



Mohan Meakin (K) Limited & another v National Bank of Kenya Limited (Civil Suit 748 of 2003) [2022] KEHC 12274 (KLR) (Commercial and Tax) (5 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 748 OF 2003**

A MSHILA, J

AUGUST 5, 2022

BETWEEN

MOHAN MEAKIN (K) LIMITED 1ST PLAINTIFF

GALOT INTERNATIONAL LIMITED 2ND PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

Background

1. Before the court are two applications. The first one is dated 7/11/2016. It was filed by the Plaintiff/Applicants and was brought *inter alia* under Order 51 Rules 1,3 & 4 of the [Civil Procedure Rules](#). It sought orders to direct the Defendant/Respondent to supply the Applicants with a certified copy of the request for renewal of overdraft facilities and notices to increase interest without which the Applicants cannot fully instruct their accountants to take accounts as ordered by the court in 8/4/2016.
2. The Application was based on grounds on its face and the sworn Supporting Affidavit of Mohan Galot on even date.
3. In opposition, the Defendant/Respondent filed a Replying Affidavit sworn by Paul Chelanga, its Manager In Charge of Recoveries, on 24/9/2018.

Plaintiff/Applicants Case:

4. The Applicants case was that *vide* a judgment delivered on 8/4/2016, this court directed that proper accounts be taken between the Applicants and the Respondent in order to establish the indebtedness



- between themselves; that the taking of accounts could be done either by the parties agreeing on a mutual accountant between themselves or by either party appointing their own accountant and a third accountant appointed by their accountants as an umpire in the said taking of accounts.
5. That the Applicants advocates sought from the Respondent certified copies of the request for renewal of overdraft facilities and notices to increase interest rate; the Respondent informed the Applicants that its request was vague and could not be acted upon but on the other hand the Respondents claimed that the requested documents were to be found in the bundle of documents filed in court.
 6. Further that the Applicant was not able to appoint an accountant of their own as they lacked the requested documents and proper instructions could not be issued in their absence; that the Respondent threatened to move the court for orders to lift the temporary injunction that has preserved the subject matter of the suit since its filing due to the stalemate in the appointment of the accountant to take accounts.
 7. The Applicant pleaded that they would suffer grave prejudice if the Respondents threats of action are actuated since as it is the Respondent who had refused to supply copies of documents as requested thus causing the stalemate.

Defendant's/ Respondent's Case:

8. It was the Respondent's case that the Applicant's belated request for discovery, outside the province of the trial court is strange especially when no request for renewal of the subject overdraft facility exists, and in fact the notices on variation of the applicable interest rates were produced before the trial court and affirmed in the judgment.
9. That the Applicants have neither shown the importance of the sought documents nor have they shown the rationale for the belated, unnecessary and unfounded discovery and that the application only serves to delay the implementation of the final order on audit of accounts.

Issue for Determination:

10. After reading the written submissions this court has framed one issue for determination which is whether the Plaintiff has set forth a basis for the documents sought;
11. The court delivered its judgment on this matter on 8/4/2016. It was held that the question as to what was owed to the Respondent could only be answered after proper accounts had been taken as stipulated under Order 21 rule 17 of the [Civil Procedure Rules](#), 2010.
12. To that end, the court ordered under paragraphs 105-107 therein that the parties were to mutually appoint an independent accountant to take accounts. In default of such an agreement, each party was to appoint an accountant, and the two appointed accountants would appoint an umpire and the three would jointly prepare a report for filing in this matter.
13. The court under paragraph 108 stated that further orders would await the filing of the said report.
14. The Applicants have now approached the court seeking an order to direct the Respondent to supply them with a certified copy of the request for renewal of overdraft facilities and notices to increase interest.
15. The Applicants argued that they cannot appoint an accountant as per the aforementioned judgment without the requested documents which are in the possession of the Respondent.



16. On the other hand, the Respondent argued that the application is baseless as a request for the renewal of the subject overdraft facility does not exist and the notices on variation of the applicable interest rates were already produced before the trial court.
17. The court has analysed the correspondence between the parties' respective advocates as annexed in the Applicant's Supporting Affidavit sworn on 7/11/2016.
18. The correspondence indicated that the parties failed to mutually appoint one accountant to take accounts as required in the judgment. This led the Respondent to appoint their own accountant, M/s Ernst & Young.
19. Further the Respondent requested the Applicants on two occasions to appoint an accountant of their choice in order for a mutually agreed upon umpire to be appointed.
20. The Applicants did not appoint an accountant and a stalemate ensued.
21. The Applicants have not given any basis from a qualified accountant/auditor on why the certified copies of letters of renewal of the overdraft and the notice of increase of interest are required. The Defendants denied that the request for renewal of overdraft exists and the Plaintiffs have not shown anything to the contrary.
22. Further the issue of notice of change of interest has been canvassed comprehensively in the judgment. Reference is made to paragraph 86, therein the court acknowledged that the Respondent had produced the notices of variation of interest and under paragraph 79, it was noted that the Respondent had notified the Applicant of the interest changes through various letters dated 9/11/1993, 25/11/1993, 3/12/1993 and 17/5/1994.
23. Therefore, this court is satisfied that the Applicants request for the notices of variation of interest are baseless as the documents sought were already produced during the trial. The upshot is that this first application is found lacking in merit;

Second Application

24. It is dated 31/1/2017 and was filed by the Defendant/Applicant. The Applicant sought for orders to lift, discharge and/or set aside the court's interlocutory injunction made *ex-parte* on 9/9/2014 and an order to permit the Applicant to proceed with realisation of its security over L.R. No.209/8330 in the usual manner.
25. The Application is supported by the annexed affidavit of Samuel Wanjohi Mundia sworn on an even date.
26. In opposition, the Plaintiff/Respondent filed a Replying Affidavit sworn by Mohan Galot, the director of the 2nd Plaintiff/Respondent, on 13/7/2018.

Defendant's /Applicant's Case.

27. It was the defendant's case that the *ex parte* temporary injunction was granted under questionable circumstances, pending the determination of the Plaintiffs' applications dated 24/7/2014 and September 2014; that these applications had since been abandoned.
28. That temporary injunctions granted *ex parte* under Order 40 Rule 4(2) only last for 14 days therefore the injunction is long spent by effluxion of time and no extension has been sought; that a dispute on accounts is not a ground for maintaining an injunction.



29. The Defendant argued that the Judgement delivered on 8/4/2016 found that the 1st plaintiff is indebted to the Defendant and the order for an audit was only to determine the sum recoverable including any default or penalty charges or interest; that in compliance with the said order for audit, the Defendant had submitted summarized statements of accounts showing the rates of interest as decreed by the court and in which the outstanding debt is Ksh.80,707,466.61 as of 31/5/2017.
30. Further that the Defendant had produced a valuation report of the charged property with a forced sale value of Ksh.78,750,000/= as of 30/6/2017; that the debt has exceeded the value of the only available security and there is a great likelihood that the Defendant will be unable to recover its debt in full and any further continuation of the *ex parte* injunction will cause great prejudice to the Defendant.

Plaintiffs'/Respondents' Case.

31. The Plaintiff/Respondents argued that the order sought by the Applicant is incapable of being granted by the Court as the court is *functus officio*.
32. That the granting of the orders sought by the Applicant would amount to this court overturning its own judgement as it would lead to the Applicant executing upon the 2nd Plaintiff/Respondents property L.R No.29/8330 for an undisclosed sum contrary to the judgment; that the Applicant seeks to execute upon the Plaintiff/Respondent's property without a determination as to the indebtedness of the 1st Plaintiff/Respondent as directed by the court.
33. The Plaintiff/Respondents relied on the case of *Bellevue Development Company Limited v Vinayak Builders Limited & Another* [2014] eKLR where the court expounded on the consideration the Court should make when determining issues surrounding the doctrine of *functus officio*.

Issues for Determination

34. Having considered the entire record, and submissions filed this court has framed the following issues for determination which are:
 - (i) whether the court is *functus officio*.
 - (ii) whether the court should lift, discharge and/or set aside the court's interlocutory injunction made *ex parte* on 9/9/2014 and an order to permit the Defendant to proceed with realisation of its security over L.R. No.209/8330 in the usual manner.
35. The first issue relates to whether the court is *functus officio*. The Plaintiff/Respondents have argued that this court is *functus officio* as it has already concluded this matter through its judgment of 8/4/2016.
36. The case of *Bellevue Development Company Limited v Vinayak Builders Limited & Another* [2014] eKLR held:

“Properly understood, whereas the court becomes *functus officio* when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently or otherwise overstretch the application of the concept of *functus officio*; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is *functus officio* one should look at the order or relief which is being sought in the case despite that judgement has already been rendered by the court.”



37. The Applicant seeks to have the ex parte injunction orders lifted in order to allow it to realise its security against the Plaintiff/Respondents; This prayer is due to the fact that the parties have reached a stalemate in taking of proper accounts before the Applicant can execute against the Plaintiff/Respondents.
38. This court is persuaded by the finding above and is satisfied that it is not *functus officio* as the order sought relates to the execution of its judgment. In determining the application, the court would be exercising its supplementary jurisdiction.
39. The second sub-issue is whether the court should lift, discharge and/or set aside the court's interlocutory injunction made ex parte on 9/9/2014 and grant an order to permit the Defendant/ to proceed with realisation of its security over L.R. No.209/8330 in the usual manner
40. In the judgment of 8/4/2016, the court found that the 1st Plaintiff/Respondent was indebted to the Applicant, however, as the exact figure was yet to be ascertained, the parties were directed to obtain proper accounts through appointing accountants individually or jointly.
41. As earlier noted, the parties failed to appoint a joint accountant, which led the Applicant to appoint one of its own. The Plaintiffs/Respondents have to date failed/neglected to appoint an accountant of their own contrary to the said judgment.
42. Under paragraphs 105 and 106, the court required the jointly appointed accountant or the two appointed accountants plus the umpire to generate a report to be filed in this matter within 45 days of appointment. This shows that the court's intention was to have the proper accounts rendered as soon as possible so that the Applicant could recover its money as quickly as possible.
43. There has been an inordinate delay on the Plaintiffs/Respondents end in complying with the court order, the result of which has frustrated the Applicant's attempts to recover the money owed to it by the Plaintiffs/Respondents.
44. The Applicant is entitled to reap the fruits of the favourable judgment it obtained. The Plaintiff/ Respondents have failed to comply with the judgment of the court for over 6 years and have intentionally frustrated the process of appointing a competent accountant to produce proper accounts.
45. The interlocutory injunction in place only serves to allow the Plaintiffs/Respondents to unjustly benefit from the status quo. The court cannot turn a blind eye to the fact that the Plaintiffs/ Respondents have not complied with the judgment of 8/4/2016 in terms of procuring the statements of account.

Findings and Determination

46. In the light of the forgoing reasons the court makes the following findings and determinations;
 - i. This court finds that the Plaintiff/Applicant's application dated 7/11/2016 is baseless as the documents sought were already produced during the trial.
 - ii. This last application is found lacking in merit and is hereby dismissed with costs to the Respondent.
 - iii. The Defendant/Applicants application dated 31/1/2017 is found to have merit and it is hereby allowed as follows.
 - iv. This court is not *functus officio*;



- v. This court hereby discharges the interlocutory injunction made *ex parte* on 9/9/2014; the Defendant/Applicant is at liberty to proceed with realisation of its security over L.R. No.209/8330 in accordance with the law.
- vi. There shall be no order as to costs on this application

Orders Accordingly.

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

HON. A. MSHILA

JUDGE

In the presence of;

Miss Musebe holding brief for Mr. Saende for the defendant

No appearance for George Gilbert for the plaintiff

Lucy-----Court Assistant

