



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 278 OF 2016

ASWA DEVELOPERS & ..

CONTRACTORS LIMITEDPLAINTIFF/APPLICANT

-VERSUS-

SPIRE BANK LIMITED (FORMERLY

EQUITORIAL COMMERCIAL BANK....DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to the application dated 1st October 2019 wherein the applicant seeks orders as follows: -

i. A declaration that the respondent's action of unilaterally debiting the sum of Kenya Shillings Two million, Four Hundred and Eighty Thousand, Three Hundred and Eighty-Two and Twenty-Eight Cents (2,480,382.28/=) from the applicant's bank account number 0403201601 was illegal.

ii. An order compelling the respondent to refund the sum of Kenya shillings two million, four hundred and eighty thousand, three hundred and eighty-two and twenty-eight cents (2,480,382.28/=) to the applicant's bank account number 0403201601.

2. The application is supported by the affidavit of the applicant's Director, **Mr. Stephen Wang'ombe** and is premised on the grounds that: -

1. The plaintiff/Applicant filed suit against the defendant respondent on 13th July 2016, seeking declaratory orders on the discharge of the securities created over the listed suit motor vehicles as well as a permanent injunction against the respondent from undertaking recovery proceedings via the repossession or attachment of the suit motor vehicles.

2. The suit herein was based on the illegal attempts by the respondent to repossess the suit motor vehicles with a view to disposing the same for the settlement of non-existent arrears on a different facility, to which the suit motor vehicles had not been pledged as security.

3. That on 15th July 2016, the matter came up for hearing of the Plaintiff's Notice of Motion application dated 12th July 2016, wherein parties recorded a consent for the payment of the outstanding amounts by the plaintiff together with the auctioneer's charges to be either agreed upon or taxed. The matter was thereafter to be mentioned on 22nd July 2016 for recording a further consent.

4. The parties thereafter engaged in negotiations over the restructure of the outstanding facility, on which the suit motor vehicles were sought to be illegally repossessed, which terms of restructure were agreed on. Parties further agreed that each was to bear its own costs. The auctioneer's costs were further agreed to be payable by the respondent.

5. That in a shocking turn of events, the respondent, on 4th March 2019, unilaterally debited the applicant's account in the sum of Kenya Shillings Two Million, Four Hundred and eighty, three hundred and eighty –two and twenty-eight cents (2,480,382.28/=). Upon the applicant's enquiry into the debit, the respondent advised that the same was on account of settlement of its advocates costs for the instant suit.

6. The applicant maintains that the respondent's actions are outrightly illegal and contravenes the provisions on the law noting that no agreement on costs was reached, neither did the respondent's advocates tax their costs, prior to the settlement. It is further curious that the said debit was done more than three years after the conclusion of settlement negotiations.

7. The said actions by the respondent are therefore prejudicial on the applicant and unless the orders sought herein are granted forthwith the latter stands to suffer loss of a colossal sum of money. It is therefore fair and in the interest of justice that the orders sought herein be granted by this honourable court.

3. The respondent opposed the application through the replying affidavit of its Legal Officer **Mr. John Wageche** who states that sometime in 2012 the applicant obtained various asset financing facilities from the respondent but that the applicant breached its obligations to repay the loans which fell in arrears of Kshs 80,255,689.65 as at 5th July 2016.

4. He states that as a result of the said breach, the respondent instructed the auctioneers to repossess the motor vehicles held as collateral to recover the monies owed by the applicant. He avers that following the filing of the instant suit, the parties herein recorded a consent on 15th July 2016 wherein the applicant agreed to pay the outstanding sum of Kshs 81,411,471.11 together with all accrued interest thereon or to provide security, acceptable bank guarantee or undertaking to pay the said amount within 45 days from the dated of consent. In the said consent, the applicant also agreed to pay the auctioneers charges and that in default, the respondent would be at liberty to proceed with the exercise of the statutory power of sale.

5. He states that after the consent order was recorded the applicant failed to honour reminders by the respondent to settle the legal fees due to the respondent's advocates thereby forcing the respondent to debit the applicant's account with the sum due for legal fees being Kshs 2,480,382.28 in line with Clause 9 (a) of the Debenture.

6. Parties canvassed the application by way of written submissions. A summary of the applicant's submissions was that the respondent had no right to arbitrarily debit its account with alleged costs that had neither been agreed upon nor taxed by the court as envisaged under Order 25 Rule 3 of the Civil Procedure Rules.

7. The applicant's case was that since the parties had not agreed on costs and the court had not made any orders as to costs, no costs were payable as at the time the respondent deducted monies from its account. It was submitted that the act of deducting funds from the plaintiff's account was premature and illegal.

8. On its part, the respondent submitted that having entered into a consent to compromise the suit, the court is functus officio and lacks the jurisdiction to entertain the suit. It was submitted that the action by the respondent to debit the Applicant's account was lawful as it was guided by the terms of the Debenture dated 30th March 2012. It was further submitted that the court cannot re-write the contract between the parties.

9. I have carefully considered the application dated 1st October 2019, the respondent's response, the parties' respective submissions together with the authorities that they cited. The main issues for determination are as follows: -

a) Whether the court is functus officio.

b) Whether the applicant is entitled to the orders sought in the application.

Functus officio

10. Black's Law Dictionary 10th Edition defines the term functus officio as follows

"Latin "having performed his or her office] (of an officer or official body without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

11. In the present case, it was not in dispute that following the filing of the main suit herein, the parties entered into a consent in which the suit was compromised in the following terms; -

a) The plaintiff do pay the defendant the outstanding sum of Kshs 81,411, 471.11 due as at 15th July 2016, together with all accrued interest thereon or to provide an appropriate and acceptable undertaking or bank guarantee to pay the said amount which payment, undertaking or bank guarantee should be provided within 45 days from the date of this consent.

b) The plaintiff do pay the auctioneer costs or charges either to be agreed upon or taxed.

c) In default of 1 above, the defendant be at liberty to proceed with the right exercise of the statutory power of sale of the securities held.

d) The matter be mentioned on 22nd July 2016 for a further consent on the defendant's costs.

12. It was also not disputed that all the terms of consent were complied with except the issue of the defendant's costs which the parties were to agree upon.

13. The respondent's case is that since the applicant failed to honour reminders to settle its costs, it invoked Clause 9(a) of the Debenture and debited the applicant's account for the sum of Kshs 2,840,382.28.

14. My finding is that in view of the fact that the consent order of 15th July 2016 specifically stipulated that the parties were to revert back to court for a further consent on the defendant's costs, the court cannot be said to be *functus officio* as the issue of costs still remained unresolved. Needless to say Order 25, Rule 3 specifically provides for the action the respondent should have taken in the event that parties failed to agree on its costs. The said provision stipulates as follows: -

“Order 25, rule 3.] Costs.

3. Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”

15. My finding is that owing to the fact that no agreement was reached on the issue of costs, the respondent was required to file its bill of costs for taxation before executing for the said costs in the event the applicant did not settle them.

16. In the present case, the respondent literally took the law into its own hands and unilaterally determined the amount due to it for costs and went ahead to debit the applicant's account for the same.

17. I find that the respondent's action of debiting the applicant's account was unlawful and uncalled for considering that the case was still pending before the court, at least in respect to the issue of costs, and all that the respondent needed to do was to seek the court's intervention when the parties failed to agree on costs.

18. For the above reasons, I find that the applicant has made out a case for the granting of the orders sought in the application dated 1st October 2019 which orders I hereby allow as prayed with no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 19th day of November 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Wamuyu for Njoroge for Plaintiff.

Miss Rotich for Kenneth Wilson for Defendant/Respondent.

Court Assistant: Silvia