



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 512 OF 2014

CONSOLIDATED BANK OF KENYA LIMITED.....DECREE HOLDER/APPLICANT

VERSUS

PINE CRIB APARTMENTS CO. LTD.....JUDGMENT DEBTOR

JOHN THONGORI & CO. ADVOCATES.....2ND RESPONDENT

CHINA WU YI COMPANY LIMITED.....GARNISHEE

AND

MASHARIKI INVESTMENTS LIMITED.....INTERESTED PARTY/RESPONDENT

RULING

1. The ruling relates to a notice of motion application dated 13th May 2019, brought under the provisions of Section 1A, 1B & 34 of the Civil Procedure Act, Order 22 Rule 1 of the Civil Procedure Rules, 2010 and Section 101(c) of the Land Act.

2. The applicant is seeking for orders;-

(a) That the rental income of Kshs. 5,880,000 in respect of L.R. No. 4871/126 (IR No. 125294) original No. 4871/23/2) held in the joint escrow account No. 100121202001379 between the decree holder and the interested party be apportioned as follows:-

(i) The sum of Kshs. 2,100,000 in respect of the decree holder's taxed costs pursuant to the Certificate of Taxation dated 27th April 2017 be paid to the firm of Wamae & Allen Advocates;

(ii) The balance of Kshs. 3,780,000 be equitably apportioned between the decree holder and the interested party as follows:-

(a) Kshs. 3,621,935.48 to the decree holder;

(b) Kshs. 158,064.52 to the interested party

(b) Costs of the application to the decree holder.

3. The application is premised on the grounds on the face of it and an affidavit of even date sworn by; Billy Ubindi, an employee of the decree holder. He avers that judgment was entered against the judgment debtor on 22nd June 2016 in the sum of Kshs. 100,000,000 and the costs and interest. The costs were taxed on 25th April 2017 in the sum of Kshs. 2,100,000. The charged property was sold by public auction to the interested party on 23rd January 2018 for Kshs. 74,100,000

4. However, the interested party did not complete the payment of the purchase price and by a letter dated 24th January 2019, the bank's advocates reminded the interested party's of the delay in completing the registration process and breach of their professional undertaking dated 19th July 2018.

5. Subsequent to 28th January 2019, the bank sent several reminders and demands to the interested party's advocates seeking payment of the balance of the purchase price and threatened to enforce the terms of the undertaking. After several demands the interested party's advocates by a letter dated 22nd March 2019 confirmed that the balance of the purchase price was paid on 22nd March 2019. By a letter dated 18th April 2019, the tenant's advocate was advised that all future rent should be paid to the interested party. In the meantime, the transfer dated 5th September 2018 was registered on 28th January 2019.
6. In the meantime, by a notice of motion application dated 11th April 2018, the decree holder applied to attach the rental income from the charged properties towards settlement of the decretal amount and subsequent apportionment of rental income with the interested party upon successful registration of the transfer. On 25th March 2019, the bank's advocate sought to record a consent on the apportionment of the rental income and set out the formula in a consent dated 25th March 2019.
7. That the interested party is only entitled to interest after 22nd March 2019 when it paid the balance of the purchase price. That at the time the consent was sent, the bank's advocates inadvertently overlooked the issue of the taxed costs which were to be paid out of the rental income towards satisfaction of the decretal sum. It is further argued that pursuant to Section 101(c) of the Land Act, costs are to be paid in priority and the decree holder's advocates taxed costs are to be deducted from the rental income which was attached to settle the decretal amount.
8. Further, under Section 98(4) of the Land Act, interest in a land purchased in a public auction demands that possession be given after payment of the balance of the purchase price as it would be inequitable to derive a benefit when the contractual obligations for payment have not been met. The delay by the purchaser in completing payment of the purchase price impacted on the recovery of the debt and the interested party has no legal or equitable right to claim any substantial portion of the rental income as it substantially delayed in payment of the balance of the purchase price for almost a year since the property was sold by public auction.
9. However, the application was opposed vide a replying affidavit dated 4th June 2019, sworn by the respondent's director Stephen Mutimba. He averred that pursuant to the consent order dated 25th July 2018, there is a sum of Kshs. 5,880,000 held in a joint escrow account between the decree holder and the interested party from the rental income for the months of April 2018 to March 2019.
10. That the interested party was not a party to the proceedings filed by the decree holder in respect of the chargor's/judgment debtor's breach of the charge dated 22nd June 2011 against L.R. No. 487/126 (I.R. No. 12594) and should therefore not be dragged into the issue of any professional fees payable to the advocates of the decree holder. Further, the fact that, the decree holder filed the notice of motion dated 11th April 2018 does not disentitle the interested party of its rightful share of the rental income earned from the suit premises.
11. That on 23rd January 2018, the interested party being the highest holder it paid a sum of Kshs. 18,600,000 to the decree holder at the fall of the hammer as deposit of the purchase price of the suit property. Thereafter on 30th April 2018 and 28th May 2018 it paid to the decree holder a further sum of Kshs. 3,000,000 and Kshs. 2,500,000 respectively in part settlement of the purchase price of the suit property. Therefore effectively as at 25th July 2018, when the consent order was recorded before court, the interested party had paid a total sum of Kshs. 24,100,000 of the purchase price of Kshs. 74,100,000 which amounts to 32% of the purchase of the suit property.
12. By virtue of these payments made to the decree holder, by the interested party prior to the registration of the transfer in favour of the interested party, it is correct to state the interested party had garnered a significant interest and stake in the suit property and this stake ought to be considered as a reasonable basis for the sharing ratio of the rental income.
13. That contrary to the picture that the decree holder seeks to paint in paragraphs 6,7 and 8 of its supporting affidavit, the delay in the completion of the transfer of the suit property to the interested party was occasioned by the discovery of a caveat registered against the title by one Mr. Surjit Singh claiming a purchaser's interest over apartment No. 3 situate on the subject property pursuant to an agreement for sale dated 4th November 2015. The interested party raised this issue with the decree holder way back in May 2018.
14. Thus the decree holder understood and appreciated the significance of having the caveat lifted to pave way for the registration of the transfer that, it not only promised the interested party that its advocates would attend to the lifting and/or withdrawal of the same but its lawyers also worked to get the same lifted. It is therefore incorrect to place the blame of the completion of the registration of the transfer upon the interested party as it is clear that the decree holder bore the greatest responsibility for the delay in completion of the transfer of the property for its failure to address the caveat timeously. Thus it would be punitive to the interested party if the sharing of the rent were to be pegged on the date of the payment of the balance of the purchase price.
15. The interested party averred that, clause 8 of the memorandum of sales dated 23rd January 2018 between the decree holder and the interested party provides that; "the property is sold subject to all rights, easements, covenants, conditions, agreement, overriding interests, restrictions, rent and other matters affecting the property, including all subsisting leases and tenancies...." Further as evidenced by emails of 27th July 2018 and 22nd August 2018 from the decree holder's advocates to the interested party's advocates, it is clear that, the interested party was at all times entitled to a significant share of the rental income than the one being proposed in the decree holder's application.
16. That, the decree holder has misapprehended sections 98(4) and 101(c) of the Land Act, 2012 as the rental income in question does not form part of the purchase price thus the same cannot be directed towards the payment of costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale. However, if the court finds that the interested party is not entitled to 50% of the rental income as from 1st April 2018, then, it should order that it is entitled to 32% up to 28th January 2019, when the registration of the transfer was effected and thereafter, it is entitled to the full portion of the rental income.
17. The application was disposed of by filing of submissions. The applicant submitted that, the sale was pursuant to a decree of the court and the rental income pursuant to the decree holder's garnishee application is a proceed from sale of the charged property. That, section 101

of the Land Act gives provisions as to the priority on how proceeds from sale of charged land are utilized, as set hereunder;

- (a) first, in payment of any rates, rents, taxes, charges or other sums owing and required to be paid on the charged land;
- (b) second, in discharge of any prior charge or other encumbrance subject to which the sale was made;
- (c) third, in payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale;
- (d) fourth, in discharge of the sum advanced under the charge or so much of it as remains outstanding, interests, costs and all other money due under the charge, including any money advanced to a receiver in respect of the charged land under section 92; and 75 No. 6 Land 2012;
- (e) fifth, in payment of any subsequent charges in order of their priority, and the residue, if any, of the money so received shall be paid to the person who, immediately before the sale, was entitled to discharge the charge.

18. Further pursuant to section 101(c) of the Land Act, costs are to be paid in priority and the decree holder's advocates taxed costs are to be deducted from the rental income. Therefore, the payment of Kshs. 2,100,000 to the firm of Wamae & Allen Advocates as taxed on 25th April 2017, is justified since it falls within the ambits of section 101(c) of the Land Act, the rent withheld being proceeds from the sold property.

19. The Applicant relied on section 98(4) of the Land Act which provides that;

“Upon registration of the land or lease or other interest in land sold and transferred by the chargee the interest of the chargor as described therein shall pass to and vest in the purchaser free of all liability on account of the charge, or on account of any other charge or encumbrance to which the charge has priority, other than a lease easement to which the chargee had consented in writing”

and submitted that, the apportionment of the balance should be prorated on the day of payment of the balance of the purchase price which was on 22nd March 2019.

20. The case of; *Stephen Kibowen vs. Agricultural Finance Corporation (205)eKLR*, was cited where the court held that; property passes upon transfer and registration and not at the time of sale. The applicant then proposed that after the payment of the advocates costs, the balance of Kshs. 3,780,000 should be equitably apportioned between the decree holder and the interested party as follows;

a) To the interested party

22nd March 2019 to 31st March 2019 – 10 days

Rent per month is Kshs. 490,000

Rent for 10 days is Kshs. 490,000 * 10/30 = Kshs. 158,064.52

b) To the decree holder

The balance being Kshs. 3,880,000-158,064.52 = Kshs. 3,621,935.48

21. Finally, the applicant submitted, the maxims of equity dictate that, “*he who comes to equity must come with clean hands*” the interested party cannot seek equal amount of rent for it had already breached clause 3(b) of the memorandum of sale. In doing so, it would be coming to court with unclean hands.

22. However, the interested party submitted that, the firm of Wamae & Allen Advocates is not entitled to Kshs. 2,100,000 or any part of the proceeds of the rental income in the escrow account for the following reasons;

(a) *The section 101(c) of the Land Act that the law firm purports to rely on does not aid it as the same relates to “proceeds from sale of charged land”. That clearly, rental income is not sale proceeds and therefore does not apply in this case.*

(b) *The certificate of costs in favour of the firm is against the 1st defendant/judgment debtor and there is no justification whatsoever why the costs should be borne by the interested party.*

(c) *The decree giving rise to the costs being claimed by the firm of; Wamae & Allen Advocates was issued on 22nd June 2016, pursuant to a consent/compromised judgment between the decree holder and the 2nd defendant The interested party bought the suit property on 23rd January 2018, which is well after the advocates' costs were taxed and the certificate of costs was issued on 27th April 2017,.*

23. The Respondent submitted that the rental income should be shared on a 50% basis between itself and the decree holder until 28th January 2019, when the transfer in favour of the interested party was registered and thereafter the interested party be entitled to 100% of the rental

income for the reasons that; section 98(8) of the Land Act, 2012, provides inter alia, "...for the purposes of this section, land, a lease or a charge shall be deemed to have been sold when a bid has been accepted at the auction sale..." .

24. However if the court were to find that the interested party is not entitled to 50% of the rental income from the date of the auction, the court should take note of the fact that as at 28th May 2018, the interested party had paid a sum of Kshs. 24,100,000 out of the purchase price of Kshs. 74,100,000 which amounts to 32% equity in the suit premises. If the court opts to base the interested party's share of the rent on its equity, then the rental income in the escrow account ought to be shared with the decree holder taking 68% of the rent and the interested party 32% but only up to 28th January 2019, when the property was registered in favour of the interested party.

25. As such with effect from the said date, the interested party is entitled to 100% of the rental income in line with section 98(4) of the Land Act, 2012, as the amount of Kshs. 158,064.52 that the decree holder purports to apportion to the interested party has no basis in law.

26. I have considered the application, the arguments advanced and the submissions alongside the annexures to the respective affidavits, filed by the parties and I find that the issues have arisen for consideration are as follows:-

- (a) *On what basis should the apportionment of the subject sum in the escrow account be based as between the parties herein?;*
- (b) *Is the law firm of Wamae & Allen entitled to the costs of Kshs. 2,100,000 or any part thereof and if so whether it is payable from the rental income;*
- (c) *Is the interested party liable to pay the taxed costs in favour of the subject law firm or is it the 1st defendant liable to pay.*

27. In dealing with these issues the following salient factors are relevant;

- (a) *The judgment in favour of the decree was entered on 26th June 2016;*
 - (b) *The costs in favour of the subject law firm was taxed on 24th April 2017;*
 - (c) *The property was sold to the interested party through a public auction on 23rd January 2018;*
 - (d) *The interested party made payments towards the purchase price of the property as follows;-*
 - (i) *On 23rd January 2018, Kshs. 18,600,000;*
 - (ii) *On 30th April 2018, Kshs. 3,000,000;*
 - (iii) *On 25th August 2018, Kshs. 2,500,000;*
- Total Kshs. 24,100,000*
- (e) *The order for deposit of rental income into the escrow account was made on 25th July 2018;*
 - (f) *The escrow account was opened in the joint names of the lawyers representing the decree holder and the interested party;*
 - (g) *The subject rent in the escrow account relates to the period of April 2018 to March 2019 and the transfer instrument in favour of the interested party was effected on 28th January 2019.*

28. It is clear from the above analysis that, at the time the escrow account was opened on 25th July 2018, the interested party had deposited a total sum of Kshs. 21,600,000 with the decree holder. It therefore follows that, whether the balance of the purchase price had been paid or not, and/or the transfer had been registered or not, the decree holder was already enjoying the benefits of the deposit made by the interested party. If this sum was held in a bank account, it would definitely earn interest.

29. In addition, more payments were indeed made after the 25th July 2018. A sum of Kshs. 2,500,000 was paid one month thereafter and the balance of the purchase price of Kshs. 50,000,000 paid on 22nd March 2019. Therefore clearly the decree holder cannot argue that the interested party has no legal or equitable right to claim any portion of the rental income before 22nd March 2019, when the full purchase price was paid. It is noteworthy that, subject the rent relates to the period of April 2018 to March 2019. The decree holder cannot have been benefiting from the proceeds of the sale and deny the interested party equivalent rights. If indeed the failure to pay the full purchase price on time did not confer any rights to the interested party, over the property, then by the same vein, it cannot have conferred any rights to the decree holder over the purchase price.

30. Even then, it is not in dispute that the transfer was registered on 28th January 2019 in favour of the interested party. This is clearly noted in the letter dated 18th April 2019 from the law firm of Wamae & Allen advocates to the tenants informing them to pay rent to the interested party. The registration of the transfer, effectively conferred upon the interested party the legal and equitable interest in the property and the interested party was immediately entitled to all the rights that accrued thereto. This is supported by the provisions of Section 98(4) of the Land Act. I therefore hold that, the apportionment of the rent cannot be based on the date of the payment of the final installment of the

purchase price.

31. As regards the issue of which party should pay the taxed costs or whether the costs are payable from the rental income, I find and hold that, it is not an issue for determination herein. The issue herein is the apportionment of the rental income. The law firm is not a party to the escrow account and any apportionment can only be made between the two parties thereto; the decree holder and the interested party.

32. In conclusion I make the following:-

(a) The sum apportioned will be based on the amounts paid by the interested party and not on the date of registration of the transfer as it is evident that although the transfer was registered earlier than the payment of the balance of the purchase price before 22nd March 2019 as confirmed by the letter of the even date, written by Kirundi & Company Advocates to the firm of Wamae & Allen Advocates enclosing the RTGS remittance slip dated 22nd March 2019. The last payment is the relevant factor. Therefore the apportionment in the ratios here below shall be calculated up to the 22nd March 2019.

(b) The sum in the escrow account shall be apportioned based on payments made by the interested party as at the time when the account was opened and during the period thereof which the interested party states to be 32% of the purchase price, therefore the rental income shall accrue to the interested party at 32% and 68% to the decree holder;

33. Consequently, the application dated 13th May 2019 is not allowed in terms of the prayers therein but in terms of the prayers set herein above. I order each party to bear its own costs.

34. It is so ordered.

Dated, delivered and signed in an open court this 26th day of February 2020.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Waigwa for the for the decree holder/applicant

Mrs. Akulo for the for the interested party

Robert.....Court Assistant