REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. E269 OF 2020

COLLOGNE INVESTMENTS LIMITED.....PLAINTIFF

AND

KCB BANK KENYA LIMITED.....DEFENDANT

AND

NAKUMATT HOLDINGS LIMITED

(UNDER ADMINISTRATION).....PROPOSED INTERESTED PARTY

R U L I N G

1. Originally, the defendant's application dated 28/10/2020 was ordered to be heard by way of written submissions. The matter was reserved for ruling on 16/11/2020. However, when the Court retired to write the ruling, it became clear to it that the said application was closely intertwined with the plaintiff's application dated 8/10/2020 whose interim orders of status quo, the plaintiff's application dated 28/10/2020 sought to discharge. In this regard, on 16/11/2020, the Court ordered that the two applications be heard together and the parties do submit orally on the defendant's application dated 8/10/2020.

2. This ruling therefore is in respect of the said Motions dated 8/10/2020 and 28/10/2020, respectively.

3. The plaintiff's application dated 8/10/2020 sought orders of injunction to stay any transfer, registration, conveyance, lease, encumbrance or dealing with the property known as **L. R. No. 209/11158 ("the suit property")** in a manner prejudicial to the plaintiff's title thereto. When the matter came ex-parte before **Kasango J** on 12/10/2020, it was ordered that the status quo obtaining as on that date, obtain until 18/12/2020 when directions on that application would be made.

4. Aggrieved by that decision, the defendant took out a Motion on Notice dated 28/10/2020 under ***Order 51 Rule 1*** and ***sections 1A, 1B and 3A of the Civil Procedure Act***, seeking the setting aside of the aforesaid order of status quo order. Having ordered that both applications be heard together, the defendant's application of 28/10/2020 was subsumed in the plaintiff's Motion of 8/10/2020.

5. **Mr. Wasuna,** Learned Counsel for the Plaintiff submitted that, by having made the order of 16/11/2020, the Court had by extension partially allowed the defendant's application and that there was need to give reasons therefor. One of the prayers in the defendant's Motion was that the same be heard on priority before the one of the plaintiff's or that alternatively, both applications be heard together before 25/11/2020. That is the prayer that was allowed when the order of 16/11/2020 was made.

6. The following therefore are the reasons for the order of 16/11/2020. The order of 16/11/2020 was made for the reason that, firstly, the defendant had indicated in its Certificate of Urgency that, it had already entered into a sale with a 3rd party and the transaction would be frustrated if the application was not determined before 25/11/2020. Secondly, if the defendant's application was heard before that of the plaintiff, it would have caused violence on the plaintiff's application without having heard the plaintiff on it first.

7. For the foregoing reasons, the Court decided to bring forward the hearing of the plaintiff's application and have both heard at the same time. The same was in the spirit of ***Article 159 of the Constitution of Kenya*** of determining disputes without undue delay. Having to wait until 18/12/2020 would have frustrated the defendant for no fault of its own.

8. The plaintiff's application of 8/10/2020 was supported by the affidavits of **Ankoor Shah, Faith Wanyonyi and Francis Wasunna** sworn on 9/10/2020. The plaintiff contended that; the suit property is charged to Bank of Africa Limited, Standard Chartered Bank Kenya Limited, Diamond Trust Bank Limited and the defendant as security for facilities advanced to the interested party; that the plaintiff had, on 1/11/2019, filed **Case No. E385 of 2019 Collogne Investments Ltd v. Bank of Africa Kenya Ltd & Another (“the said suit”)** but its injunction application was dismissed against which an appeal was lodged.

9. It was further contended that the interested party applied for an injunction in the said suit and the sale of the said property was suspended until 21/10/2020. That a notification of sale of the suit property scheduled for 25/9/2020 was never served upon the plaintiff. That on 22/9/2020 when the matter came up for mention, the plaintiff's advocate applied for interim injunction but the advocate for the defendant undertook on behalf of the defendant, not to sell the suit property.

10. Despite as aforesaid, the plaintiff was surprised when it learnt on 26/9/2020 that the property had been sold after strange people invaded it's premises claiming to have bought the same in an auction. Effort to get clarification from the defendant's advocates on the alleged sale bore no fruits. The plaintiff also sought to confirm the issue of the undertaking given on 22/9/2020, but the court record did not disclose the same. The audio-visual footage in the system for the proceedings of 22/9/2020 could not be retrieved.

11. Both **Mr. Francis Wasuna** and **Faith Wanyonyi, Advocates** supported the plaintiff's contentions that the defendant's advocate had given an undertaking on behalf of the defendant on 22/9/2020 not to sell the suit property.

12. The defendant opposed the Motion vide the replying affidavit of **Kiranga Francis Munyua** sworn on 9/9/2020. It was contended by the defendant that; the plaintiff had guaranteed the interested parties' facilities to the tune of Kshs.1 billion and gave the suit property as security therefor. That the interested party had defaulted whereby, on 15/3/9/2020, the defendant demanded the sum of Kshs. 2,068,015,558/21. When the interested party failed to pay the demanded amount, the defendant issued the requisite notices under the law.

13. The defendant further denied having mishandled the accounts of the interested party as had been contended. That the amounts debited by the defendant were authorized under the security documents. That the plaintiff and the interested party had never challenged the amounts demanded by the defendant. It further contended that the suit property was a shared security between 4 banks to the tune of Kshs.4b, which is in excess of the value of the security.

14. On the other hand, by its Motion dated 28/10/2020 brought under ***Order 51, Rule 1 of the Civil Procedure Rules and Sections 1A,1B and 3A of the Civil Procedure Act,*** the defendant sought that the order of status quo made on 12/10/2020, which was to remain in force until 18/11/2020 be set aside.

15. The grounds upon which the application was predicated upon was set out in the supporting and further affidavits of **Kiranga Francis Munyua**. It was contended that due to the default by the interested party, the defendant had sold the suit property by way of a public auction on 25/9/2020 to the highest bidder, **Furniture Palace International Limited** *(“the Purchaser”*) for Kshs. 1,042,600,000/-. That the entire transaction was to be completed by 25/11/2020.

16. That the status quo order would impede the completion of the said transaction thereby entitling the purchaser to rescind the sale and the defendant be obliged to refund the deposit paid. That it was unlikely to find another purchaser for a similar amount. The defendant further contended that the status quo order was obtained on the basis of false information and misrepresentation that the defendant's advocates had undertaken not to sell the suit property at the auction of 25/9/2020.

17. The plaintiff opposed the Motion vide the replying affidavit of **Ankoor Shah** sworn on 6/11/2020. It contended that the status quo order was properly issued and a court order can only be reviewed under exceptional circumstances which the defendant had not satisfied. It contended that, its application dated 22/5/2020 should be heard on its merits in order to determine the rights of the parties.

18. The plaintiff denied that it had misrepresented any facts to the court and reiterated that the defendant had undertaken not to dispose the suit property on 25/9/2020. That the record of the proceedings of 22/9/2020 do not accurately and/or comprehensively reflect the proceedings of the day and as such, they cannot be relied on by any of the parties.

19. It was further contended that in **Civil Case No E385 of 2019 – Collogne Investments Limited V Bank of Africa Kenya Limited and Another,** *(“the said suit”)* the order of 31/8/2020 suspending the sale of the suit property had been extended to 24/11/2020. That because of the undertaking of 22/9/2020, the purported sale to the purchaser was unlawful, contemptuous and null and void. That the property had been sold as an undervalue as the plaintiff had a buyer for the suit property for Kshs.2 billion. It was urged that the Motion be dismissed.

20. The applications were disposed of partially by way of written submissions for the Motion of 28/10/2020 and orally for the Motion of 8/10/2020. The Court has carefully considered those submissions.

21. **Mr. Wasuna** for the plaintiff submitted that, the defendant did undertake not to dispose of the suit property and that the typed record of proceedings of 22/9/2020 did not accurately and/or comprehensively reflect the proceedings of that day. In the premises, Counsel submitted that both parties cannot rely on the same. That it is only an audio transcript of the proceedings of that day which can determine whether or not an undertaking was given on behalf of the defendant. That if the same is missing, an inquiry ought to be conducted whilst the suit property is preserved and status quo maintained.

22. It was further submitted that in ***Civil Case No E385 of 2019 – Collogne Investments Limited V Bank of Africa Kenya Limited and Another,*** the court had issued an order on 31/8/2020 suspending the sale of the suit property and that the said order was still subsisting. No sale therefore could take place while that order was in force.

23. **Mr. Aduda**, Learned Counsel for the interested party supported **Mr. Wasuna's** submissions. He further submitted that in light of the

Court Order in ***Civil Case No E385 of 2019 – Collogne Investments Limited V Bank of Africa Kenya Limited and Another,*** any sale between 31/8/2010 and 21/10/2020 was illegal. That the defendant was aware of the existence of the said Order since its advocates in this case are also advocates of the defendant in that case. He urged that the Court should not accord any benefit to the defendant as it was guilty of wrongdoing and illegality.

24. **Ms. Lubano,** Learned Counsel for the defendant submitted that, the alleged undertaking was not in writing and was disputed. That as such, the court ought to be guided by the Court of Appeal decision in **Kenya Anti-Corruption Commission V Republic & $ Others(2013) Eklr,** where it was held that in the absence of an admission by a party that in fact an oral undertaking had been given, there was no basis upon which a judge could make a finding that such an oral undertaking had been given.

25. That the Order in ***Civil Case No E385 of 2019 – Collogne Investments Limited V Bank of Africa Kenya Limited and Another*** related to entirely different parties, different debt, legal charge and process. That the same was not binding upon the defendant. That in any event, the said order had been obtained with the consent of the parties as there was at the time pending proceedings before the Court of Appeal. Counsel denied her firm being conflicted as submitted by the plaintiff.

26. The court has carefully considered the affidavits on record, the written and oral submissions of learned counsel. What is before Court for consideration is an application for injunction and one for setting aside an interim order. The principles applicable are well known, the applicant must establish a prima facie case with a probability of success, it must establish that if the injunction is not granted it will suffer loss that cannot be compensated by an award of damages and that if the Court is in doubt, it will determine the matter on a balance of convenience.

27. In order to establish whether there is a prima facie case, the Court has to consider several issues. These are; w*hether there was any undertaking given not to sell the property, whether the sale of t25/9/2020 was in contempt of the order of 31/8/2020 and finally, whether the firm of Oraro and Company, Advocates is conflicted.*

28. Before determining whether or not there was any undertaking given, an issue as to what record has to be considered is to be determined. The plaintiff's contention is that the typed record of the proceedings for the 22/9/2020 cannot be relied on as the same is not a reflection of what truly transpired in court. It contends that since the audio recording cannot be traced, an inquiry be held first as to what happened in court on that day and that in the meantime the status quo be maintained.

29. This Court has noted the statements on oath made by the parties. It is contended that the audio recording for the material day could not be retrieved. The Court is in agreement with the plaintiff that, where court proceedings are both audio recorded as well as handwritten, both can serve an important purpose in determining what transpires in court. However, where one version is missing with a reason, such as in this case, the available record will be the one to be considered.

30. The issue of court record is a matter of general public importance. In **Kenya Commercial Bank Ltd Vs. Muiri Coffee Estate Ltd & Another [2016]**, the Supreme Court of Kenya observed: -

> ***"The importance of the record of a Court, particularly for a Court of record, such as the High Court, cannot be gainsaid. We agree with learned counsel for respondent, Mr. Muite, that the record of a Court of record is a fundamental reference-point in the administration of justice. We have perused the Court of Appeal Ruling granting certification, and we find no fault with its observations and findings, as regards this vital question of the availability of a record of a Court of record. The Court of Appeal in granting leave, indeed reinforced the public-interest element in this issue, that speaks to its nature, as a matter of general public importance, when it held thus:***
>
> *"We must also concede that upon hearing the forceful submissions made before us by **Mr. Muite** for the applicant, we cannot but conclude that the issue of the character of superior Courts as Courts of record and the consequences of absence or incompleteness of the record, where rights are determined with finality on the basis of what ought to be on that very record, is neither shallow not idle. Rather, formulated in the precise manner in which it was before us, the issue appears to us to have far-reaching consequences and implications on the integrity of the adjudicative processes of the courts."*

31. The centrality of the Court record in achieving the principle of access to justice in ***Article 48 of the Constitution of Kenya*** cannot be gainsaid. A court record is so central in the administration of Justice that the right to access to justice cannot be achieved in its absence.

32. In the present case, there are typed proceedings from the Judge's handwritten notes for the 22/9/2020. The plaintiff contends that the same does not capture what transpired in court on the material day. The audio recording was sought but was found to be unavailable. This Court inquired on the reason for the absence of the said audio recording and the information obtained from the Deputy Registrar was that, there was no audio recording done for that Court on that day.

33. The foregoing being the case, the Court has to deal with what it has as the day's proceedings for that day. Why the Court Assistant for that Court decided not to audio record the proceedings of the day, is an issue to be dealt with administratively. For the Court however, it has to determine the dispute before it on the basis of the material before it. The Court declines the invitation that it holds any action until an inquiry is made as to why the audio recording for that day is missing.

34. In this regard, the finding the Court makes is that, the typed proceedings of the Judge's handwritten notes for the 22/9/2020, form the conclusive record of the proceedings for that day.

35. The next issue for consideration is whether there was any undertaking given by the defendant on 22/9/2020. What the Court has before it is the Judge's handwritten court proceedings for that day. In that record, there is no reference whatsoever to any undertaking. There is also no mention of the impending sale of 25/9/2020. Neither is there any reference to any undertaking.

36. In **Halsbury's Laws of England, 4th Edition Vol. 44 (1), pgs 222, 223 and 224,** it is observed that: -

> ***"Where a solicitor who is acting professionally for a client gives his personal undertaking in that character to the client or to a third person, or gives an undertaking to the court in the course of proceedings, that undertaking may be enforced summarily upon application to the court.***
>
> - ***It must be shown that the undertaking was given by the solicitor personally, and not merely as agent on behalf of his client.***
> - ***It must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.***
> - ***The undertaking must be clear in its terms. The whole of the agreement to which it relates must be before the court, and the undertaking must be one which is not impossible ab initio for the solicitor to perform.***
> - ***If the undertaking is conditional, the condition must be fulfilled before the undertaking will be enforced."***

37. From the foregoing, it is clear that an undertaking must be clear in its terms. The same must be before Court and capable of being enforced and/or which an advocate is capable of performing.

38. In **Kenya Anti-Corruption Commission v. Republic & 4 Others [2013] eKLR,** the Court of Appeal observed: -

> ***"With regard to the appellant's breach of an alleged oral undertaking given by the appellant's counsel in Misc. Criminal Revision No. 29 of 2009, all that the learned trial Judge had before him was an assertion by the 4th respondent that an oral undertaking had been made by the Appellant in the said proceedings not to make a move before the delivery of the ruling in the Criminal Revision proceeding. On the other hand, there was a denial by the Appellant that it had made such an undertaking. In the absence of an admission by the appellant that in fact an oral undertaking had been given, we find that there was no basis upon which the learned trial Judge could make a finding that such an oral undertaking had in fact been given."*** (*Emphasis added*)

39. Before Court are assertions by the advocate for the plaintiff that there was an undertaking given orally in Court by the defendant's advocates that the defendant would not sell the suit property. On the other hand, the defendant and its advocates deny that fact. As at 22/9/2020 when the parties appeared before **Odero J**., the sale of the suit property was impending. If the undertaking was given, why is it not reflected on the handwritten record of the Court?

40. All that appears on record, are directions as to the filing and exchanging of written submissions in respect of the application dated 22/5/2020. Then the matter was adjourned to 1/12/2020 to confirm compliance.

41. The application dated 22/5/2020 was filed before the intended sale of 22/9/2020 was fixed. The question that arises is, how was the issue of that sale raised before court for the undertaking to have been given? What were the terms of the said undertaking?

42. Since all the Court has is the handwritten record of the Court, which has no reference to any undertaking having been given, the Court finds that there is no evidence that the defendant had undertaken not to sell the suit property on 25/9/2020.

43. The next issue is whether the sale of 25/9/2020 was in breach of the Court Order of 31/8/2020. All the parties are in agreement that on 31/8/2020, **Majanja J** did suspend the sale of the suit property until the matter was to be mentioned on 24/10/2020. The question is whether, by virtue of the firm of **Oraro & Company** being the advocate for the defendant in that suit as well as in this suit, the defendant herein was bound by the order given therein.

44. It is not in dispute that **Messrs Oraro & Company,** who appear for the defendant in this case, were the advocates on record for the defendant in ***Civil Case No E385 of 2019 – Collogne Investments Limited V Bank of Africa Kenya Limited and Another***. It is also not in dispute that the defendant in this suit was aware of the said order. There is also no dispute that the order related to the suit property herein.

45. The general rule is that once a court issues an order, the same binds all and sundry, the mighty and the lowly equally without exception. An order is meant to be obeyed and not otherwise.

46. In **Attorney General v. Times Newspapers Ltd and Another (1991) 2 All ER 398,** it was held that it is immaterial whether one is a party to a suit or not. That anyone who knowingly impedes or interferes with the administration of justice is guilty of contempt irrespective of whether he is named in the order or not.

47. The foregoing however, would be the case where the order and the act complained of will be in the same transaction, i.e. where for example the Court suspended the sale and the sale was continued in furtherance of the restrained act and not separate and distinct.

48. In the present case, the suit in which the order was made is not before this Court. The Court has seen the copy of the order. It is clear that the defendant in that case was **Bank of Africa Kenya Limited.** It was that bank that had sought to sell the suit property.

49. There was no suggestion that the dispute in that case was in relation to the Charge between the plaintiff and the defendant in this case. The dispute in that suit must have been in relation to the dealings between the parties therein. It may have been either the lending or debt or

sale between the plaintiff and **Bank of Africa Limited.** It had nothing to do with the defendant's dealings with the plaintiff.

50. That being the case, the Court finds that the order made in that case did not affect the defendant's rights as against the plaintiff in their dealings that had nothing to do with the **Bank of Africa Limited.** The Court agrees with the submission of the defendant that, to the extent that the sale of 25/9/2020 had nothing to do with the dealings between the plaintiff and the **Bank of Africa Limited,** that sale cannot be assailed on the basis of the order of 31/8/2020.

51. The Court was invited to consider that the sale by the defendant would injure and prejudice the rights of the other lenders who have the suit property as their only security. While this Court sympathizes with the said lenders, it defeats logic how prudent bankers would extend facilities amounting to over Kshs.4 billion on a single security whose value is less than Kshs. 2 billion. The loss should lie where it has fallen.

52. There was a contention that the sale of the suit property was at an undervalue as the plaintiff had a buyer for over Kshs. 2 billion. The name of the buyer was not disclosed. If that was the case, nothing would have been easier than to have the said buyer deposit the entire sum in Court and the Court, acting for the benefit of all the parties, would have restrained further dealings with the title to the suit property.

53. It was contended that the firm of **Oraro & Company** was conflicted by acting for all the lenders in respect of the suit property. In **William Audi Odode & Another v- John Yier & Another, Court of Appeal Civil Application No. NAI 360 of 2004,** while declining an application to bar an Advocate from acting for some of the parties, the court held: -

> ***"I must state on the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel".***

54. In the case of **Riley Falcon Security Services Limited v Samuel Michael Onyango & 5 others [2017] Eklr,** it was held that: -

> ***"The Court of Appeal in the case of Delphis Bank Ltd v Channan Singh Chatthe& 6 others [2005] eKLR set out the principles upon which an advocate may be disqualified from acting for a litigant. This right may be limited in two instances. Firstly, where there is a possibility that the advocate may be called as a witness in the case and secondly where there exists a conflict of interest between two clients out of a previous advocate/client fiduciary relationship with the opposing client."***

55. In the present case, none of the Lenders has complained about the actions of **Messrs Oraro & Company Advocates.** It cannot lie in the mouth of the debtor and its guarantor, that the said law firm is conflicted and should not act for all or any of the Lenders. That argument is rejected. The lenders have the right to choose their own legal representative.

56. In view of the foregoing, the Court is satisfied that the plaintiff has not disclosed any prima facie case with any probability of success.

57. As regards the second limb of **Giella v. Cassman Brown [1973] EA 169,** the plaintiff was not able to demonstrate that if the injunction is not granted, it will suffer irreparable loss and damage. The plaintiff having given the suit property as a security for the colossal sum of monies advanced to the interested party, it cannot now turn around and claim any irreparable loss when the lender comes calling to recover its outlay. The property had been turned into a commercial chattel.

58. Further, the debt is not denied, default is also not denied. The charge has also not been challenged. The banks right to realize its security is perfectly in order.

59. If the Court was in doubt, which is not the case here, the balance of convenience tilts in favour of allowing the defendant to recover its outlay. Indeed, the loss already suffered by the defendant, and the other lenders, is colossal and the earlier they recover the little that there is and count on their losses, the better.

60. In the premises, I find the application dated 28/10/2020 to have been meritorious and allow the same and set aside the orders of status quo made on 12/10/2020. On the other hand, the application thereof dated 8/10/2020 is without merit. Prayer Nos. 2, 3 and 4 are dismissed with costs. However, prayer No. 5 of that motion is allowed.

It is so ordered.

DATED and DELIVERED at Nairobi this 23rd day of November, 2020.

A. MABEYA, FCIArb

JUDGE