



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL, COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. E17 OF 2020

KENYA UNITED STEEL COMPANY (2006) LTD.....PLAINTIFF

-VERSUS-

STANDARD CHARTERED BANK KENYA LTD.....DEFENDANT

RULING

1. For the court's determination are two applications by both the Plaintiff as well as the Defendant. Plaintiff's application is a **Notice of Motion** dated **12th November, 2020**, filed alongside the **Plaint** instituting the suit herein and seeks a temporary injunction pending the hearing and determination of the suit, while the Defendant's application is dated **27th November, 2020** and prays that the Plaintiff's suit be struck out.

2. By **Court Orders** of **1st December, 2020**, it was directed that the two applications be heard together. That direction was informed by the fact that if the court finds merit in the Defendant's application, which is canvassing the doctrine of res-judicata, then the suit will stand struck out and there will be no need of venturing into the Plaintiff's Motion.

3. In that scheme of things, I will proceed with the two applications simultaneously while treating the Defendant's application as an opposition to the Plaintiff's application and the response thereof as a further affidavit by the Plaintiff. However, before then it is important to set out, in summary, the grounds to the two applications.

The Notice of Motion dated 12th November, 2020

4. The Notice of Motion is filed by the Plaintiff and seeks for orders that *pending the hearing and disposal of the suit the court be pleased to grant to the Plaintiff a temporary injunction restraining the Defendant from selling and/or disposing of the property known as **Subdivision No.884 Section VI MN and Mombasa/Block XIX/179**.*

5. The application is grounded on the reasons that the two parcels of land which have been registered in the name of the Plaintiff have been advertised for sale on **16th November, 2020**. The said advertisement is said to be in breach of **Rule 15** of the **Auctioneers Rules** for failing to issue the requisite a 45 days notice and further that no statutory notices under **Sections 90** and **96** of the **Land Act** were issued with respect to **Land Parcel No.Mombasa/Block XIX/179**. With respect to land **Parcel No.884 Section VI MN**, the Plaintiff avers that the same is being sold at gross undervalue contrary to provisions of **Section 97(3)** of the **Land Act, 2012**.

6. The application is also supported by an **affidavit** sworn by **Abid Alam** who in reiterating the grounds on face of the application produced annexures of the advertisement for the intended sale, a Valuation Report showing that Parcel of land known as **Subdivision 884/Section VI/MN** was valued at Kshs.1,520,000,000/= in the **year 2015**.

7. The application is opposed by the Defendant and in doing so, it filed **Grounds of Opposition** dated **27th November, 2020** and an **affidavit** sworn by **Adam Ng'ethe**, an auctioneer employed by **Garam Investments Auctioneers**. The Defendant terms the application as an abuse of the court process and having failed to make full disclosure of material facts especially the fact that the issues raised herein were settled or are somewhat pending before the high court vide **Mombasa HCCC No.19 of 2017**.

8. The Defendant then attacks the Plaintiff's case for not having established a *prima facie* case having admitted being in default and indebted to defendant for facilities in which the suit properties were charged as securities thereof. The Defendant adds that the allegation that the properties were undervalued is not a sufficient ground to stop the intended sale and in any event no irreparable loss will be suffered by the Plaintiff that is incapable of compensation by award of damages.

9. Turning to the **affidavit** of **Mr. Adam Ng'ethe**, the same confirms that the Defendant had issued the requisite notices to the Plaintiff. He deponed that after being instructed by the Defendant's advocate to sell the two suit premises, he served the Plaintiff with notifications as required under **Rule 15(d)** of the **Auctioneers Rules**. He avers the Plaintiff was later served with the notification of sale and letter of sale notice through its advocate who was authorized to receive such notices and also through its postal address. The same affidavit has also annexed an **affidavit** by **Joseph Gikonyo** who has deponed similar facts as **Mr. Adam** buttressing the assertion that the notices had been served to the Plaintiff's advocate.

Notice of Motion dated 27th November, 2020

10. The application is expressed to have been brought under the provisions of **Sections 1A, 1B** of the **Civil Procedure Act , Order 2 Rule 15(d)** and **Order 4, Rule 1(1), (2) and (6)** all of the **Civil Procedure Rules, 2010**. It substantially seeks prayers that the **Plaint** dated **12th November, 2020** to be struck out. The reasons advanced by the Defendant to ground the said application are as disclosed on the face of the application and the **affidavit** of **Josephine Warutere** are that the Plaintiff had previously instituted **Mombasa HCCC No.19 of 2017** against the Defendant wherein the subject matter was the Defendant's exercise of its statutory power of sale over parcel of land known as **Subdivision No.884, Section VI, Mainland North, Mombasa**. That in the said suit, the issue of statutory notices issued by the Defendant with respect to **Mombasa/Block XIX/ 179** was addressed and the prayer for injunction sought dismissed. The Plaintiff then appealed to the Court of Appeal vide **Appeal No.7 of 2020** but the Court of Appeal affirmed the High Court decision and consequently dismissed the appeal.

11. The Defendant faults the Plaintiff for filing the instant proceedings without disclosing the proceedings in **Mombasa HCCC No.19 of 2017** in an attempt to re-litigate the issues already dealt with. It is also deposed that the issue on issuance of notices was considered then and it was affirmed that the Plaintiff had been issued with all statutory notices.

12. According to the Defendant, the Plaintiff has not been making any repayment on the facilities and the last payment was made on **27th March, 2013**. That at the moment, the amount due has exceeded the forced market valued of the properties in question and no further interest can be charged by virtue of **Section 44** of the **Banking Act**. It is averred that the forced sale value of the two properties is Kshs.788,250,000/= and Kshs.24,000,000/= for **Subdivision No.884, Section VI MN** and **Mombasa/Block XIX/179** respectively.

13. The affidavit in support has exhibited and annexed the **Plaint** in **Mombasa HCCC No.19 of 2017** and the decisions thereof as well as the decision by the Court of Appeal in **Appeal Case No.7 of 2020**. On such set of facts, it is sought that the Plaintiff's application dated **12th November, 2020** as well as the **Plaint** be struck out with costs.

14. The application has been opposed by the Plaintiff by vide an **affidavit** sworn by one **Abid Mahmoud Alam**, the Plaintiff's director. The gist of that opposition is that the parcel of land described as **Mombasa/Block XIX/179** was never the subject matter in **Mombasa HCCC No.19 of 2017** and the injunction which was denied was in respect of **Subdivision No.884 Sec VI/MN**. That no notices were ever issued in relation **Mombasa/Block XIX/179** and even if the said notices were issued, then the three (3) month's notice was defective for breaching **Section 90(1) and (2)** of the **Land Act** for not demanding the sum in arrears that would regularize the account but instead demanded settlement of the entire sum due.

15. It has been pointed out that the non-payment by the Plaintiff is not intentional but the same is as a result of the Plaintiff's operations having stalled in the **year 2016**. Lastly, the deponent has disputed the forced sale value and avers that the Defendant has undervalued the two properties which are sufficient to settle the Defendant's interests.

16. Directions were issued that the parties dispose the applications by way of written submissions. In canvassing the applications, the Plaintiff filed separate submissions for each, that is, on **12th April, 2020** and **15th December, 2020** respectively. The Defendant on the other hand filed a single set of submissions for both applications on **27th January, 2021**.

Plaintiff's Submissions

17. In its submissions and while responding to the allegations of non-disclosure, the Plaintiff reiterated that the instant suit was triggered by an advertisement for sale on **2nd November, 2020** by the Defendant's agent **Garam Auctioneers** with the intended sale set on **16.11.2020**. While appreciating that indeed **Mombasa HCCC No.19 of 2017** does exist and while conceding that **LR.884 Section VI/MN** was subject to the said case, the Plaintiff submitted that the **Mombasa/Block XIX/179** was not subject thereof. It is submitted the issues raised in the present suit relate to the advertisement of the intended sale and the validity thereof, the service of the auctioneer's 45 days notice and the apprehension that the subject premises may be sold at gross undervalue. It is averred that these complaints on their own are capable of being construed as a distinct cause of action and if they were to be pleaded in the former suit, then the Plaintiff would first be compelled to amend its **Plaint** to accommodate the subsequent changes. According to the Plaintiff, such a rigorous process would impede its right to obtain a conservatory relief in the interest of justice. On the foregoing, the Plaintiff pleaded with the court to find that the suit is properly before the court and can as well address the Plaintiff's application on its merit.

18. On the merit of the application dated **12th November, 2020**, the Plaintiff submitted that it has made out a case worth the grant of the injunctive orders sought. **Firstly**, by establishing a *prima facie* case in relation to the insufficiency of the advertisement for sale and failure to issue statutory notices as pointed out herein above. **Secondly**, the Plaintiff has submitted that it neither instructed an advocate by the name **Moses Mateko** nor was the said advocates ceased with any authority to accept service on its behalf. Therefore it is unclear to whom the notices were served, and be that as it may, the person so served was not an agent of the Plaintiff.

19. According to the Plaintiff, it cannot be gain said that the service of notice by Registered Post ever reached it, the Defendant being well aware that the Plaintiff's Directors were out of the country.

20. On substantial loss to be suffered, the Plaintiff reiterated that despite the fact that the Defendant is a 1st tier bank, if the properties are sold

at such gross under value, then the Plaintiff will suffer loss incapable of compensation in monetary terms. According to the Plaintiff, the balance of convenience would then tilt in its favour and it would be reasonable in the circumstances, for the court to direct that *status quo* to be maintained pending the determination of the dispute.

Defendant's Submissions

21. For the Defendant, the position taken is that the Plaintiff has not acted with utmost good faith by filing the case herein for it was required to place all material facts including those facts against its interest before obtaining the ex-parte injunctive orders. As such it is averred that the Plaintiff was obligated to disclose the proceedings in **Mombasa HCCC No.19 of 2017** in acting in utmost good faith. Also, it is averred that it was upon the court to consider what material facts are relevant but not the Plaintiff. Further, the Defendant faults the Plaintiff for non-compliance with **Order 4 Rule 1(1) of the Civil Procedure Rules** which requires a previous suit over the same subject matter to be disclosed but since this was not obliged with, it is sought that the court implores the suit herein as an abuse of court.

22. As regards the complaint that the advertisement for the intended sale was for less than 14 days, the Defendant has submitted that the allegation has now been overtaken by events since the sale was stopped by the orders of this court, so that if future sale has to be undertaken, then the properties will have to be re-advertised. It is further submitted that all the other notices were issued in accordance with the law and their validity was considered in **Mombasa HCCC No.19 of 2017**. According to the Defendant, it was also entitled to demand the entire debt once the demand matured as against the assertions by the Plaintiff that it was entitled to demand the amount that can regularize the accounts.

23. To buttress its submissions, the Defendant has cited plethora of precedents including the decisions in the cases of **Uhuru Highway Development Ltd -vs- Central Bank of Kenya & 2 Others [1995]eKLR**, **Hasmukhlal Virchand Shah & Another -vs- Investment & Mortgages Bank Ltd [2020]eKLR**, and **Kivanga Estates Limited -vs- National Bank of Kenya Ltd [2017] eKLR**.

Analysis and Determination

24. With the summary of facts and submissions in mind as well as having considered the authorities relied on by the parties, it is clear that when the Plaintiff filed this suit, it was accompanied with an application for injunction. Thereafter, besides opposing the application the Defendant served an application seeking both the Plaintiff's application and the entire suit dismissed for material non-disclosure. Notwithstanding the nature of those applications and the pleadings filed herein, the dispute herein is one straight forward one seeking the determination of two issues namely;

a) Whether or not the Plaintiff's application as well as the entire suit should be struck out for material non-disclosure.

b) Whether in the Plaintiff has made a case to warrant the grant of an order for restraining injunction.

25. On the first issue, I must re-emphasize that striking out of pleadings is a draconian, drastic and a summary order capable of bringing a suit to an end before it has even been heard on merit and it is reasonably expected that striking out pleadings should be an order of last resort. My view is based on the rules of natural justice which requires that the court must not drive away any litigant from the seat of justice without a hearing, however weak his or her case may be. The Court of Appeal, while addressing itself on the issue in the case of **Kivanga Estates Limited (Supra)** stated thus:-

"...It is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations."

26. Therefore, in my view and having regard to the sentiments by the Court of Appeal in above cited case, the court will be justified to direct striking out of pleadings when it is in the first instance satisfied that the pleading have been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious.

27. The same is in consonance with **Order 2 Rule 15 of the Civil Procedure Rules** which sets out the grounds upon which the court may exercise its discretionary power by dismissing any pleadings before it. **Order 2 Rule 15** has been couched on the following terms;

15.(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

a) It discloses no reasonable cause of action or defence in law; or

b) It is scandalous, frivolous or vexatious; or

c) It may prejudice, embarrass or delay the fair trial of the action; or

d) It is otherwise an abuse of the process of the court...and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.(emphasis mine).

28. Having said that much, it is clear from the submissions made before me that when filing this suit, the Plaintiff was very much aware that there is still a pending suit between itself and the Defendant being **Mombasa HCCC No.19 of 2017**. In the said suit, a **Plaint** whereof is annexed to the Defendant's application wherein the Plaintiff among other prayers seeks that; a declaration that an intended sale for **LR No. 884 Section VI MN** in the absence of lawful and or valid redemption notice is unlawful, irregular null and void, a further declaration that the notices therein were vitiated by material inaccuracies in the sums sought which clog its right of redemption. The Plaintiff has then sought that the Defendant to be restrained from selling the subject property unless the requisite notices are issued.

29. It is equally important to note that the **Plaint** was filed contemporaneously with a **Notice of Motion** application dated **24th February, 2017** which sought interim orders for injunction pending the determination of the suit.

30. A **Ruling** thereof was delivered on **16th January, 2020** and the application was dismissed for failure of establishing a *prima facie* case. The court was satisfied that the requisite notices had been properly issued with no irregularities on part of the Defendant. Dissatisfied by that Ruling, the Plaintiff filed an Appeal and in its Ruling on **7th August, 2020**, the Court of Appeal dismissed the appeal having found no fault in the Ruling of the High Court on **16th January, 2020**.

31. I have read through both the **Ruling** of the High Court in **Mombasa HCCC No.19 of 2017** dated **16th January, 2010** as well as the Ruling delivered in the subsequent Appeal. It is therefore clear to me that the court addressed on the validity of statutory notices issued by the Defendant as well as the issue on the Defendant's right to exercise its Statutory Power of Sale over parcels of land known as **LR. No. 884 Section VI/MN and Mombasa/Block XIX/179**. As submitted by the defendant, the Plaintiff failed to make material disclosure to this court both in its **Plaint** and the application dated **12th November, 2020** by which interim orders were granted. The Plaintiff was prepared to conceal crucial facts from this court to achieve its objective of obtaining interim orders of injunction. The Plaintiff's conduct is, to say the least, dishonest. In my humble view, it has been submitted that the Plaintiff and its Directors were peddling falsehood while under oath, which conduct amounts to an abuse of the due process of the court.

32. What appears to be the main Justification by the Plaintiff in filing the suit herein is that there has been material change of facts which are capable of being construed as new cause of action and if the Plaintiff was compelled to amend the Pleadings in the earlier suit, then its right to obtain interim orders in the interest of justice would be defeated. Well this court addressed this issue, which I reiterate herein, in the case of **Paul Koinange –vs- Donald Kipkorir et al, High Court Civil Suit No.2040 of 2000**. This court thus stated;

“...The admission of a fact fundamental to the decision arrived at cannot be withdrawn and fresh litigation started with a view of obtaining another judgment upon a different assumption of facts. Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new version which they present as to what should be a proper apprehension of the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would never end, except when legal ingenuity is exhausted. It is a principle of law that this can never be permitted.”

33. The Plaintiff ought to have amended its pleadings in **Mombasa HCCC No.19 of 2017** to accommodate what it now describes as a new cause of action instead of filing the suit herein. I say so because it is clear that in the former suit, the plaintiff wished to have the Defendant prevented from exercising its Statutory Power of Sale over its properties which were set as securities to the facilities advanced to itself by the Defendant. The interlocutory application filed in that regard as noted herein was dismissed. What appears to have followed is an attempt by the Defendant to realize its securities after continued default by the Plaintiff in regularizing the debt due. In so doing, the Defendant advertised the suit properties for sale which has now brought back the plaintiff with the current suit and application.

34. Irrespective of the words or expressions used in the Plaintiff's suit and application with regard to the suit properties, whichever way you look at it, the Plaintiff seeks an injunction, and the intended result is to have the Defendant restrained from realizing the securities for the same reason that no valid notices were ever issued. In my view, that issue was canvassed in **Mombasa HCCC No.19 of 2017** and subsequently determined. That being the position, the Plaintiff is estopped from filing another application or suit seeking more or less similar orders while a similar suit is still pending.

35. In the upshot, I am thus of the opinion that the Defendant's application seeking to strike out the suit filed herein is merited and proceed to allow it. The result is that the Plaintiff's suit commenced by **Plaint** dated **12th November, 2020** and the simultaneous application filed alongside it, are struck out with costs to the Defendant.

It is hereby so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF JUNE , 2021.

D. CHEPKWONY

JUDGE