



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COMM CASE NO. 41 OF 2019

BETWEEN

ASHOK KUMAR SHAH .....PLAINTIFF

AND

GUARDIAN BANK LIMITED.....1<sup>ST</sup> DEFENDANT

KENNEDY NGUMBAU T/A WHITESTONE &

COMPANY AUCTIONEERS .....2<sup>ND</sup> DEFENDANT

RULING

### Introduction and Background

1. The 1<sup>st</sup> Defendant (“the Bank”) has filed the Notice of Motion dated 16<sup>th</sup> December 2020 under **Order 2 Rule 15(1)(b) and (d) of the Civil Procedure Rules** (“the **Rules**”) seeking to strike out the Plaintiff’s suit against it with costs. The application is supported by grounds on its face together with the affidavits of Mary Omullo, a Legal Officer with the Bank, sworn on 16<sup>th</sup> December 2020 and 2<sup>nd</sup> July 2021 respectively. It is opposed by the Plaintiff’s replying affidavit sworn on 11<sup>th</sup> February 2021.

2. The Plaintiff’s case against the Defendants is as set out in the Complaint and is premised on a sale by public auction conducted by the 2<sup>nd</sup> Respondent (“the Auctioneer”) on behalf of the Bank, which was exercising its statutory power of sale, in respect of the property known as LR. No. 209/4401/3017 (“the suit property”). At the auction held on 2<sup>nd</sup> November 2012, the Plaintiff, through *M/s Zen Nominees Limited* purchased the suit property for a sum of KES. 14,500,000.00. However, the sale was invalidated by a ruling delivered by the court in **Milimani HCCC No. 322 of 2013**. As a result, the Bank refunded the Plaintiff KES. 14,500,000.00 being the purchase price but the Plaintiff claims that there is a shortfall of KES. 3,500,000.00 paid to the Auctioneers which together with interest, forms the basis of his claim.

3. In its Statement of Defence dated 11<sup>th</sup> March 2019, the Defendants admit that the auction took place as alleged by the Plaintiff and that he purchased the suit property for KES. 14,500,000.00 by paying 3 installments to the Bank directly; KES. 3,625,000.00, KES 10,500,000.00 and KES. 375,000 on 16<sup>th</sup> November 2012, 19<sup>th</sup> June 2013 and 10<sup>th</sup> July 2013 respectively which the Bank admits that it refunded the Plaintiff. It adds that in **Milimani HCCC No. 322 of 2013**, the Plaintiff admitted on oath that he was declared the highest bidder for the suit property at KES. 14,500,000.00.

4. The Bank avers that if the Plaintiff paid any money to the Auctioneer, the same was not for the Bank or in connection with the instructions relating to the exercise of its statutory power of sale. It also denies that it received KES. 3,500,000.00 as alleged or at all. It also states that the Plaintiff’s claim is statute barred under **section 4 of the Limitation of Actions Act (Chapter 22 of the Laws of Kenya)**.

### The Application

5. The Bank’s application states that the Plaintiff’s suit is frivolous, vexatious and an abuse of the court process on the ground that the Plaintiff admits that it received the KES 14,500,000.00 refund from the Bank. The Bank submits that this is the only money it received from the Plaintiff following the aborted public auction of the suit property. In the circumstances, it states that the claim for the balance of KES.

3,500,000.00 cannot possibly lie against the Bank. The Bank states that the Plaintiff, in his own deposition in **Milimani HCCC No. 322 of 2013** swore that the bid/purchase price and which was paid by him directly to the Bank and subsequently refunded was KES. 4,500,000.00.

6. The Bank further contends that the documents annexed in the Plaintiff's deposition evidently show on their face that the cumulative sum of KES. 3,500,000.00 paid by the Plaintiff to the Auctioneer was not towards settlement of the purchase price for the suit property but rather in respect of what is consistently referred to therein as "logistic charges" for which the Bank cannot be required to answer for arising from the contractual relationship that arose between it and the Plaintiff out of the said public auction.

7. From the totality of the evidence, the Bank submits that the Plaintiff's claim against it is untenable and devoid of any factual or legal foundation, is frivolous and vexatious and ought to be struck out.

### **The Plaintiff's Reply**

8. The Plaintiff accuses the Bank of failing to address the court on the KES. 3,500,000.00 paid to it through the Auctioneer as pleaded in the Plaintiff's Reply. He states that he has consistently maintained that he paid KES. 18,000,000.00 to the Bank directly and/or through the Auctioneer who received the money on behalf of the Bank.

9. The Plaintiff contends that while conducting a public auction in the exercise of a statutory power of sale, an auctioneer acts at all material times as an agent for the bank and the latter is bound by the actions which the auctioneer undertakes while carrying out his mandate and that he has irrefutable evidence that KES. 3,500,000.00 was paid to the Auctioneer who was the appointed agent of the Bank for the purposes of disposal of the suit property under the Bank's statutory power of sale. Further, the Bank has in its application and deposition acknowledged receiving KES. 14,500,000.00 directly, therefore, it is beyond any dispute that the total payout made to the Defendants pursuant to the statutory sale of the property was KES 18,000,000.00 being the sum of KES. 14,500,000 and KES. 3,500,000.00. The Auctioneer points out that the Bank, had in its instruction letter to the Auctioneer, instructed him not to sell the property for less than KES. 18,000,000.00 thus it cannot be a coincidence that the Plaintiff paid KES. 3,500,000.00 to the Auctioneer which is the difference between the reserve price of the suit property set at KES. 18,000,000.00 and the KES 14,500,000.00 paid directly to the Bank.

10. In addition to the claim for KES. 3,500,000.00, the Plaintiff prays that the Defendants be ordered to pay him interest for the period during which they retained/continue to retain the monies paid and traded with it, whilst denying him the opportunity to invest it elsewhere profitably and this is why he has gone to great lengths in the plaint to demonstrate the opportunity cost he incurred following the detention of the money by the Defendants for a period of nine (9) months after the invalidation of the sale by the court, without any valid reason for the continued retention of the said sums.

### **Analysis and Determination**

11. Before I proceed to deal with the substance of the application, I propose to dispose of the Plaintiff's plea that the Bank's deposition is sworn without attaching any board resolution or power of attorney by the Bank authorizing the deponent to swear affidavits on its behalf. This plea was disposed of by the decision of the Court of Appeal in **Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another [2015] eKLR** as follows:

In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that "they were duly authorized." It was then up to the appellants to demonstrate by evidence that they were not so authorized.

12. The power of the court to strike out a suit is drastic and must only be resorted to in the clearest of cases (**D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another NRB CA Civil Appeal No. 37 of 1978 [1980] eKLR**). Where there are facts to be ascertained or the defence raises triable issue then the court will not exercise that power and instead allow the matter to be ventilated at a full hearing.

13. The Bank's position is that the Plaintiff has no case against it as the KES. 3,500,000.00 was not paid to it directly but to the Auctioneer as 'Logistics Charges' thus the Plaintiff's claim for recovery of this amount ought to be against Auctioneer and not the Bank. The Plaintiff stated that the Auctioneer was always the agent of the Bank and thus, in receiving the said KES. 3,500,000.00 acted upon the instructions of his principal, which was the Bank.

14. Whether the Bank can distance itself from the actions of its agent, the Auctioneer, when it is presumed that the Auctioneer was acting for and on behalf of the Bank and whether any party aggrieved by the actions of an auctioneer, as agent, can sue the principal, which in this case, is the Bank, is a triable issue. As the court in **Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another NKR ELC No. 296 of 2013 [2019] eKLR** observed, "The auctioneer is an agent of the chargee, and being an agent, a person aggrieved by the actions of the auctioneer can as well sue the principal, that is the chargee himself." The onus of satisfying the court that the Auctioneer was not acting on behalf of the Bank when it received the impugned KES. 3,500,000.00 lies with the Bank and proving this can only be done at trial.

15. As Madan J.A., held in **D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another (supra)**, "if a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it." The arguments by the parties clearly demonstrate that they deserve ventilation at a full trial and that is what the court will accord them in the interests of justice.

### **Conclusion and Disposition**

16. For the reasons I have set out above, I dismiss the 1<sup>st</sup> Defendant's application dated 16<sup>th</sup> December 2020 with costs to the Plaintiff.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF AUGUST 2021**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Kibiku instructed by K. Kibiku and Company Advocates for the Plaintiff.

Mr Mutua instructed by Mutua-Waweru and Company Advocates for the 1<sup>st</sup> Defendant.