



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 229 OF 2017

BETWEEN

UPWAYS INVESTMENTS LIMITED PLAINTIFF

AND

HF GROUP (Formerly

HOUSING FINANCE COMPANY OF KENYA LTD) 1ST DEFENDANT

MUGA AUCTIONEERS & GENERAL MERCHANTS 2ND DEFENDANT

TAIFA AUCTIONEERS 3RD DEFENDANT

RULING

1. Before I deal with the plaintiff's application, I will set out a brief background of the matter. It is not in dispute that the plaintiff received from the 1st Defendant ("the Bank") loan facilities amounting to Kshs. 210 million. Kshs. 125,000,000 was secured by LR No. 13330/431 while Kshs. 85,000,000 was secured by LR No. 13330/445 and 13330/446 ("the suit properties"). In due course, the plaintiff defaulted in servicing the loan and the Bank expressed its intention to sell the suit properties by public auction.

2. The plaintiff filed the plaint dated 30th May 2017 in which it sought several orders including a permanent injunction halting the intended sale of the suit properties and orders compelling the Bank to provide statements of accounts and re-calculation of interest. The plaint was accompanied by a Notice of Motion dated 30th May 2017 seeking interlocutory relief. The Bank opposed the application.

3. On 18th July 2019, the parties appeared before Kasango J., and recorded the following consent order ("the Consent Order"):

THAT the 1st Defendant herein accepts the negotiated amount, Kenya Shillings Sixty Million (Kshs. 60,000,000) all-inclusive in full and final settlement of the Plaintiff's indebtedness and of the suit subject to the following terms and conditions:

a) Receipt by the 1st Defendant of an acceptable Bank undertaking to be procured by the Plaintiff to fully liquidate the negotiated amount in the next 90 days and in any event, not later than 29th July 2019 by way of Real Time Gross Settlement (RTGS) as per the Bank payment details as set out here below [BANK DETAIL]

b) The recovery process shall be halted upon receipt of the said undertaking.

c) The title documents and a duly executed discharge of charge shall be released to the Plaintiff upon receipt of the entire negotiated amount of Kshs. 60,000,000.

d) Upon receipt of the entire negotiated amount of Kshs. 60,000,000, the 1st Defendant shall liquidate the indebtedness relating to this account and forego any resultant shortfall that shall arise on the loan balance. The 1st Defendant shall not be responsible for any incidental costs that arise out of this transaction.

e) In the event of delay and/or failure of remittance of the negotiated amount of Kshs. 60,000,000, the 1st Defendant shall be at liberty to recover the full debt of the account and proceed with realization process to recover the full debt owed, currently standing at Kshs. 93,959,335 as at 29th April 2019.

f) The terms and conditions herein supersede the offer letter dated 11th April 2019.

g) The plaintiff shall pay Wacira Wambugu & Co., Advocates LLP the outstanding legal fees of Kshs. 500,000/- (Kenya Shillings Five Hundred Thousand) by way of Real Time Gross Settlement (RTGS) within seven (7) days of filing this consent.

4. The plaintiff has now moved the court by the Notice of Motion dated 22nd April 2020 made under **section 1A, 1B and 3A** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)**, **Order 40 rules 1, 2, 3 and 4** and **Order 50 rule 1** of the **Civil Procedure Rules**, the Constitution of Kenya and all other enabling laws of Kenya seeking the following orders:

a. ----- [Spent] -----

b. ----- [Spent] -----

c. THAT this Honourable Court be pleased to issue an interlocutory prohibitory injunction restraining the 1st and 2nd Respondents, its agents and/or assigns from dealing with, disposing of, selling or otherwise interfering with the titles to properties known as LR NO. 13330/445 and LR NO. 133300/446 located in Thome area within Nairobi City County (hereinafter "the suit property") pending the inter-parties hearing of this motion and determination of this suit.

d. THAT this court be pleased to extend the time for the Applicant to comply with the Consent Order dated 17th June, 2019 from 29th July 2019 to 1st December, 2020.

5. The application was supported by the affidavit of John Kabuba Njoroge, the plaintiff's managing director, sworn on 22nd April 2020. The Bank opposed the application through Grounds of Opposition dated 13th May 2020 and the replying affidavit of its Assistant Legal Manager, Joseph Lule, sworn on 13th May 2020.

6. The facts upon which the application is made are set out in the deposition by Mr Njoroge. He explained that prior to the consent, the plaintiff had, on 17th June 2019, identified a local investor, Capitaland East Africa Ltd, which was receiving financing for the commercial project on the suit property from a bank in the United Arab Emirates, NBD Bank. The Bank insisted on having an acceptable undertaking from a local bank, to clear the outstanding loan amount but this deal did not succeed within the time limited by the consent order.

7. According to Mr Njoroge, the plaintiff has now identified a purchaser for the suit property for Kshs 267,000,000/= whose financier, Equity Bank issued a bank undertaking dated 22nd November 2019 for Kshs 87,638,345.95/= to the Bank in order to set off the debt. The Bank however took over 1 month to consider the undertaking and responded on 19th December 2019 giving its preferred format for the bank to bank undertaking. Following the change in the terms of the undertaking, Equity Bank had to take more time in the re-issue of the bank to bank undertaking causing delay in meeting the terms of the Consent Order.

8. Mr Njoroge further deponed that the plaintiff incorporated, Pillar Place Limited, a real estate development company and partnered with Cementers Limited for the development of a commercial development consisting of various retail shops and residential apartments on the suit property. Cementers Limited intended to obtain financing amounting to USD 12,500,000 from Eclectic Eton Enterprises Inc through JPMorgan Chase Bank NA situated in New York, USA. Part of the financing would be used to clear the Bank's debt.

9. It was further deponed that the plaintiff, through its real estate company, entered into a joint venture agreement with an American company, Hedra Holding SRL, for the disbursement of the USD 12,500,000 but due to the COVID-19 global pandemic, disbursement of funding from JPMorgan Chase Bank has been delayed. The plaintiff therefore prays that the time for compliance with the consent order be extended to enable the US based financier disburse the funds to enable it clear its debt to the Bank.

10. In response to the plaintiff's case, Mr Lule explained that the plaintiff had previously filed an application for an injunction over the suit properties but the application was dismissed by the Court sometime in 2017. The plaintiff was granted interim conditional orders extending the period to pay off Kshs. 52,507,472 due in February 2017 for a period of 30 days and then a further period of 90 days to pay off the said arrears. Despite the injunction application being dismissed, the plaintiff consistently failed to pay off the arrears owed to the Bank despite being accorded various opportunities to pay off the debt over a period of over 3 years during which time the Bank has also put of various auctions following various promises by the plaintiff to pay off the debt.

11. Mr Lule stated that despite the plaintiff being indebted to the Bank for Kshs 93,950,335 as at 29th April, 2019, it accepted Kshs. 60,000,000 all-inclusive as full and final payment. The Bank contended that the plaintiff willingly recorded the Consent Order and as a result the Bank suspended all recovery proceedings to allow the plaintiff to comply with its provisions. According to Mr Lule, the plaintiff failed to procure an acceptable Bank undertaking to fully settle the Kshs. 60,000,000 by 29th July 2019. It also failed to pay the Kshs. 60,000,000 on or before 29th July 2019. By a letter dated 2nd August 2019, the Bank notified the plaintiff of the default and since the plaintiff failed to make payment, the Bank proceeded to instruct its agents to schedule another public auction on 20th November 2019. The plaintiff sought further indulgence from the Bank and the Bank wrote a letter dated 15th November 2019 offering to suspend the auction if the plaintiff paid Kshs. 86,500,000, the auctioneer's and valuation fees. Since the plaintiff failed to accept the Bank's offer, it lapsed and the Bank once again proceeded with recovery since no further payments were made.

12. It is the position of the Bank that the plaintiff owes it Kshs. 115,356,927.40 as at 30th April 2020, which amount continues to accrue interest and default charges. Mr Lule deponed that the plaintiff has not made any monthly payments on the loan accounts since 2017, a period exceeding 3 years.

13. What the plaintiff seeks and the main issue for consideration by the court is whether the court can extend the time for the applicant to comply with the Consent Order. Without belabouring the point, the principles upon which the court may set aside or vary a consent order are well settled and have been re-stated by our courts in several cases. Some of these cases include **Hirani v Kassam [1952] 19 EACA 131** where the court stated as follows:

The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here.

In **Brooke Bond Liebig Ltd v Mallya [1975] EA 266** the Court stated that:

[A] consent order cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

While in **Flora Wasike v Destimo Wamboko [1988] 1 KAR 625**, the Court of Appeal stated as follows;

It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out....

14. The aforesaid principles have been restated by the Court of Appeal recently in **East Africa Portland Cement Limited v Superior Homes Limited NRB CA Civil Appeal No. 158 of 2014 [2017] eKLR** and **S M N v Z M S & 3 Others [2017] eKLR** where the Court expressed the view 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.

15. The question for determination then is whether the plaintiff has established misrepresentation, fraud, collusion, lack or ignorance or any other factors that would invalidate an otherwise lawful bargain. I have no doubt that the Consent Order was entered into voluntarily in order to put an end to the suit and settle the plaintiff's debt owed to the Bank. It is also not in dispute that the plaintiff has failed to comply with the terms of the Consent Order.

16. What the plaintiff seeks is the courts indulgence to enable it complete certain financial arrangements to enable it settle its indebtedness. The Bank has given a long history of granting the plaintiff indulgence. Now that the requests were exhausted by the Consent Order, the plaintiff has not turned to the court to vary a valid consent. The plaintiff has not made any allegation of any fraud, misrepresentation or like ground that would invalidate the Consent Order.

17. Even if I accept that the plaintiff has made great effort to make pay off the debt, I cannot force the Bank to accept the plaintiff's proposal outside what the parties had already agreed. The parties are to be held to their bargain consummated in the Consent Order hence I am not inclined to intervene particularly in this case where the Bank has been kept out of its money for a period of over 3 years. Clause (e) of the Consent Order entitles the Bank to exercise its contractual and statutory remedies.

18. In conclusion, I find and hold that the plaintiff has not established a case for variation of the Consent Order dated 18th July 2019. I dismiss the Notice of Motion dated 22nd April 2020 with costs to the 1st defendant.

DATED and DELIVERED at NAIROBI this 22nd day of JUNE 2020.

D. S. MAJANJA

JUDGE

Mr Muindi instructed by Wacira Wambugu and Company Advocates LLP for the plaintiff.

Ms Abuya instructed by Walker Kontos Advocates for the 1st defendant.