the actions/conduct of the respondents thereof, and thus there is nothing left for trial by the court save for payment of costs to facilitate registration of the sub-leases in the name of the applicant and costs of the suit which the respondents herein had agreed to settle pursuant to the aforementioned



agreement of sale and deed of settlement but have failed to keep their contractual undertaking hence unnecessarily delaying finalization of the suit. In that regard, the applicant submitted that judgment ought to be entered in favor of the plaintiff/applicant as against the respondents jointly and severally as sought in the application herein as the suit herein stands fully compromised as discussed above.

Issues For Determination

20. The court has considered the applicant's application and written submissions and the issues for determination are;
 - a. Whether the plaintiff's name should be substituted or changed to FinCredit Limited from AAR Credit Services Ltd in the suit and all orders thereto;
 - b. Whether suit judgment should be entered against the defendants in terms of prayer (2) of the application;

Analysis

Whether The Plaintiff's Name Should Be Substituted Or Changed To Fincredit Limited From Aar Credit Services Ltd In The Suit And All Orders Thereto?

21. The respondents did not file any response to the application and is thus unopposed.
22. By dint of the provisions of order 8 rule 3 of the *Civil Procedure Rules*;

“ 3 (1) Subject to order 1, rules 9 and 10, order 24, rules 3,4,5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

3 (3) An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.”
23. The applicant annexed a certificate of change of name marked 'GN-1' which indicates that AAR Credit Service Limited changed its name to Fincredit Limited on June 20, 2018.
24. There being no objection, the substitution is allowed to reflect its change of name.

Whether The Suit Judgment Should Be Entered Against The Defendants In Terms Of Order (2) Of The Application?

25. The court by a ruling and order dated July 29, 2016 and November 10, 2016 respectively, ordered that the respondents to transfer apartments known as CS-AB2-002 in Block 2; CS-AB4-202 in Block 4 and CS-AB2-003 in Block 2 all erected on LR No MN/III/92033-Sultan Palace, Kikambala, Kilifi (suit properties) to the applicant within 30 days of the order and in default thereof, the respondents do furnish security sufficient to satisfy the decree that may be passed against them within 60 days from the date of the order.
26. The applicant informed the court that the 1st, 3rd and 4th respondents have in part compliance of the said order jointly and severally assigned, executed and delivered sub-leases and completion documents to the 4th defendant to facilitate registration of the sub-leases for the suit properties in the name of



the applicant and delivery of vacant possession of the apartments to the applicant in full and final settlement of the claim as prayed in the Plaint in this suit. The same was uncontroverted.

27. Further to the above, the 1st, 2nd and 3rd respondent undertook to pay debt collection fees and costs of the suit to the applicant and indemnify it against any costs incurred in recovery of the principal claim by virtue of clauses 4 and 8 of the deed of settlement and clause 11.5 agreement for sale respectively.
28. Going by the above and the ruling and order of the court dated July 29, 2016 and November 10, 2016 respectively, partial compliance thereof by the respondents acts of assignment, execution of documents in particular the aforementioned deed of settlement and the agreement for sale and delivery of vacant possession of the premises; this court is satisfied that by the respondents aforementioned acts of execution and delivery the suit herein has been fully compromised and there is nothing left for trial by this court;

Findings And Determination

29. In the light of the foregoing this court makes the following findings and determinations;
 - (i) This court finds the application has merit and it is hereby allowed;
 - (ii) The plaintiff/applicants name be and is hereby substituted to read FinCredit Limited instead of AAR Credit Services Ltd;
 - (iii) The suit be and is hereby deemed as compromised as between the parties;
Suit judgment is hereby entered in favour of the plaintiff/applicant against the defendant/ respondents jointly and severally in terms of prayer (b) (ii) (iii) (iv) and (v) of the application.
 - (iv) The respondents shall bear the costs of the suit and the application.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 5TH DAY OF AUGUST, 2022.

HON A MSHILA

JUDGE

In the presence of;

Kendi for the Applicant/Plaintiff

Muhindi for the 4th Defendant

Lucy-----Court Assistant

