



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 7 OF 2019

BARNABAS ARAP KIPRONO.....PLAINTIFF

-VERSUS-

DESTERIO ANDADI OYATSI

KENNETH HAMISH WOOLER KEITH AND

ELIZABETH KLEM (sued as executors and

Executrix of the Estate of NICHOLAS KIPYATOR

KIPRONO BIWOTT, DECEASED).....DEFENDANTS

RULING

[1] This Ruling is in respect of two applications herein. The 1st application is dated **27 February, 2019**, filed by the Plaintiff for temporary injunction. The 2nd application is dated **21 March 2019**. It was filed by the Defendants seeking a raft of declaratory orders against the Plaintiff. Directions were consequently made on **2 April 2019** for the disposal of the two applications simultaneously, hence, this Ruling.

[2] The brief background thereto is that Plaintiff, **Barnabas Arap Kiprono**, filed this suit on **28 February 2019** claiming some **Kshs. 382,000,000/=** together with interest thereon and costs. The suit is in respect of contracts executed between the Plaintiff and the Deceased between **November 2015** and **September 2016**. The Plaintiff's cause of action is that the Deceased utterly and blatantly acted in breach of the terms of those contracts by failing, refusing or otherwise neglecting to fulfil his obligations imposed upon him by the said contracts and by the **Law of Contract Act, Chapter 23** of the **Laws of Kenya**. It was therefore the contention of the Plaintiff that, as at the time of the Deceased's death, he was justly and truly indebted to him in the aforesaid sum of **Kshs. 382,000,000** and interest at agreed rates; and that the demise of the Deceased has halted payments and his recovery efforts; hence the suit.

The 1st application

[3] Along with the Plaint, the Plaintiff filed the Notice of Motion dated **27 February 2019** seeking the following orders:

[a] Spent

[b] Spent

[c] That there be an interim preservative order, preserving the estate of the Deceased herein against the Respondents whether by themselves, their agents, their servants or any other person acting through them from selling, dealing, alienating, transferring, disposing or intermeddling with the properties known as **LAND REFERENCE NO.1/809 (Original Number 1/37/4), LAND REFERENCE NO. 27815, LAND REFERENCE 8125, ELDORET MUNICIPALITY BLOCK 9/2556, ELDORET MUNICIPALITY BLOCK4/2 ELDORET MUNICIPALITY BLOCK 7/40, ELDORET MUNICIPALITY BLOCK 7/41, KILIFI/JIMBA/362, CHEMBE/KIBAMBASHE/377, SUBDIVISION 167 SECTION VI MAINLAND NORTH, KEIYO/UPPER CHEPTEBO "A"/1, MOSOP/KAPTARAKWA/472, MOSOP/KAPTARAKWA/473, KIPLOMBE/KIPLOMBE BLOCK 6(KUTSI)/1** pending the hearing and determination of this suit;

[d] That costs be provided for.

[4] The application was premised on the grounds that the Deceased died testate on **11 July 2017** and that the Defendants are the Executors and Executrix of his Will; and that the Plaintiff is justly and truly owed a total sum of **Kshs.6,780,105,176** by the Estate of the Deceased. It was further averred that the Defendants have filed Summons for Confirmation of Grant of Probate of the Deceased's Will in **Nairobi High Court Probate and Administration Cause No. 1506 of 2017: In the Matter of the Estate of Kipyator Nicholas Kiprono Biwott**, dated **30 November 2018**; and that the same was filed with the sole intention of distributing the assets of the Deceased among his beneficiaries. The Plaintiff thus expressed apprehension that should that process be proceeded with, he will be exposed to irreparable loss and damage as the beneficiaries will most likely deal with the properties in a manner adverse to his interest as a creditor; in which event, the suit will be rendered nothing more than an academic exercise.

[5] In support of the application, the Plaintiff relied on his affidavit, to which he annexed copies of the Deceased's Will (Annexure BAK1), the six contracts (Annexure BAK2-BAK7), demands made by him for payment (Annexure BAK8), Summons for Confirmation of Grant (Annexure BAK9) and other documents in proof, *inter alia*, the Deceased's net worth as at the time of his death. He accordingly urged the Court to allow his application and grant the orders sought.

[6] In response to the application, the Defendants relied on the Grounds of Opposition dated **2 March 2019**, contending that:

[a] As a preliminary point, this Court has no jurisdiction to grant reliefs applied for by the Plaintiff herein, which reliefs effectively restrain the Defendants from discharging their statutory obligations to administer the Estate in terms of the Grant issued by the Court in **High Court Petition No. 1506 of 2017**;

[b] As a further preliminary point, this suit and the Notice of Motion dated **27 February 2019** should be transferred to Nairobi as the 3 Defendants reside and work in Nairobi and further the Succession Cause in which the said Grant was issued is filed in Nairobi;

[c] The application for temporary injunction to restrain the Defendants is misconceived as the Plaintiff's claim is for money allegedly lent to the Deceased and not for any proprietary right in the said parcels of land;

[d] In any event, the Plaintiff's claims against the Defendants are unconstitutional, null and void under the provisions of **Article 46** of the **Constitution**, as read together with the provisions of **Section 63** and **Section 13** of the **Consumer Protection Act, 2012**;

[e] Further, the Plaintiff's claims in the suit are meant to enforce tax evasion transactions by the Plaintiff, and by reason thereof, the said claims are untenable in law, and amount to abuse of the court process.

[7] In addition to the Grounds of Opposition, the Defendants filed a Replying Affidavit, sworn by **Desterio Andadi Oyatsi**, the 1st Defendant herein. He conceded that Grant of Probate to administer the Estate of the Deceased has been issued to them; but contended that the Court does not have the jurisdiction to issue the orders sought. He further averred that from the Plaintiff's own assertions in the Plaintiff and Supporting Affidavit, the contracts are unconscionable and therefore not actionable; and that it was on that basis that the Defendants rescinded the contracts on **2 March 2019**. He annexed to his affidavit a copy of a letter written by them to the Plaintiff to that effect as **Annexure "D1"**.

[8] An objection having been raised in respect of the jurisdiction of the Court to grant the orders prayed for, it is imperative for me to first consider and determine that question of jurisdiction, for, as was aptly stated in the **Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd [1989] KLR 1**:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[9] The Court of Appeal further observed in **the MV Lilian S Case**, (per Nyarangi, JA) that:

"...it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it..."

[10] What, then, is meant by jurisdiction. Courts have adopted the definition offered in the work, the **Major Law Lexicon, Volume 4**, where the word is aptly defined thus:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."

[11] While the High Court does have jurisdiction to hear and determine applications for temporary injunction such as the instant application, it is also a truism that the Court with the powers to do so in respect of a deceased person is the High Court exercising its jurisdiction as a Probate and Administration Court. Hence, **Section 2** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**, provides that the Act applies to all cases of intestate or testamentary succession to the estates of deceased person dying after the commencement of the Act. Indeed, in **Section 47** of the **Law of Succession Act**, the High Court is vested with powers to issue any order expedient for purposes of preserving the estate of a deceased person, for it is explicit that:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient...”

[12] **Rule 63** of the **Probate and Administration Rules** is more pointed in this regard in its deliberate mention of **Order 40** of the **Civil Procedure Rules**. It states that:

“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 ... shall apply so far as relevant to the proceedings under these Rules.”

[13] It is for the foregoing reason that I come to the conclusion that, for good order, the application for temporary injunction ought to have been made in **Nairobi High Court P & A No. 1506 of 2017**. Indeed, as was observed by the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, jurisdiction is regulated. The Court held that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law... It cannot expand its jurisdiction through judicial craft or innovation..."

[14] I would accordingly uphold the preliminary objection raised by the Defendants and strike out the application dated **27 February 2019** with costs.

The 2nd application

[15] The Defendants' application dated **21 March 2019** was filed under **Section 1A & 1B** of the **Civil Procedure Act, Order 13 Rule 2** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. It seeks orders that:

[a] A declaration be issued to the effect that the Plaintiffs admits in his claim and documentary evidence that the money claimed herein was an alleged loan advanced to the Deceased during the period **5 November 2015** and **2 September 2016** in the total sum of **Kshs. 382,000,000** and that the interest accrued on the said loan is **Kshs. 6,398,105,176/=** during a period of two years;

[b] A declaration that the said interest sum amount to **Kshs. 6,398,105,176/=** on a principal sum of **Kshs. 382,000,000/=** is interest charged at the rate of 160% per annum;

[c] A declaration that a representation in the alleged loan agreement conferring upon the Plaintiff the right to charge compound interest at the rate of 160% per annum on a sum of **Kshs. 382,000,000/=** is unconscionable and unlawful;

[d] A declaration that the alleged contract between the Plaintiff and the Deceased was duly rescinded on **2 March 2019** under the provisions of the **Consumer Protection Act, No. 46 of 2012**, and that by reason thereof, the said agreements or contracts ceased to have any legal effect from the said date of rescission and are now null and void;

[e] That Judgment on Admission be entered dismissing the Plaintiff's suit against the Defendants;

[f] That the Defendants be awarded costs of the suit and of the application on the higher scale.

[16] The application was hinged on the grounds that the claim is unsustainable in law as it seeks to enforce alleged contracts that are unconscionable, unlawful and prohibited by statute, being **Section 13** and **Section 63** of the **Consumer Protection Act**. It was further asserted that the Plaintiff's cause of action is based on an alleged contract which has been rescinded under the law. The application was supported by the affidavit of **Desterio Andadi Oyatsi** wherein he deposed to the aforementioned contentions. He further posited that the Plaintiff ought to be found to have committed tax evasion in that he neither declared the transaction to tax authorities nor maintained a record of the loans in question for purposes of tax computation.

[17] The Plaintiff on his part filed a Notice of Preliminary Objection dated **1 April 2019** contending that the application offends the provisions of **Articles 25(c) and 50(1)** of the **Constitution of Kenya**; and that it is therefore an abuse of the process of the Court and should be dismissed with costs. Thereafter on **12 April 2019**, the Plaintiff filed a detailed Replying Affidavit in response to each of the averments set out in the Defendants' application. He averred that the Supporting Affidavit is competent for failure to comply with **Order 1 Rule 13(2)** of the **Civil Procedure Rules** by failing to attach authority to depone. He also deposed to matters of law as to why the application, as it is, cannot stand muster; for instance that the orders sought cannot be granted at the interlocutory state; that the contracts were all valid and in accordance with the requirements of the law; and that there is no admission properly so called, from which a final judgment of the Court can be based.

[18] In particular, the Plaintiff denied having admitted the applicability of the **Consumer Protection Act** or any procedural abuse during the formation of the contracts; and that in any case these are matters that should be reserved for full trial. He similarly denied the tax evasion allegations made herein by the Defendants, contending that no complaint has been lodged against him that has been brought to his attention.

[19] The application was canvassed by both written and oral submissions by learned Counsel and the two main issues that emerge for the Court's determination are:

[a] Whether the application is indeed defective for want of compliance with **Order 1 Rule 13** of the **Civil Procedure Rules**, and

therefore ought to be struck out at once;

[b] Whether in the circumstances the Defendants are entitled to Judgment on Admission for the dismissal of the suit with costs.

On Compliance and want of it

[20] The provision relied on by the Plaintiff is **Order 1 Rule 13** of the **Civil Procedure Rules**. It states as follows in part:

“...where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.”

[21] In the Replying Affidavit sworn by the 1st Defendant on **4 March 2019**, he averred, at paragraph 2 thereof that he is authorized to swear that affidavit on behalf of all the Executors, the Defendants herein. That should suffice for purposes of these proceedings. I note that Counsel relied on **Sammy Achuchi Oduori & Others vs. Iberafria Power (EA) Ltd [2008] eKLR**, a pre-2010 decision wherein the Court (**Nambuye, J.** as she then was) was of the view that failure to comply was fatal. It is noteworthy, however, that what was in issue was a verifying affidavit filed pursuant to **Order VII** of the **Civil Procedure Rules** (now **Order 4 Rule 1** of the **Civil Procedure Rules**. Secondly, and more importantly, the authority is a pre-2010 decision and must now submit to the dictates of **Article 159(2)(d)** of the Constitution and the Oxygen Principle of the **Civil Procedure Rules**. In respect of this provision, I find apt the following expressions of **Hon. Nyamu, J.** (as he then was) in **Stephen Boro Githia vs Family Finance Building Society & 3 others Civil Appeal No. Nai. 263 of 2009**:

“The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all cobwebs hitherto experienced in the civil process and to weed out as far as practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution disputes in a just, fair and expeditious manner...the challenge to the courts is to use the new broom of overriding objective to bring cases to finality...”

[22] The thinking found approval by the Court of Appeal in the more recent case of **City Chemist (Nrb) & Others vs. Oriental Commercial Bank Ltd., Civil Application No. NAI. 302 of 2008 (UR 199/2008)**:

“...is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles.

[23] In the premises, I find no merit in the argument that the application is indeed defective for want of compliance with **Order 1 Rule 13** of the **Civil Procedure Rules**.

On Judgment on Admission

[24] In this regard, the Defendants invoked the provisions of **Order 13 Rule 2** of the **Civil Procedure Rules**. It states that:

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

[25] Hence, the Defendants urged the Court to infer that the Plaintiff, by certain admissions in his pleadings and affidavits filed herein, had conceded that it had no valid claim; and therefore, that his case should be dismissed summarily on that basis. Of course, the Plaintiff denied those assertions in his Replying Affidavit.

[26] Needless to say, that this is a case in which the parties have filed their pleadings. It involves a colossal amount of money. To dismiss it summarily would not, in my considered view work justice for the parties. In the case of **Choitram vs. Nazari (1984) KLR 327 Madan, JA** made the point that:

“For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.”(emphasis added)

[27] In the same judgment, the Court, as per **Chesoni Ag. JA**, expressed the view that:

“Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words “otherwise” which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions.....It is settled that a judgment on admission is in the discretion of the court and not a matter of right that discretion must be exercised judicially.”

[28] Hence, where, as in the case herein, the so-called admission is denied, the justice of the case requires a hearing and determination on the merits. I therefore find no merit in the Defendant's application and would accordingly dismiss the same with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 9TH DAY OF AUGUST 2019

OLGA SEWE

JUDGE