



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

COMM CASE NO. E016 OF 2018

LOGITAC GLOBAL LOGISTICS LIMITED.....PLAINTIFF

VERSUS

STANBIC BANK KENYA LIMITED.....DEFENDANT

AND

OSMAN ABDULLAHI OSMAN.....1ST INTERESTED PARTY

GULLET ABDULAHHI OSMAN.....2ND INTERESTED PARTY

RULING

NOTICE OF MOTION

The Applicant filed a Notice of Motion Application dated **1st September 2020** for orders that; -

1. The Defendant be granted leave to enjoin the interested parties here as Defendants to the Counterclaim.
2. Pursuant thereto, the Defendant be granted leave to amend the Counterclaim in the manner of the attached draft Amended Defence and Counterclaim.

Which Application is supported by the sworn Affidavit of **Elisha Nyikuli** dated **1st September 2020** on the grounds that; -

- a. The Plaintiff lodged this suit as against the Defendants seeking various remedies.
- b. The Defendant filed Defence to the Claim and also brought a Counterclaim against the Plaintiff.
- c. The Defendant wishes to amend the Counterclaim to enjoin the 2nd and 3rd Defendants as per the draft attached in their capacities as guarantors of the 1st Defendant and seek the amount outstanding upon the sale of additional securities.
- d. The proposed Interested Parties executed guarantees to pay the facilities in case of inability of the Plaintiff/Defendant in the Counterclaim to meet its obligations.
- e. No prejudice shall be suffered by either party as the amendments are intended to enable the court try all the issues at once.
- f. It is in the interest of justice that the Application is allowed.

REPLYING AFFIDAVIT

The Application was opposed vide the sworn Affidavit of Osman Abdullahi Osman dated 3rd November 2020 and stated that; -

1. The Defendant/Applicant exercised its right of redemption and did not disclose how much was fetched from what was sold when the following items were disposed; -

- a. Property in Karen LR. No. 209/10302/1.
- b. Two Toyota Motor Vehicle Pick-ups being Registration Numbers KCH 472N and KCH 474N.
- c. Two Trucks.
- d. Excavator.
- e. Wheel loader.

2. Apart from the above assets being sold without following the due process the Defendant has advertised the Respondents property in Industrial Area for sale on several occasions and the last advertisement was placed on the Nation Newspaper of 19th October 2020 and the Auction was scheduled for 27th October 2020.

3. The Defendants should not be allowed to exercise its right of redemption and at the same time bring a suit against the Respondents as a Counterclaim.

4. The Defendant cannot join the guarantor into these proceedings after selling the security without demand and without accounting for the proceeds of such a sale.

5. The Application should be dismissed since it is made in bad faith and the Applicant's hands are tainted as it failed to disclose the facts herein.

6. The Defendant also failed to disclose to the court that it is a party to other proceedings ongoing in Tanzania involving some of the trucks which are part of this dispute.

DEFENDANT/APPLICANT'S SUBMISSIONS

The Applicant submitted that it should be granted leave to join the Interested Parties as Defendants to the Counterclaim as **Order 1 Rule 10 (2) of the Civil Procedure Rules** provides for joining of parties whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit. The Applicant relied on the case of **Technomatic Limited T/A Promopack Company –versus- Kenya Wine Agencies Limited & Another [2014] eKLR** where the court stated; -

“When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

- 1. He must be a necessary party.***
- 2. He must be a proper party.***
- 3. In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.***
- 4. The ultimate order or decree cannot be enforced without his presence in the matter.***
- 5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit”.***

On whether or not leave should be granted to amend the Counterclaim, the Applicant submitted that the proposed amendments are necessary for the purpose of bring to light and determining the real issue in controversy between the parties herein and that the Application for leave to amend has been made in the interest of justice, in good faith and without undue delay.

The case of **Central Bank of Kenya –versus- Trust Bank Limited [2000] 2 E.A Pg 368**, it was stated; -

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid the multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice on the other side.”

The Defendant/applicant deposed that the amendment is necessary to bring all parties and issues before the Court to avoid multiplicity of suits.

PLAINTIFF/RESPONDENTS' SUBMISSIONS

The Respondent submitted that The case of **Central Bank of Kenya –versus- Trust Bank Limited [2000] 2 E.A Pg 368**, it was stated; -

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid

the multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice on the other side.”

The Respondent submitted that Under **Section 90 (3) of the Land Act** a Mortgagee cannot exercise two options of realizing security and at the same time sue the Mortgagor. The Applicant can only sue when the whole amount has not been realized after exhausting the realization process. In this case it cannot be said that the security was insufficient when realization is not complete and has not been exhausted.

The Respondent further submitted that the Counterclaim is a suit on its own which can exist even with the withdrawal or dismissal of the main suit hence the Applicant cannot be allowed to bring proceedings against the proposed Defendants without complying with the relevant provisions of the law. In the case of ***Patrick Waweru Mwangi & Another -versus- Housing Finance Company of Kenya Ltd [2013] eKLR*** the court stated; -

“The court is empowered under Section 91(2) of the Land Act to stop the commencement of any proceedings until the Chargee in this case the Applicant has exhausted all the remedies available to it under Section 90(3) of the Land Act.”

Further, that the amendment of pleadings can be denied if it may prejudice the Respondent and in this case there was no service upon the proposed Defendants. Failure to serve is proof that the Applicant is not acting in good faith and its actions will prejudice the Respondents.

The Plaintiff/Respondent submitted that the Defendant/Applicant is involved in litigation in Tanzania over assets forming the subjectmatter of the suit.

The Defendant/Applicant has not exhausted the realization of the securities and seeks to join guarantors to realize the outstanding debt without completing sale of securities first before embarking on the next mode of realization of the debt.

Clesoi Holdings Ltd vs Prime bank Limited (2016) eKLR the Court observed that the remedy available to the Chargee cannot be used simultaneously and one can only sue when the security is insufficient.

In this case, the Plaintiff/Respondent submitted that the security cannot be insufficient when the realization process is not completed. The Applicant admits to disposal of additional securities but there is accounting of what was realized and what remains outstanding.

The proposed interested parties are guarantors, the liability of the guarantor is not only to perform if the principal fails to do so but to ensure the principal performs its obligations and therefore deserves to be notified before a suit is filed against the guarantor. Without a demand the guarantor has no obligation to honour the guarantee

See ***Kenya Commercial Bank vs Kipngeno Arap Ngeny & Anor 92002) 1KLR 106 & Delphis Bank Ltd (under Statutory Management) vs Shield Hire Purchase Ltd & 4 Others (2007) eKLR***

DETERMINATION

The Court considered the pleadings and submissions by parties through Counsel and the issue for determination is whether the Defendant/Applicant may amend the Counterclaim and join proposed 3rd parties to the Counterclaim/Suit.

The Applicant’s claim is that **Order 1 Rule 10 CPR 2010** allows for parties to be joined relevant to the subject matter to enable the Court determination of the matter without multiplicity of suits.

The sale of assets pursuant to the Ruling of Hon LJ R. Ngetich of 13th December 2018 have not been able to redeem the amounts outstanding which are quite substantial.

The assets taken out of the jurisdiction still continue to remain outside the jurisdiction of the Court and despite an order for repossession the same has not been effected, the execution is frustrated by plaintiffs and proposed guarantors.

The Legal Charge over Reference 209/103201/1 partly secured the outstanding debt by Plaintiffs. Efforts to dispose the suit property has not been successful despite various auctions.

This Court whereas agrees in principle that the amendment of the Counterclaim and joining of the proposed interested parties being guarantors and Directors of the Plaintiff Company at this stage is premature for the following reasons;

a) The Directors/Guarantors ought to be served with demand notices, that the Applicant is calling up performance of the guarantee (s) failure to which they will be sued and hence lawfully joined as parties to the Counterclaim and these proceedings.

b) The Court orders of the Ruling of 13th December 2018 was that if the Plaintiff failed to deposit Ksh 25,239,047 by 26th November 2018, then repossession of the trucks/vehicles was allowed. Before , the guarantors are notified and demand Notices issued , the proceeds of the repossession and sale of the trucks ought to be disclosed and therefore the outstanding debt ought to be after deduction from proceeds of sale emanating from the Court Ruling of 13th December 2018.

c) If there is no disclosure and/or reconciliation of accounts of the facility, repayments, arrears from default by Plaintiff’s to service

the facility, proceeds of sale/auction of securities and there fore the outstanding debt, then the Guarantors will be unfairly notified and/or joined to proceedings without knowing the outstanding debt and will be prejudiced if the total amount is due from them instead of the principal debtor whose part of assets have been sold.

DISPOSITION

1.The Application is stayed at this stage pending exhaustion of the sale of securities and/or reconciliation of accounts from proceeds of sale of assets and outstanding debt within 90 days.

2.The Guarantors may be notified by service of Demand Notices calling up for performance of guarantees.

3.Each party to bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 3RD AUGUST 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONS OF 17TH APRIL 2020)

M.W. MUIGAI

JUDGE