



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO 316 OF 2018**

**ISAAC'S INVESTMENT COMPANY LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**FIRST COMMUNITY BANK LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**REGENT AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The subject Application herein is dated 17<sup>th</sup> June 2020, brought under the provisions of Order 45 Rules 1 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and all other enabling provisions of the law.
2. The Applicant is seeking for orders that, the Honourable Court be pleased to review the orders issued on the 19<sup>th</sup> February 2020, and reinstate the Interlocutory Orders it granted on the 9<sup>th</sup> of August 2018 and the costs of the Application be provided for.
3. The Application is based on the grounds on the face of it and an affidavit of the even date and a further affidavit dated 13<sup>th</sup> July 2020, sworn by **Ali M. Isaac**, a director of the Plaintiff's company, authorized by co-directors to swear the affidavits on their behalf.
4. He averred that, the Plaintiff (herein "**the Applicant**") filed the suit herein on 8<sup>th</sup> August 2018, together with an Application of the even date seeking for prayers inter alia that, an injunction be issued to restrain the sale of the subject suit property herein. On 9<sup>th</sup> August 2018, the Court issued orders directing that the status quo, be maintained pending the hearing and determination of the Application and gave directions on the disposal of the Application. However, the Application is still to be heard and determined.
5. Subsequently, the 1<sup>st</sup> Defendant (herein "**the 1<sup>st</sup> Respondent**"), commenced the process of the sale of the suit property after the Court vacated the *status quo* order. The Applicant once again applied for stay of sale of the suit. On 7<sup>th</sup> May 2019, the parties recorded a consent wherein, the auction scheduled for the 9<sup>th</sup> May 2019, was suspended on agreement that, the Applicant would avail fifteen (**15**) units of the suit property, within 30 days of the date of the order for joint valuation to determine the value thereof.
6. However, the Applicant avers that, it did not participate in the valuation as agreed nor signed any document to confirm participation in the valuation and therefore it is not satisfied with the manner in which the joint valuation was done. That an email dated 26<sup>th</sup> December 2019, was sent to **Claris Ajwang Ogombo** a Legal officer of the 1<sup>st</sup> Respondent complaining about the pricing of the units as valued.
7. It is argued that, even then, despite the consent recorded by the parties to value the said units, the Application dated 8<sup>th</sup> August 2018, raises serious issues *inter alia* that the Applicant was not served with the statutory notice nor a notification of sale under Section 96 of the Land Act, 2012. Further the 1<sup>st</sup> Respondent has breached the Islamic financing agreement entered into with the Applicant by exercising secular rights over an Islamic financial arrangement.
8. Similarly, as noted by the Court on 21<sup>st</sup> January 2020, the only issue agreed on is the advancement of money, therefore the other matters raised in the Application dated 8<sup>th</sup> August 2018 need to be canvassed and determined. That Application was never compromised by the consent as alleged.
9. However, the 1<sup>st</sup> Respondent opposed the Application through a replying the affidavit dated 6<sup>th</sup> July 2020, sworn by **Charles Roche**, acting Head of Finance of the 1<sup>st</sup> Respondent. He averred that, the Application is an abuse of Court process and a misrepresentation of facts. The Application dated 8<sup>th</sup> August 2018, came up for hearing inter parties on the 9<sup>th</sup> August 2018, wherein the parties consented to maintain

the *status quo*.

10. On 23<sup>rd</sup> September 2018, the Applicants advocates wrote to the 1<sup>st</sup> Respondent's advocates seeking to engage in negotiations with the view of reaching an amicable settlement which fact the Applicant reiterated on 29<sup>th</sup> November 2018. In the meantime, the Applicant did not file its submissions as directed by Court on the 9<sup>th</sup> October, 27<sup>th</sup> November 2018, 31<sup>st</sup> January and 4<sup>th</sup> March 2019, while relying on the *status quo* orders issued on 9<sup>th</sup> August 2018.

11. The 1<sup>st</sup> Respondent then moved to Court via an Application dated 28<sup>th</sup> February 2019, seeking among other orders, that the Court do vary the status quo order issued on 9<sup>th</sup> August 2018 and the Applicant be ordered to deposit the rental income from 20 unsold apartments in the suit property into Court. On 4<sup>th</sup> April 2019, the Court declined to extend the status quo orders. Therefore, there were no interim orders were in place restraining the 1<sup>st</sup> Respondent from taking any action with regard to the suit property.

12. The 1<sup>st</sup> Respondent then moved to exercise its statutory power of sale, wherein the Applicant filed an Application dated 2<sup>nd</sup> May 2019, seeking for an order of injunction to restrain the 1<sup>st</sup> Respondent from conducting the auction slated 9<sup>th</sup> May 2019. The Application was subsequently, compromised via a consent dated 7<sup>th</sup> May 2019, wherein the auction was suspended, and the Applicant agreed to avail fifteen (15) apartments of the suit property for valuation to be done jointly within 30 days to determine the value.

13. Pursuant to the consent order, on 8<sup>th</sup> May 2019, the 1<sup>st</sup> Respondent wrote to the Applicant's advocates forwarding details of three proposed valuers, for purposes of agreeing on the mutual valuer. On 23<sup>rd</sup> May 2019, the parties mutually consented to engage **Messrs Legend Valuers Limited**, who conducted a valuation on 6<sup>th</sup> June 2019.

14. Thereafter, the Applicant raised concern about the valuation vide a letter dated 4<sup>th</sup> July 2019, which concerns were responded to by the 1<sup>st</sup> Respondent vide a letter dated 8<sup>th</sup> July 2019. On 14<sup>th</sup> October 2019, the parties and their advocates held a meeting and agreed that, the sale of the fifteen (15) units would be guided by the valuation report prepared by the valuer agreed on by both parties.

15. The Applicant then filed another Application dated 9<sup>th</sup> January 2020, alleging an intention by the 1<sup>st</sup> Respondent to sell the units at a value not provided for in the joint valuation report. On 19<sup>th</sup> February 2020, when the Application came up for hearing, the 1<sup>st</sup> Respondent undertook to dispose of the units' subject of the joint valuation.

16. The 1<sup>st</sup> Respondent avers that, in the circumstances therefore, the Application dated 8<sup>th</sup> August 2018, was substantially determined and the matter ought to proceed for full hearing on the balance of the five (5) apartments not subject to the joint valuation as well as other matters raised in the plaint. That the current Application which seeks to impeach the consent order is meant to frustrate the 1<sup>st</sup> Respondent in its pursuit of its legal rights as a chargee under the undisputed charge documents executed between the parties.

17. Further, the Application to review the orders issued on 19<sup>th</sup> February 2020, cannot be sustained by the Court as the Applicant has not satisfied the legal threshold for a review. Finally, the sum of Kshs. 35,146,263/= alleged to be un accounted for was applied to the outstanding balance leaving the amount demanded by the 1<sup>st</sup> Respondent outstanding to date.

18. The Applicant averred in the further affidavit that the Auctioneer requested that a potential purchaser to visit the suit premises with a view of making an offer to purchase one of the units. The potential purchaser verbally offered a sum of Kshs.7,000,000/=, which is way below the market price of the units within the premises.

19. On 17<sup>th</sup> June 2020, the 1<sup>st</sup> Respondents issued a notice all the tenants, of sale of the fifteen (15) apartments on the suit premises and demanding that they vacate the premises by 1<sup>st</sup> August 2020. On 29<sup>th</sup> June 2020, the 2<sup>nd</sup> Respondents took out an advertisement in the Daily Nation newspaper advertising the property for sale by public auction. That disposing of the fifteen (15) units will compromise the entire suit and the Applicant stand to suffer prejudice should the Court refuse and/or fail to issue conservatory orders pending the ruling in the Application dated 8<sup>th</sup> August 2018 and/or review the orders issued on the 19<sup>th</sup> January 2020.

20. Further, the 1<sup>st</sup> Respondent has not accounted for the Kshs.35,146,263/= which was deposited sometimes in 2015 in an escrow Musharaka account which was operated jointly by the parties.

21. The parties disposed of the Application by filing submissions. The Applicant's submissions dated 13<sup>th</sup> July 2020, were filed 31<sup>st</sup> July 2019, while the 1<sup>st</sup> Respondent filed first and supplementary submissions dated 18<sup>th</sup> July 2019 and 13<sup>th</sup> November 2019 respectively. The Applicant's submission mirrored the averments in the supporting affidavit of Ali M. Issac reiterating that did not participate in the valuation and only got to know about it from posters which had been displayed at the lifts, staircases and the notice board at the subject premises.

22. The joint valuation was the bedrock upon which they parties agreed to enter into a consent and settle this matter out of Court and the actions of the 1<sup>st</sup> Respondent go against the spirit and tenor of the joint valuation and only smacks of malice.

That the 1<sup>st</sup> Respondent will not suffer any prejudice as the suit property is "physically there and it is charged" while the Applicant stands to suffer irreparable damage should the auction slated for 30 July 2020 proceed as the apartments were undervalued.

23. The Applicant relied on the cases of **Esther Tragok Ayabei & Another vs. Kihenjo Njuguna & Another HCCA No. 22 of 2018** where it was held that;

*“where the proceedings are compromised by agreement and the compromise is made the subject of a consent order, the Court may set aside the consent order if it is shown have been based on an agreement induced by misrepresentation”.*

24. It was further submitted that the 1<sup>st</sup> Respondent is in possession of Kshs.35,146,263/= which amount was deposited in the escrow account held jointly by the Plaintiff and the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Defendant has therefore not come to Court with clean hands. Finally, the Applicant submitted that, the chargee cannot enforce more than one remedy at the same time and/or contemporaneously, by “being interested in the rent collection and at the same time advertise a public auction of the suit property” The Applicant relied on the case of **China Young Tai Engineering Company Limited and Ravasam Development Company Limited and Equitorial Commercial Bank Limited, Misc Application No 546 of 2015.**

25. That the Applicant has not satisfied the conditions under Order 45 Rule 1 of the Civil Procedure Rules, 2010 which deal with review of orders and require evidence of discovery of a new and important matter of evidence; or some mistake or error apparent on the face of the record.

26. It was submitted the consent order is not appealable and can only be set aside on grounds on which a contract would be set aside, which is; fraud or collusion or by an agreement contrary to the policy of the Court. The 1<sup>st</sup> Respondent relied on the cases of **Board of Trustees National Social Security Fund vs. Michael Mwalo (2015) eKLR** and **Flora N. Wasike vs. Destino Wamboko (1988) eKLR** and submitted that, the Applicant has all through been represented by counsel and fully participated in the conduct of this matter.

27. Further, there is evidence of fraud or collusion tabled before the Court to warrant a stay of the consent order dated 19<sup>th</sup> February 2020 and that, the valuation conducted did not obtain the best price reasonably obtainable for the said units. The 1<sup>st</sup> Respondent relied on the case of **Zum Zum Investment Limited vs. Habib Bank Limited (2014) eKLR.** That the first Application having been compromised by the consent, the current Application is therefore res-judicata as concerns the prayer of stay which was settled on 19<sup>th</sup> February 2020. Similarly, the prayer for an order for temporary stay of the consent orders issued on 19<sup>th</sup> February 2020, lacks statutory basis as it is brought under the wrong provisions of the law and must therefore be dismissed.

28. Finally, the 1<sup>st</sup> Respondent submitted that the Applicant has admitted its indebtedness. Therefore, as a chargor who is in default, it cannot use a dispute over the outstanding amount as grounds for the issuance of injunctive orders. The 1<sup>st</sup> Respondent relied on the case of **Yusuf Abdi Ali Co. Ltd vs. Family Bank Limited (2015) eKLR.** The Applicant is therefore undeserving of the orders sought, the entire Application lacks merit and ought to be dismissed with costs.

29. I have considered the arguments advanced alongside the submissions and I find that, the main issue to determine is whether the Applicant has met the threshold of grant of the orders sought Basically there are two prayers to consider, whether to; review the orders issued on the 19<sup>th</sup> February 2020 and to reinstate the interlocutory orders it granted on the 9<sup>th</sup> of August 2018 and costs.

30. As regards the first issue I note that, the Applicant seeks for review of the consent order basically on the ground that, it did not participate in the valuation report filed in Court, which is the basis of the intended auction. However, I note from the annexures to the affidavit by the Applicant only two documents; the authority dated 1<sup>st</sup> August 2018 to sign all documents on behalf of the Plaintiff company and a letter dated 4<sup>th</sup> July 2019, from the firm of **Lubulela & Associates** to the 1<sup>st</sup> Respondent’s advocates questioning the criteria that informed the choice of units valued.

31. In the further affidavit, the Plaintiff annexed an sms message apparently to his lawyers dated 4<sup>th</sup> June 2019 and an email to one Claris Ajwang Ogombo questioning the unit price which was less than the price at off plan. To the contrary the 1<sup>st</sup> Respondent, has annexed to the replying affidavit; a letter dated 8<sup>th</sup> May 2019, from the firm of Lubulela & Associates suggesting that **Ms Legit Valuers Limited** undertake the joint valuation. A letter of the even date by the firm of **Omusolo Mungai & Co. Advocates,** proposed the firms of **Legend Valuers Limited** and **Saad Yahya & Associates** to conduct the joint valuation. The author sought that, the Applicant’s law firm revert by 13<sup>th</sup> May, 2019. On 23<sup>rd</sup> May, 2019, the firm of Lubulela & Associates replied and stated “*You may engage M/s Legend Valuers Limited to undertake the valuation.*”

32. It is clear from the above correspondence that the parties consented to the firm of Legend Valuers Limited to undertake the joint valuation and therefore the allegations by the Applicant that it was not consulted is insincere. Indeed, the only issue the firm of Lubulela & Associates raised in the letter dated 4<sup>th</sup> July 2019, produced by both parties, is the criteria used to identify the units valued and comparisons made with other units to ascertain the value and in particular the 2 bedroomed units.

33. The letter was responded to on the 8<sup>th</sup> July 2019. I have read that response and I find it quite detailed and informative. The 1<sup>st</sup> Respondent even stated that “*if your client feels they can obtain prices higher than those indicated, this would obviously be in the best interest of all parties and especially your client as any amounts recovered from the sale after settling the outstanding amount shall be due to them*” The same letter addresses the issue of the amount in the escrow account and how it was utilized.

The Applicant did not raise any further issues on the valuation when the parties appeared in Court. This issue is now raised at the eminent sale of the suit properties.

34. It is noteworthy that the valuation was carried out sometimes in July 2019. How is it that, almost a year thereafter the Applicant is raising the issue? Be that as it were, it suffices to note that, the joint valuation report was filed in Court and adopted by both parties and therefore it is binding on them.

35. Even then, although the Applicant claims it does not know how the units were identified for valuation and subsequent sale, there is

evidence that the lawyers representing the parties, held discussion in Court and in the presence of the Applicant where the list of fifteen (15) apartments was discussed and the valuation report were tabled.

36. There is also correspondence by the 1<sup>st</sup> Respondent that the valuers conducted a valuation of the units on every floor of the building to capture an accurate cross section of the value of all the units in the building. The report allegedly, states that, the valuer adopted the sales comparative approach and listed a number of properties in the neighbourhood on which the comparison was based. These facts were not refuted in any way. Further the advertisement for public auction also identifies the fifteen (15) units to be sold.

37. Therefore, the reasons advanced by the Applicant that there was no consultation and/or the undervaluation of the units, are not supported by the evidence on record and even they were, the prayer cannot be granted as the Applicant has not even met the threshold of grant of the orders for review as herein stated.

38. As regards the prayer for reinstatement of the interlocutory orders, issued on the 9<sup>th</sup> August 2018, it suffices to note that, interim injunctive orders are issued for a maximum of 12 months hence the subject orders herein expired on or before, 9<sup>th</sup> August, 2019 and are not available for extension.

39. In addition, the Applicant has so far filed three Applications Application dated 8<sup>th</sup> August 2018, 9<sup>th</sup> February 2020, and the current Application dated 17<sup>th</sup> June 2020, to stop the sale of the suit property. Yet it is not disputed that the Applicant is in arrears in payment of the sum advanced. It will be unjust to continue stopping the sale when the Applicant is not repaying the amount advanced. Be that as it were if the applicant finds that the sale was improperly conducted, it can be compensated in damages. An injunction order is an equitable order given where damages are not equitable. This being a commercial transaction, damages would be appropriate and adequate.

40. All in all, I find no merit in the Application and I dismiss it. The costs to abide the outcome of the main suit.

41. It is so ordered.

***Dated, signed and delivered this 30<sup>th</sup> day of July, 2020 on line at Nairobi.***

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Olewe for the Applicant

Ms. Kiiru .for the Respondent

Robert Court Assistant