



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.72 OF 2019

WILLIAM NDETI T/A NDETI ENTERPRISES.....PLAINTIFF

VERSUS

NIC BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This **Ruling** determines the **Notice of Motion** application dated **19th December 2019** brought by the Plaintiff/Applicant pursuant to **Sections 1A, 1B and 3A**, all of the **Civil Procedure Act, Cap 21 Laws of Kenya** and **Order 22 Rule 18 and 22** of the **Civil Procedure Rules**. The application seeks the following orders:-

a) Spent;

b) Spent;

c) Spent;

d) That this Honourable Court be pleased to issue temporary injunction restraining the Defendant, its employees, servants and or agents from selling and/or auctioning the Plaintiffs properties known as subdivision No.14182 (original No.188/65 Section 1MN and subdivision No.14183 (original No.188/66);

e) The Plaintiff/Applicant be allowed to pay the amount owing by monthly instalments of Kshs.100,000/= from the month of January 2020 until payment in full;

f) The Defendant/Respondent be compelled to produce the statement of accounts of the Plaintiff/Applicant showing all the Deposits made by the Plaintiff towards the Payment of the Loan;

g) That the costs of this application be borne by the Defendant/

Respondent.

2. The application is based on the grounds on the face of its body which are further explicated in the **Affidavit** of **William Ndeti**, sworn on the **19th December, 2019**. The Plaintiff's case as expressed in the application is that he is the owner of the subject suit properties known as subdivision **No.14182(original No.188/65) Section 1MN** and **Subdivision No.14183 (original No.188/66)**. That he instituted this suit before the Lower Court on or about **12th March, 2015** seeking for an order of injunction against the Defendant from selling the subject suit properties by **Public Auction**. However, parties ended up recording a **Consent** on **16th July, 2016** to the effect that the Plaintiff shall be making monthly payments of **Kshs.300,000/=** until payment in full. The **Consent** is annexed as **Exhibit "WN-2."**

3. The Plaintiff averred that since the Consent was recorded, he has been diligently making payments as agreed until sometimes in **May, 2018** when he was faced with financial constraints. As a result, the Defendant/Respondent engaged the services of **Five Eleven (511) Auctioneers** in a bid to execute and auction the suit properties. The Plaintiff also disputes the amount he owes the Defendant and asserts that the amount due to the Defendant/Respondent as at **4th May, 2018** was **Kshs.15,482,009.99** and not **Kshs.63,947,765/=** as stated in the

Warrants of Attachment.

4. It is the Plaintiff's case that the Defendant has refused to issue him the statements of the accounts showing the total amount paid and if the

Respondent Bank is not restrained by this court from auctioning his property, the Plaintiff is bound to suffer great injustice and prejudice.

5. The Application proceeded for hearing on the **29th September, 2020**. The Plaintiff/Applicant appeared in person whilst **Mr. Karina** appeared on behalf of the Respondents.

6. **Mr. Karina** in objection to the Application submitted that all the issues raised in the Application had been agreed upon vide a **Consent** dated **2nd July, 2015** and filed in court on **16th July, 2015** by the Counsel of the Applicant. Under the said **Consent**, the Plaintiff admitted that the amount owing was **Kshs.27,503,447.32** as at **12th June, 2015**.

7. The Learned Counsel further submitted that the Plaintiff proposed to repay the loan by first paying a lump sum of **Kshs.500,000/=** and subsequent monthly instalments of **Kshs.300,000/=** until payment in full. As such, the Counsel asserts the view that the amount that was agreed on **12th June, 2015** cannot be re-litigated nor can the court accept new evidence for the reason that the Consent was signed by both the parties and was adopted as order of the court. The court is thus *functus*

officio.

8. With regard to the prayer for rescheduling the repayment plan, the **Mr. Karina** submitted that the terms were settled by Consent and cannot be altered by this court.

9. In response to whether the Defendant should be compelled to offer the Bank Statements, it was submitted that the Plaintiff has a remedy under **Order 22 Rule 57 and 58** of the **Civil Procedure Rules** to settling the terms before the scheduled auction. The Counsel further insisted that the Plaintiff is the custodian of the primary evidence of the payment and it is within his knowledge on how much he has paid hence the prayer cannot hold water.

10. In conclusion, the Counsel sought the court to vacate the temporary Stay Orders granted because the Plaintiff has not been making any payments not even the proposed **Kshs.100,000/=**.

11. The Plaintiff/Applicant on the other hand submitted that the Defendants are claiming a lot of money from him and that is why he seeks to be supplied with Bank Statements. He averred that he has tried to engage the Defendant's advocates for a discussion on rescheduling the repayment plan but in vain. He is therefore seeking the court to indulge him in the proposal to repay the loan amount due by monthly installments of **Kshs.100,000/=**. It was his assertion that he has drawn cheques of **Kshs.100,000/=** to a total of **Kshs.800,000/=** but they have all been rejected by the Defendant.

12. According to the Plaintiff, the terms of the Consent are novel to him. He asserts that he did not sign any Consent and the signature on the face of the Consent is not his but for an advocate who was not under his instructions. He specifically submitted that he had no advocate on record then and learnt about the Consent after being served by the Auctioneers.

Analysis and Determination

13. I have considered the application and the oral submissions made by the parties herein. Plaintiff herein prays for an order of permanent injunction restraining the Defendant from selling and/or auctioning the Plaintiff's suit properties and for avoidance of doubt, properties known as **Subdivisions No.14182 (original No.188/65) Section 1MN** and **Subdivision No.14183 (original No.188/66)**. He also seeks indulgence by this court to repay the outstanding loan amount in instalments of **Kshs.100,000/=** and finally that the Defendant be compelled to supply him with Statements of Accounts with regard to repayment of the loan. Therefore, the issue for consideration is whether, in the circumstances the orders sought can issue.

14. With regard to whether a permanent injunction can issue against the

Defendant Bank as sought, this court borrows from the decision in the case of **Kenya Power & Lighting Co. Limited..Vs...Sheriff Molana Habib, Civil Appeal No.24 of 2016 [2018]eKLR**, where the Court defined a permanent injunction as follows;

... A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected".

15. It is a common ground in this case that the Plaintiff has an outstanding loan balance with the Defendant Bank. However, he asserts that the bank is claiming a higher amount which is not consonant to the amount he believes he is owes. Further, the Plaintiff does not deny defaulting in repayment of the loan amount owed to the Defendant bank but submits that he is faced with financial constraints and is therefore unable to service the loan as earlier agreed. On that note, this court takes the initiative to remind the Plaintiff that a Chargor who offers his property as security clearly anticipates the sale of the property in the event that he fails to service the loan. I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal.

16. In any case, a prayer for permanent injunction cannot issue at the interlocutory stage. This may be sought later on during the hearing of the suit itself after evidence in support of and against the claim has been tendered. A permanent injunction should however not be confused with a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified period/time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties.

In the circumstances, I hold that a prayer for permanent injunction is out of place at this stage.

17. I now turn to examine whether the Plaintiff's prayer to repay the outstanding loan amount in instalments of **Kshs.100,000/=** is sustainable. At some point in his oral submissions, the Plaintiff averred that he is faced with financial constraints and is unable to make repayments at the rate of agreed monthly instalments of **Kshs.300,000/=** but can make repayments at the rate of **Ksh.100,000/=** monthly instalments instead. He further submitted that he neither signed any consent admitting the debt nor the mode of payment nor did he have an advocate on record at the time of recording

the Consent.

18. Despite the Plaintiff's assertions that he knew nothing about the Consent until he was served with the Proclamation Notice, the evidence before this court tells a different story. **Ground (b)** of the application under consideration as well as **paragraph (4)** of the Plaintiff's **Supporting Affidavit** acknowledges that the parties herein recorded a **Consent agreement** on the **16th July, 2016**. It was agreed therein that **"the Plaintiff shall be making monthly payments of Kshs.300,000/= until payment in full"**. The Plaintiff even annexed the **Consent agreement** as **"WN-2"**. Therefore, the Plaintiff's oral submissions do not support the averments he made under oath in the affidavit made in support of the application.

19. Once again, this court must hasten to remind the parties that, it is trite law that parties are bound by their pleadings so that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments in the pleadings goes to no issue and must be disregarded. This is further compounded with the need to avoid any surprises by which no opportunity is given to the other party to meet the new situation.

20. In this case, and for the reasons stated above, this Court will only consider the submissions made in support of the grounds on the face of the application and disregard any submissions made by the Plaintiff in variance with the averments which are at variance with the grounds and affidavit in support of the application.

21. I now proceed to consider the application for payment of the out-standing amount in instalments. **Order 21 Rule 12** of the **Civil Procedure Rules, 2010** provides that:

"After passing of any such decree, the Court may on the application of the judgment-debtor and with the consent of the decree holder or without the consent of the decree holder for sufficient cause shown, order that the payment of the amount decreed be postponed or be made by installments on such terms as to the payment of interest, the attachment of the property of the judgment debtor or the taking of security from him, or otherwise as it thinks fit".

22. **Order 21 Rule 12** therefore gives this Court a wide discretion as to whether payment of the amount decreed be postponed or settled by way of instalments. However, as with any other discretionary power, it must be exercised in a judicial and not an arbitrary manner. In this case, the onus is on the Plaintiff/Applicant to show that he is entitled to indulgence under this rule. Put otherwise, in the provisions of **Order 21 Rule 12**, the Applicant must demonstrate that there is sufficient cause to order the postponement or payment by instalments. One would then ask, what constitutes sufficient cause under **Order 21 Rule 12(2)** of the **Civil Procedure Rules**? The same has been explained in a number of cases as highlighted below.

23. Firstly, in the case of **A. Rajabali Alidina (supra)**, the court defined sufficient reasons to include: ***the circumstances, under which the debt was contracted, the conduct of the debtor, his financial position, and his bona fides in offering to pay a fair proportion of the debt at once.***

24. Secondly, in the case of **Hildegard Ndalut...Vs...Lelkina Dairies Ltd & Anor. (2005) eKLR**, the Court observed that:

"Both parties have referred to the case of Keshavji Jethabhai & Brothers Limited –vs- Saleh Abdulla [1959] EA 260, which is a case from a High Court of Tanganyika. That case followed the principles laid down in the Indian case of Sawatram Ramprasad –vs- Imperial Bank of India (1933) AIR Nag. 33 – that a defendant should be required to show his bona fides by arranging fair payment of the proportion of the debt – in persuading the court to allow payment by way of installments. This, in my view, is the proper test to apply in granting orders for payment of a decretal amount by way of installments. A judgment creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgment. The judgment creditor might genuinely be in a difficult position in paying the decretal amount at once. However, he has to show seriousness in paying the amount. In that event he should show his bona fides by arranging fair payment proposals to liquidate the amount". (emphasis mine).

25. Finally, the case of **Keshavji Jethabhai & Brothers Limited...Vs... Saleh Abdulla [1959] EA 260**, lays down the principles that should guide the Court in the exercise of discretion in such matter and states as follows:

a) ***Whilst creditors' rights must be considered each case must be***

considered on its own merits and discretion exercised accordingly;

b) ***The mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion;***

c) *The debtor should be required to show his bona fides by arranging prompt payment of a fair proportion;*

d) *Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.*

26. In considering the instant application vis-a-vis the above established principles, it is apparent that the reasons advanced by the Applicant for not being able to pay the debt as agreed is that he has been experiencing financial difficulties. The Respondent's Counsel on the other hand, highly takes issue with the Applicant's arguments by stating that the parties had agreed the instalments to be made in repaying the debt in a Consent. According to the Counsel, the Consent is tantamount to a Contract between the parties and the court cannot re-write the same.

27. I have also considered the rival arguments and the fact that the Plaintiff seeks indulgence to pay the debt in monthly instalments of **Kshs.100,000/=**. However, other than alleging inability to pay, the Applicant has not demonstrated his financial position to enable the Court ascertain the reasonable amount that he can pay. The argument by the Plaintiff/Applicant that he is experiencing financial difficulties and unable to pay the debt as agreed remain an allegation which is unsubstantiated and cannot be a sufficient ground to reschedule the agreed payment plan. I draw the inference from the Court of Appeal decision in the case of **Keshavji Jethabhai & Bros. Limited...Vs...Saleh Abdullah (1959) EA 260**. Here the Superior Court held thus:-

“The mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason.....; ordinarily, he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt...”

28. I also note that the Plaintiff had recorded a Consent and under **Clause 4** thereof, agreed that he will be paying the Defendant monthly instalments of **Kshs.300,000/=**. The Plaintiff has not adduced sufficient grounds to challenge the Consent nor has he applied to have it set aside. To that extent, I agree with the Defendant's Submission that a Consent is in the form of a Contract and binds all the parties. It follows that the Consent dated **2nd July, 2015** between the parties herein can only be set aside on grounds which would justify the setting aside of a Contract.

29. The upshot is that the prayer fails for the reason that the Plaintiff has not convinced this court enough to warrant the exercise of its discretion in allowing the payment by monthly instalments as proposed.

30. On the prayer for supply of the documents, that is considered to be a facilitating order that would obviate prospects of other interlocutory applications. The Defendant averred that the Plaintiff is the custodian of the primary evidence. However, I am of a descending opinion and in my view adopt the words of the Court of Appeal in the case of **Barclays Bank of Kenya Ltd...Vs...Christopher Kenyariri** and say that on the fact of this case, justice requires that the Plaintiffs should be put in possession of all the documents in the possession of the Defendant and connected with the creation of the legal Charges and the account on such facility. This prayer is hence merited and is hereby granted.

31. In the end, the Plaintiff's application fails save for **prayer (6)** which is hereby allowed. The interim prayers that had been granted pending the determination of the application are also vacated.

32. With regard to costs, it is apparent that the Defendant never filed any document with regard to the application. This court therefore directs each party to bear its own costs.

It is hereby so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 17th day of November, 2020.

D. O. CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21**

Rule 1 of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE