REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. EO83 OF 2019

DEVELOPMENT BANK OF KENYA LIMITED..PLAINTIFF

-VERSUS-

1. AMBROSE DICKSON OTIENO RACHIER

2. OTIENDE AMOLLO

3. J. OKOME ARWA

4. FRANCIS OLALO

5. STEPHEN LIGUNYA all trading as RACHIER & AMOLLO ADVOCATES

6. MARENYO LIMITE..DEFENDANTS

RULING

1. This ruling is in respect to two applications, namely;

a) The application dated 14th February 2020 (hereinafter "the 1st Application") wherein the 1st defendant seeks orders for mandatory injunction and,

b) The application dated 7th July 2020 (hereinafter "the 2nd Application") in which the plaintiff seeks orders for the review of the ruling of this court delivered on 29th May 2020.

The 1st Application

2. Through the 1st application, the 1st defendant seeks orders to compel the plaintiff to release to him the original title to the property known as LR. NO. Kajiado/Mailua/xxxx (hereinafter **"the Suit Property"**) to enable him sell the said property to a third party so that he can repay certain loans that are due to the plaintiff in his personal account.

3. The 1st defendant's case is that the original title to the suit property should be released to him because he deposited the same with the bank as an additional security for a loan that has been fully repaid, and that in the circumstances, the plaintiff has unlawfully detained the same. He further maintains that the Respondent has no right in law to auction the said property.

4. The respondent/plaintiff opposed the application through the replying affidavit of its Legal Manager **Ms. Doreen Kimori** who avers that Defendants deposited the original title to "the Suit Property" as a security for full repayment of monies owed by the law firm of Rachier & Amollo Advocates (R&A), to the Plaintiff Bank. She states that the firm of Rachier & Amollo Advocates owes the Plaintiff Bank in excess of Kshs. 179,867,449/ = as at 31/5/2019 and that the Bank holds a lien by deposit of original title within the meaning of Section 79(6)(b) and (9) of the Land Act.

5. She states that the Plaintiff Bank had by its application dated 6th June 2019 (hereinafter **"the Earlier Application"**) sought leave of Court as is required under Section 79(9) of the Land Act, to sell the said suit land but that by the ruling delivered on 29th May 2020, the Court

omitted to make a decision on the relief sought by the Plaintiff at prayers 3(i) thereof relating to this property. She contends that the omission prompted the Plaintiff Bank to file an application for the review of the said ruling.

6. She further states that whereas the Plaintiff is not opposed to the move by the Defendants to sell the property in order to settle their debts to the Bank, the Bank is opposed to the release the title to the Defendants as sought in the application. She adds that the respondent will however be agreeable to the sale on condition that the purchase price is paid to the Bank so as to reduce their liabilities.

7. She avers that in the face of liabilities admitted by the defendants and security freely given to the Bank, the Court cannot grant the orders sought unless and until the liabilities are paid and settled.

The 2nd Application

8. The plaintiff filed the application dated 7th July 2020 seeking orders for the review of the Ruling delivered on 29th May 2020 on the basis that there is an error on the face of the record as the court left undetermined prayer No. 3 of the plaintiff's Application dated 6th June 2019. In the said prayer No 3, the Plaintiff sought orders:

> "***That the Honourable Court be pleased to grant leave to the Plaintiff Bank to sell by public auction the following properties of the 1st Defendant to reduce the loans advanced to Rachier & Amollo Advocates now owing to the tune of Kshs. 179,867,449.70 at 31.05.2019 with compound interest at 13 % p.a until full payment namely:***
>
> ***i. LR NO. KJD/MAILUA/xxxx;***
>
> ***ii. Flat No. 3, One Type "A" in Block "A" East Church flats erected on LR No. 1870/VA/61, Westlands and registered as I.R. No. xxxxx/x; and***
>
> iii. ***Flat No. 2, One Type "B" in Block "A" East Church Flat erected on L.R. No. xxxx/V1/xx, Westlands and registered as I.R. No. xxxxx/xx."***

9. The 1st — 5th defendants opposed the 2nd application through the Grounds of Opposition dated 25th September 2020 in which they list the following grounds: -

> ***1. THAT this court lacks jurisdiction to entertain the said Application.***
>
> ***2. THAT the said application lacks merit for the following reasons:***
>
> > ***a) There is no error on the face of the record as alleged or at all. The Ruling delivered on 29th May 2020 (Hereinafter called "the said Ruling") expressly stated that plaintiff's Application dated 6th June 2020 (alongside 2 other applications) was dismissed for lacking merit. (The said Ruling never stated that prayers 1, 2,4,5 and 6 of the plaintiffs Application dated 6th June 2020 were dismissed; but rather that the WHOLE APPLICATION (including prayer 3 thereof was dismissed).***
> >
> > ***b) It is misleading and incorrect for the plaintiffs to allege that prayer 3 of their application dated 6th June 2019 was not determined.***
> >
> > ***c) Even if it were to be argued that prayer 3 of the plaintiff's application dated 6th June 2019 was not determined (which is denied) it is a fundamental principle of law that any relief sought but is not expressly granted by the court is deemed to have been refused.***
>
> ***3. THAT this court is in any event functus officio and cannot reopen an issue which it has already ruled upon.***
>
> ***4. THAT the said Application is grounded on willful and deliberate falsehoods and misrepresentations as outlined hereunder:***
>
> > ***a) The plaintiff deliberately misrepresent that R & A owes it some money which is untrue.***
> >
> > ***b) The plaintiff deliberately misrepresents that prayer 3 of the application dated 6th June 2019 was not determined.***
> >
> > ***c) The plaintiff deliberately misrepresents that the 1st defendant conceded to the application dated 6th June 2019.***
>
> ***5. THAT the plaintiff fails to appreciate that this honourable court has the power to dismiss any application which it finds to be lacking merit even if it had been conceded by the obligant (which was not the case herein).***
>
> ***6. THAT prayer 3 of the plaintiff's Application dated 6th June 2019 was PROPERLY DISMISSED by this honourable court vide the said Ruling and cannot be entertained again nor granted by this court as prayed in the said Application for the following reasons:***

a) The Original title to the property known as L.R.NO. KAJIADO/MAILUA/xxxx was given to the bank as an additional security for two loans amounting in aggregate to Kshs. 14,500,000 which loans were FULLY REPAID as illustrated in paragraphs 5-13 of the 1st Defendants Affidavit sworn on 14/2/2020 in support of the Application dated the same day (Hereinafter called "The said Affidavit").

b) Copies of the title to property known as 1870/VI/61 (Known as East Church Flats) were given to the plaintiff as security for FUTURE financial accommodation which were requested vide the 1st defendant's letter dated 7th January 2016 which financial accommodations were not granted by the plaintiff as demonstrated in paragraphs 15-18 of the said Affidavit.

c) Rachier & Amollo Advocates (Hereinafter called "R & A") does NOT OWE the plaintiff any other debt and the plaintiff has failed to produce any written request for a loan emanating from R & A signed by at least TWO (2) signatories thereof (as per the mandate given to the plaintiff) or by at least TWO (2) PARTNERS thereof (as per the provisions of the Partnerships Act), nor any written document proving that any such loan was disbursed to R &

7. THAT the said Application is fatally defective.

10. Parties canvassed both applications together by way of written submissions. The 1st application, the 1st defendant invited this court to inquire into the circumstances under which the title to the suit property was deposited with the Respondent in order to determine whether the Respondent is entitled to detain the original title or to auction the property so as to repay debts allegedly owed to the plaintiff by R & A. The 1st defendant argued that the alleged debts do not exist and were not in the contemplation of the Applicant at the time he pledged the said original title to the respondent as additional security for a debt which has since been fully repaid. The 1st defendant explained, at length, the circumstances which under which the said original title was deposited with the plaintiff.

11. The 1st defendant submitted that the plaintiff is taking this court for a ride as the loan of Kshs. 12,500,000 was fully repaid and the plaintiff does not have any lawful justification for detaining the original title to the said property. It was the 1st defendant's case that the plaintiff's allegation that R & A owes it Kshs. 179,867,449 has no merit since no documentary evidence was produced to support of such a claim.

12. It was submitted that the plaintiff has no justification for detaining the title to the suit property or to auction the same.

13. On its part, the plaintiff submitted that the letter dated 12th November 2013 depositing the subject title document as a security was very clear that it was in respect to for loan facilities advanced to R & A Advocates, which sums are in excess of Kshs.179 Million. It maintains that the debts were repeatedly admitted by the 1st Defendant and that the present defence that the loans were illegally incurred through unauthorized payments made to third parties is a red herring.

14. It was submitted that the 1st Defendant had not demonstrated that there are special circumstances that would warrant the granting of orders of mandatory injunction. The plaintiff however proposed that the suit property could be sold on condition that the proceeds of sale are paid directly to the bank in exchange for the title deed so as to reduce the defendants' debts. The plaintiff argued that since it was the collective desire of both parties to sell the suit property in order to reduce the outstanding sum, it would serve the interest of justice that the court for fashion its order to protect the Plaintiff and allow the 1st Defendant sell the property.

15. The plaintiff urged the court to consider the application for mandatory injunction with circumspection owing to the fact that the grant of the order may amount to determining the issues in a summary manner.

16. As regards the 2nd Application, the plaintiff submitted that because this court did not consider prayer No. 3 in the earlier application, there was an error of omission which is apparent on the face of the record. It was further submitted that the 1st Defendant did not oppose the said prayer at the hearing of the Application and that the omission to consider the said prayer therefore left the prayer undetermined.

17. The Plaintiff argued that it has not lodged any Appeal against the Ruling in the earlier application as alleged since a Notice of Appeal and a Letter requesting for court proceedings does not constitute an Appeal.

18. The 1st to 5th defendants, on the other hand, argued that it is misleading and incorrect for the plaintiff to allege that prayer 3 of their application dated 6th June 2019 was not determined. They further argue that even if it were to be said, for argument's sake, that prayer 3 of the earlier was not determined, it is a fundamental principle of law that any relief sought but is not expressly granted by the court is deemed to have been refused.

19. They also argued that this court is *functus officio* and cannot reopen an issue which it has already ruled upon. They further submitted that urge that since the plaintiff had already filed its Notice of Appeal in respect to the impugned ruling, it is not permissible to pursue an appeal and an application for review concurrently. For this argument, the defendants cited the decision in ***Karani &47 Others v Kiiana & 2 Others*** [19871 KLR 557 where the court held that:

"Once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal."

20. Reference was also made to the decision in ***Edward for Industrial & Commercial co. Ltd v. Bollore Africa Logistics (K)*** [20151 e KLR where P.J. Otieno J. observed that: -

"it is true that the purpose of the court and indeed any judicial system is to render substantial justice. That substantial justice however is also subject to other virtue and parameters being that there ought not to be delay and that it be done proportionately and judicial time need to be employed efficiently. 1 am of the persuasion that the remedy for review and appeal are not to run concurrently or consecutively but are alternatives. "

"having opted for review, the applicant is not entitled to an appeal for to do that would be to seek double allocation of judicial time and therefore fail on its obligation to help in the efficient use and employment of judicial resources as commanded by section IA and Article 159 (2) b. '

"the foregoing finding lead me to conclude and find that, the applicant deliberate election under order 44 Rule 1 (a) and opted for review, he thus forbore the right of appeal and not entitle to seek a second bite at the cherry once his option came to unfavourable end as it did. No appeal shall lie from an order of which has been challenged on review."

21. The defendants submitted that the review Application does meet these mandatory requirements for the granting of the orders for review and further, that the application is defective as not only is the court *functus officio* but that the order sought to be reviewed has not been extracted nor has it been annexed to the application.

Analysis and Determination

22. I have carefully considered the two applications and the parties' respective submissions together with the law and the authorities that they cited. As I have already noted in this ruling, the 1st defendant seeks orders of mandatory injunction to compel the plaintiff to release the original title to the suit property to him to enable him sell the suit property so as to settle the debts that he owes to the plaintiff in his personal accounts.

23. It is instructive to note that a mandatory injunction is not the same as a prohibitory injunction and that the considerations for granting the two injunctions are slightly different. In the case of prohibitory injunction an applicant must establish, firstly; a *prima facie* case with a probability of success, secondly; that the he will suffer irreparable damage which cannot be adequately compensated by an award of damages if an injunction is not granted and further, lastly; that the balance of convenience tilts in the applicant's favour. (See ***Giella v Cassman Brown*** (1973) EA 358). In the case of mandatory injunction, on the other hand, the applicant must in addition to the above conditions, also establish special circumstances. Needless to say, the standard for its grant is usually higher than that of prohibitory injunctions.

24. The considerations for granting interlocutory mandatory injunctions were well stated in the case of ***Kenya Breweries Ltd & Another v Washington O. Okeyo*** [2002] eKLR where the Court of Appeal said: -

"The test whether to grant a mandatory injunction or not is correctly started in Vol.24 Halsbury's Laws of England 4th Edition paragraph 948 which read: -

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application".

25. In the above cited case, the Court of Appeal quoted with approval an English decision in the case of ***Locabail International Finance Ltd v Agroexport and others*** (1986) 1 ALLER 901 where it was stated: -

"A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction."

26. In ***Nation Media Group & 2 others v John Harun Mwau*** [2014] eKLR the Court of Appeal held: -

"It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."

27. The principles of law arising from the above decisions is that a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear. What then is the 1st defendant's case and can it be said to be clear?

28. It was not disputed that the 1st defendant deposited the subject original title, whose release he now seeks, with the plaintiff in order to secure certain loan facilities. The parties were however unable to agree on the specific loan that was secured by the title and if the said loans have been repaid, in full. While the 1st defendant contends that the title was deposited to secure a loan of Kshs. 12,500,000/=which has been fully repaid, the plaintiff maintains that the loans secured by the title have not been repaid and stands at Kshs. 179,867,449 as at 31st May 2019.

29. While the 1st defendant states that the plaintiff has no justification for withholding the subject title as there is no outstanding loan, the plaintiff argues that the bank holds a lien, by deposit of original title within the meaning of Section 79(6)(b) and (9) of the Land Act.

30. From the contrasting positions taken by the parties herein regarding the circumstances under which the subject title was deposited with the plaintiff, I find that the 1st defendant's case is neither clear nor has he demonstrated that there are special circumstances that would necessitate the granting of the mandatory orders of injunction. My further finding is that the issue of whether or not the title should be released to the 1st defendant is an issue that can only be determined after considering the merits of the main suit and not at this interlocutory stage.

31. Turning to the 2nd application wherein the plaintiff seeks orders for review of the ruling in the earlier application on the basis that the court omitted to make a decision in respect to prayer no. 3 thereof. In the said prayer no. 3, the plaintiff seeks leave to sell the 1st defendant's property, by public auction, so as to reduce the debt owed to it by R&A.

32. Order 45, Rule 1(b) of the Civil Procedure Rules (CPR) is clear that for the court to review its decision, certain requirements should be met. This Order provides as follows:

> ***"(1). Any person considering himself aggrieved-***
>
> ***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed.***
>
> ***and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***
>
> ***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."***

33. The aforesaid Rule is based on Section 80 of the Civil Procedure Act; Cap. 21 Laws of Kenya (CPA) which states as follows:

> ***"Any person who considers himself aggrieved-***
>
> ***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is allowed by this Act.***
>
> ***may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.***

34. Under Section 80 of the Civil Procedure Act, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. This discretion should however be exercised judiciously and not capriciously.

35. The Plaintiff's case was that there is a mistake or error apparent on the face of the Ruling delivered on 29th May 2020. Reference was made to the Court of Appeal's decision in **Ryce *Motors Limited v Jonathan Kiprono Ruto & another*** [2016] eKLR, wherein it was held that an error/omission apparent on the face of the record is an omission/error that is self-evident and does not require a long-drawn process of reasoning to establish. On their part, the defendants maintained that the application is fatally defective, does not meet the mandatory requirements for the granting of orders of review and that the court lacks the jurisdiction to entertain the application.

36. It was not disputed that on or about 3rd June 2020, the plaintiff filed a Notice of Appeal against the ruling in the earlier application through the online platform. It was also not disputed that the plaintiff wrote to the Deputy Registrar requesting for certified copies of the said Ruling and proceedings for purposes of the Appeal.

37. Courts have taken the position that it is not permissible to pursue an appeal and an application for review concurrently. I am guided by the decisions in ***Serephen Nyasani Menge v Rispah Onsare*** [2018] eKLR wherein Mutungi J. discussed the provisions of Order 45 Rule 1(a) and (b) and Section 80(a) and (b) and held: -

> ***"order 45 rule I(a) and (b) in addition to setting out the conditions that an applicant for review must satisfy in order to get the application granted, reiterates the proviso of section 80 (a) and (b) which in my view makes it plainly clear that he options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted fora review the option of an appeal cannot at the same time be available to the party. "***
>
> ***"In my view a proper reading of section 80 of the Act and order 45 rules 1 and 2 makes it***

abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the applicant exhausted the process of review up to appeal and wishes to go back to the same order she sought review of and failed and to try her luck with an appeal. The applicant wants a second bite at the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the court process and the same must surely fail. The applicant had her day in court when she chose to seek review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made in the review application. Litigation cannot be conducted on the basis of trial and error."

38. Similarly, in ***V. Chokaa &Co. Advocates v County Government of Mombasa as Successor of Municipal Council of Mombasa*** [2017] eKLR it was held: -

> ***"for purposes of an appeal of the Court of Appeal is instituted by filing a Notice of Appeal. It is not denied that Advocate prior to filing the application for review had filed and served a Notice of Appeal. He had thus opted to appeal and therefore relinquished his option to seek review. That to me is to clear and undeniable interpretation I give to Order 45 Rule 1(2). Therefore, even beyond the merits as stated above, this application would not lie for being barred by the rule."***

39. Taking a cue from the above cited decisions and having regard to the fact that the plaintiff opted to file an appeal against the impugned Ruling, I find that it is not open for the plaintiff to concurrently file the application for review.

40. My above findings would have been sufficient to determine the application for review but I am still minded to determine if the review application would have been granted had the plaintiff not filed a Notice of Appeal. In other words, does the plaintiff's application meet the conditions set under Order 45 Rule 1 for the granting of orders for review?

41. The plaintiff's argument was that there was an error of omission apparent on the face of the record in view of the fact that the court did not consider one prayer (No. 3) in the earlier application. My finding is that the mere fact that one of the prayers sought by the plaintiff was not granted does not necessarily connote that there is an error in the ruling. I note that this court declined to grant the orders sought in the earlier application in its entirety. I find that in the circumstances of this case, the proper cause of action available to the plaintiff is to appeal against the said decision. My take is that this court will be sitting on an appeal in its own decision if it revisits a specific prayer in an application that was dismissed in its entirety. Moreover, courts have held that a relief that is sought but not granted ought to be deemed to have been refused. (see ***Bank Fur Und Wirtschaft A.G v Attorney-General & Another [19991 e KLR*** and ***Eunice Nafula Tembe v Multiple Hauliers (EA) Ltd & 3 Others [20141 e KLR***).

42. Furthermore, it is not entirely correct that this court did not consider prayer no. 3 in the earlier application. When dismissing the earlier application, this court highlighted all the prayers sought therein and pronounced itself, in part, as follows: -

> ***"In the present case, this court takes cognizance of the fact that bank loans and the provision of security for such loans are contracts that are ordinarily governed by written agreements between the parties specifying the action to be taken by the bank in the event of default in the loan repayments. In this case, <u>no material was placed before this court to show that the plaintiff will be entitled to sell or restrict dealings in the defendants' properties should the defendants not keep up with the loan repayments.</u> The plaintiff has also not demonstrated that the defendants will not be able to satisfy any decree passed against them should the court find in its favor so as to justify the granting of the orders sought in the application filed on 6th June 2019." [Emphasis added]***

43. In conclusion, having regard to the findings and observations that I have made in this ruling, I find that both the 1st and 2nd applications are not merited and I therefore dismiss them with no orders as to costs.

44. Before I conclude this ruling, I wish to point out that from a simple reading of the two competing applications, it is clear that the plaintiff and the 1st defendant are in agreement that the suit property ought to be sold so as to reduce the defendants' indebtedness to the plaintiff. Both parties sought the leave of the court to sell the suit property. Their point of departure/disagreement, however, was the amount due to the plaintiff and the specific loan(s) that remain unpaid. My humble view is that considering the long-standing bank/customer relationship between the parties herein, if they were truly and genuinely committed to resolving the dispute, nothing would have been easier than to engage the services of an independent auditor/accountant to establish the true status of the loan accounts so as to resolve their differences once and for all. This court is appalled that instead of taking this clear path in dispute resolution or fixing the main suit for hearing, the parties have chosen to outdo each other by filing multiple interlocutory applications that may not solve the substantive dispute before the court.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 27TH DAY OF MAY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID - 19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

<u>**In the presence of:**</u>

Mr. Ochieng for the 2nd -5th defendants.

Mr. Ochieng for Juma for 1st defendant.

Ms Achieng for Ojiambo for plaintiff.

Court Assistant: Sylvia.