



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL CASE NO.42 OF 2017

TRANSAFRIC TIMBER LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This is a ruling on application dated 19th May 2020 seeking the following orders: -

- a. That directions on reconciliation of accounts of the amount outstanding from the plaintiff to the defendant pursuant to charges registered in favour of the defendant be issued.**
- b. That the Court releases the sum of kshs.2,000,000 deposited in Court to the defendant.**
- c. That upon directions being given on reconciliation of accounts, this matter be heard on priority basis.**
- d. That rental income arising from Nakuru Municipality Block 2/299 be secured pending hearing and determination of this mater.**
- e. That ruling of 16th January 2020 be reviewed to accommodate the directives to be issued.**

2. Grounds on the face of the application is that the Court in its ruling of 16th January 2020 found that there is need to reconcile the outstanding amounts and the plaintiff applied and obtained all statements it needed from the defendant; and the defendant insist it is truly owed the disputed amount and the same continue to accrue interest and penalties. Further that one of the secured properties has monthly income of kshs.1,240,000 and the plaintiff had assigned the rental income to the defendant and it is in the interest of justice that this matter be resolved urgently as it involves colossal sum of money and the defendant is being prejudiced by delay.

3. The application is supported by affidavit sworn by **Phoebe O. Abebe** Remedial Manager of the defendant. She restated grounds captured above. She further averred that statements were issued to the plaintiff through a letter dated 23rd January 2020 and confirmed by letter dated 5th February 2020. She stated that the plaintiff has had more than 4 months to reconcile its accounts but is yet to report its findings to the defendant.

4. She averred that by letter dated 6th February 2020 their lawyer wrote to the plaintiff's lawyer asking them to indicate time within which they would file the reconciled accounts. She stated that the plaintiff is truly indebted to the defendant to the tune of kshs.528,217,524.00 which has escalated to kshs.554,888,762.25 as at 19th May 2020.

5. She averred that the order of injunction should not be used to avoid *bona fide* financial obligations and orders of 16th January 2020 should be reviewed to accommodate the orders sought.

6. She averred that the property known as **Nakuru Municipality Block 2/299** has about 80 units earning rent of about kshs.1,240,000 per month meant to go towards the loan but is currently diverted elsewhere yet the plaintiff signed a deed of assignment of rent to the defendant. That the plaintiff's Managing Director **Zakaya Maina Waweru** wrote to the defendant on 1st February 2017 authorizing rental income to be applied towards the loan; and after Court injunction kshs.1,850,000 received from Kenya Police was withdrawn by the plaintiff without bank's authorization with the aim of denying the defendant crucial income meant to reduce the loan.

7. She further averred that the plaintiff has also signed a debenture over the property in favour of the defendant as per copy annexed to the

supporting affidavit which cannot be effected in light of the injunction.

8. In response, the respondent filed replying affidavit sworn by **Zakayo Maina Waweru** on 25th May 2020. He averred that the applicant's allegation on rental income being misdirected is unsubstantiated and only serves to complicate the issue at hand.

9. He averred that the property known as **Nakuru Municipality Block 1/Langalanga 917** hosts hotel and lodgings which was greatly affected by Covid-19 pandemic and therefore not generating income; and Property number **Nakuru Municipality Block 2/299** has rental apartment which was leased to police hence paid by government but the lease was determined in 2019 and there was therefore no rent payable to the property. He denied that Kshs1,850,000 was paid by Kenya Police on 28th February 2020.

10. He averred that at the time of vacating the premises by the government, most apartments were badly damaged requiring major repairs and therefore no new tenants took up the premises.

11. He averred that the government undertook to do repairs and has done valuation but is yet to effect the repairs. He stated that it will apply for discharge of properties once this matter is determined and urged Court to dismiss the application.

12. Parties agreed to proceed by way of written submissions

APPLICANT/APPLICANT'S SUBMISSIONS

13. The Defendant/Applicant filed submissions dated 10th June 2020. In respect to prayer 1, the defendant/applicant submitted that the plaintiff/respondent herein filed an application dated 25th November 2019 seeking an injunction pending professional audit of their account No. 01110020246800 and by ruling delivered on 16th January 2020 the interim orders were granted on condition that the plaintiff do deposit a sum of Kshs.2,000,000/= as security and the defendants were ordered to supply the plaintiff with the statements for the above stated account for purposes of professional auditing which they did on 5th February 2020 but despite the respondent acknowledging receipt of the bank statements, they have not acted on the bank statements 6 months later as they are enjoying stay orders.

14. The applicant further submitted that **Order 20 of the Civil Procedure Rules** provides for the procedure of taking of accounts and the Court should give directions on the time frame of how long it should take to reconcile the accounts and report be filed as the Court found it necessary to have an account reconciliation and the respondent should not be let to set pace as they are enjoying interim orders.

15. The applicant submitted that the respondent in reply annexed undated letter **ZMW1** to confuse issues as the same was not addressed to any auditor and they further blamed Covid-19 lockdown for failure to prepare the financial or reconciliation report. The applicant submitted that business and Court should give timelines for reconciliation of accounts. Authorities cited by the applicant in support of their application are: **Mainye Anyenga Vs Ecobank Kenya Limited (2014) eKLR**, **Popat Investment Vs Barclays Bank of Kenya Limited** and **Ramamdhan Chitechi Mitati Vs Equity Bank Limited (2016) eKLR**.

16. In respect to prayer two, the applicant submitted that the Court imposed a condition while granting the interim order of an injunction to the plaintiff of depositing Kshs.2,000,000/= in Court as security and stated that it would be prudent that the honorable Court to order the security be released to the defendant/applicant to reduce the sum owed of over 500,000,000/= by the plaintiff/respondent.

17. As concern prayer 3, the defendant/applicant submitted that justice delayed is justice denied and the matter should be heard on a priority basis after direction on the reconciliation of account as the amount the plaintiff/respondent owe the defendant applicant is huge being kshs.554,888,762.25 as at 19th May 2020 and the same continues to attract interests and if the suit is not resolved with speed, the debt may become unmanageable and the securities are being eroded against the high debt.

18. In respect to prayer 4, the defendant submits the plaintiff/respondent should not be allowed to divert the rental income from **Nakuru Municipality Block 2/299** for personal use without paying the debt with the defendant/applicant as they had a valid and enforceable rental assignment deed dully annexed and admitted. At Paragraph 13 of the Supporting affidavit the defendant was able to demonstrate how the rental income of about Kshs.1,850,000/= was being used to service the debt but upon being issued with the injunction orders the said amount was diverted to other use and the defendant is seeking the intervention of the honorable Court in preservation of the rental income. The defendant submits that he was not asking the said rental income to be channeled to its account but the same to be preserved and applied appropriately once the interests of the parties are determined.

RESPONDENT'S SUBMISSIONS

19. The plaintiff/respondent filed in their submissions dated 18th June 2020. They submitted that following the Court's ruling of 16th January 2020, the auditor is still going on with audit due to the voluminous nature of the statements and it is the plaintiff's view that the defendant grew impatient prompting him to file the current application seeking for new directions and review of the orders issued on 16th January 2020.

20. The respondent submitted audit of a statements is being done as the amount claimed by defendant/applicant is in contention who in turn requested for more time to complete the scrutiny and file the report. Plaintiff further submitted that it is keen to ensure the process is completed within a reasonable period without unnecessary delay as they dispute owing the defendant/applicant at all; the process should not be hastily carried out but should be thorough. The Plaintiff urged the Court to take note that since March 2020 when the 1st case of Covid-19 was recorded in Kenya all sectors were affected and execution of tasks have been slowly, they submit this prayer is overtaken by events as directions were given on 16th January 2020.

21. The plaintiff/respondent submits that the amount of Kshs.2,000,000/= deposited in Court is not idle and its act as their security as per the Court's order on 16th January 2020, they would be prejudiced if the same is released to the defendant/applicant as their main issue of contention is that they do not owe any money to the defendant/applicant.

22. The respondent submitted that it is not opposed to prayer 3 once the accounts have been reconciled the matter can be given the earliest possible date for hearing. In respect to prayer 4, the respondent submitted that the properties where the defendant/applicant was assigned rental income is **Nakuru Municipality/Block 1 (Langa Langa) 917** which hosts hotel and lodgings (which business has been affected by Covid-19 pandemic) and **Nakuru Municipality/Block /299** rental apartments which had been leased by the government was terminated in the year 2019 thus no rent is emanating from this two properties. It is their submissions that no rent is being diverted for personal use nor capable of being preserved. The respondent submitted that the grounds raised by the applicant do not warrant the review or variation of orders issued on 16th January 2020 and have not satisfied the grounds laid down for a review as per **Order 45**. They relied on **Order 45 of the Civil Procedure Rules, 2010** which is very explicit on grounds which a Court should review its order as set out hereunder: -

a. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

b. There was a mistake or error apparent on the face of the record; or

c. There were other sufficient reasons; and

d. The application must have been made without undue delay.

23. The Plaintiff/respondent submits that the application was not brought under the review orders thus the Court has no basis of reviewing the same. They prayed the said application be dismissed with cost. They submitted to having relied on the cases of;

i. Francis Njoroge V Stephen Maina Kamore (2018) eKLR;

ii. Abudallahi Mohammed Sheikh V Gulf African Bank Limited (2018) eKLR

iii. Southern Engineering Co. Limited V Heady Berge Limited & Another (2019) eKLR

ANALYSIS AND DETERMINATION

24. I have considered arguments by both parties herein. I do agree that this matter should be heard on priority basis to determine the unresolved issues between the parties herein. From the documents annexed, there is no dispute that the plaintiff has been supplied with statements by the defendant. The statements were intended to give the plaintiff opportunity to do reconciliation and establish the correct amount owing to the defendant. Between now and February is about 5 months, in my view despite the Covid-19 pandemic, the auditors who must have have received the statements before lockdown in March should have used this period to finalize reconciliation of accounts and have the findings shared between parties herein. I do not see clear justification for the delay.

25. It is not disputed that rental earnings from the plaintiff's property was meant to be utilized to repay amount owing. The plaintiff however indicates that there are no earnings received from the property assigned to the defendant. There is no clear proof to the allegation. In my view this can be ascertained by independent party. In my view before the property is discharged by the bank, any earnings should be channeled to the bank. It should be clearly demonstrated that indeed no earnings are received from the properties assigned to the bank.

26. In respect to release of kshs 2,000,000 deposited in Court, I am of the view that there is need for reconciliation of accounts before any further directions are made. On hearing of the matter, I do agree that there is need to fast track this matter determine exact amount of money owing to the defendant from the plaintiff.

27. FINAL ORDERS

1. Rental income from properties **Nakuru Municipality Block 1/Langalanga 917** and Property number **Nakuru Municipality Block 2/299** be channeled to the defendant.
2. An independent party to ascertain rental income received in respect of properties named in 1 above.
3. Kshs 2,000,000 deposited in Court to remain in Court.
4. This matter be heard on priority basis.
5. Plaintiff /respondents to share the reconciled accounts with the defendant/applicant within 14 days from the date of this ruling.

Ruling dated, signed and delivered via zoom at Nakuru This 30th day of July, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Mr. Mburu Counsel for Plaintiff/Respondent

Mr. Kamonjo Counsel for defendant/ Applicant