



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E014 OF 2020

BETWEEN

GIDEON MUSYOKA NDAMBUKI.....PLAINTIFF

AND

HOUSING FINANCE COMPANY OF KENYA LTD.....DEFENDANT

RULING

1. It is common ground that the plaintiff charged his property; MACHAKOS TOWN/BLOCK II/284 (“the suit property”) to secure advances for Roof Garden Hotel from the defendant (“the Bank”). Due to default in repayment of the loans, the Bank expressed its intention to sell the suit property by public auction on 4th February 2020 in exercise of its statutory power of sale. On 31st January 2020, the plaintiff filed a plaint accompanied by a Notice of Motion seeking to restrain the Bank from auctioning his property.

2. On the date of the auction, 4th February 2020, the parties recorded the following consent order (“the Consent Order”):

By consent of the Parties the public auction of the suit property scheduled for today the 4th day of February 2020 be stopped on the following conditions:

- 1. THAT the Plaintiff pays to HFC Ltd a sum of Kenya Shilling Five Million (Kshs. 5,000,000/-) on or before 5th February 2020.*
- 2. The Plaintiff pays auctioneers fees in connection with the stopped public auction together with legal fees within 14 days from today;*
- 3. The Plaintiff to pay in full the balance of the arrears within 30 days from today; and*
- 4. In default of any of the foregoing conditions, the Defendant be at liberty to advertise the suit property.*

3. In due course, the Bank advertised the suit property for public auction on 14th April 2020. The plaintiff once again moved the court by a Notice of Motion dated 26th March 2020 seeking injunctive relief pending the hearing and determination of the application and, “An order be and is hereby issued directing the Plaintiff to liquidate the outstanding arrears within 45 days from the date when the Land Registry at Nairobi resumes operations.”

4. The motion was supported by the plaintiff’s supporting and supplementary affidavit sworn on 26th March 2020 and 11th May 2020 respectively. The plaintiff stated that he paid Kshs. 4.6 million in compliance with the consent order. He did not receive the claim for the Bank’s advocates’ fees until 5th March 2020 when the suit property had already been advertised and that he was unable to clear the outstanding arrears due to a delay in the transfer process of his other property, LR 2259/707, situated in Karen, Nairobi due to the COVID-19 pandemic. He also informed the court that Machakos Teacher SACCO is ready to offer him money to enable him clear the arrears to the Bank. He therefore prays to be given 45 days to clear the arrears when the Lands Registry in Nairobi shall be reopened to enable him complete the transfer. He also depones that the Government of Kenya owes him money which he is still trying to recover.

5. The Bank opposed the application through the affidavit of Belinda Ng'ang'a, its Head of Legal, sworn on 16th April 2020. The thrust of its contention is that the application is *res-judicata* and that the prayer for the injunction would not serve any useful purpose since there was no prayer for injunctive relief in the plaint. The Bank took the position that the plaintiff had not made out the grounds for review of the Consent Order. As regards the evidence presented by the plaintiff, the Bank contended that there was no proof that LR 2259/707 belonged to him. It stated that the plaintiff was using the COVID-19 pandemic to avoid his contractual obligations.

6. Both parties filed written submissions which they highlighted briefly. The issue as I see it is whether the court can vary the Consent Order recorded by the parties. A consent order is in the nature of a contract and as the Court of Appeal stated in ***National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR***, "A court of law cannot re-write a Contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

7. It follows then that a consent order can only be set aside on the same grounds that would be available to invalidate or vary a contract as the Court of Appeal recently affirmed in ***S M N v Z M S & 3 Others [2017] eKLR*** that:

Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an arrangement contrary to the policy of the court ... or if consent was given without sufficient material facts or in misapprehension or ignorance of such material facts, or in general for a reason which would enable the court to set aside an agreement.

8. Has the plaintiff established any basis for the intervention by the court? The issues raised by the plaintiff about its efforts to look for money to clear its indebtedness to the Bank do not fall within the settled grounds for setting aside or varying a consent order. Further, the COVID-19 pandemic came after the plaintiff has already defaulted on its obligations under the Consent Order. The plaintiff has stated that he paid Kshs. 4.6 million and not Kshs. 5.0 million which amounts to prima facie default. Having admitted that he has not settled the arrears as agreed in the Consent Order, the Bank is now entitled to exercise its statutory and contractual remedies.

9. The plaintiff has not established a case for variation of the Consent Order dated 4th April 2020. I dismiss the Notice of Motion dated 26th March 2020 with costs to defendant. For avoidance of doubt the interim injunction issued on 1st April 2020 is hereby discharged.

DATED and DELIVERED at NAIROBI this 26th day of JUNE 2020.

D. S. MAJANJA

JUDGE

Mr Magara instructed by Magara Dennis and Company Advocates for the plaintiff.

Mr Molo instructed by Mutua Waweru and Company Advocates for the defendant.