REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

CIVIL CASE NO. 29 OF 2019

DALU COMPANY LTD.....1ST PLAINTIFF

DAVID KABUBII KURIA.....2ND PLAINTIFF

LUCY MUTHONI KURIA.....3RD PLAINTIFF

VERSUS

I & M BANK LTD.....1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS...2ND DEFENDANT

RULING

BACKGROUND OF THE CASE

The Applicants filed under certificate of urgency Notice of Motion of 29th January 2019. They sought that pending the hearing of this application *interpartes*; a temporary injunction to be issued restraining the Respondents by themselves, their proxies, servants, agents or otherwise whomsoever from selling, advertising for sale and/or alienating and/or disposing off, selling , advertising for sale and/or alienating and/or disposing off, selling by public auction or completing conveyance or transfer of any sale concluded by auction or private treaty the parcel of land known as **Unit 3, 4 & 5 on 6th Floor of Tower 2 in the Mirage on LR 209/18559 Nairobi** registered in the name of Plaintiff/Applicant.

On 29th January 2019, the Duty Court ordered the application to be served to the Respondent and the matter to be mentioned on 31st January 2019. This was due to the imminent possibility of the sale of the auction of the suit property being auctioned in default of repayments to the existing facility. The 1st Respondent filed the Plaintiff's statement of Account from 1st January 2017- 10th January 2019.

On 31st January 2019, Mr. Gitonga Counsel for the Applicants informed this Court, that the intended auction was pursuant to the charged suit property and the Applicants were served with notice under **Rule 15 of the Auctioneers Act**. They were not able to retrieve relevant documents for the matter in light of the recent terrorist attack at Riverside Park Building. Counsel impressed upon the Court that since the Notice the Applicants on 26th October 2018; the Applicants made payments totaling Ksh 2,287,713/-. The facility is a 10 year loan commencing from 2015 and the Banking Act allows one to regularize loan repayment and defray the debt. The Applicants took issue with the fact that the statutory Notices prescribed under **Section 90 & 96 of Lands Act** were not served.

Mr. Wawire, Counsel for the Respondents in formed this Court that they were served by 5.30pm the previous day and were unable to file response and will require 14 days to do so. Notwithstanding the inconvenience and limited time they had; they produced copies of the 2 requisite Notices served to the Applicants vide registered post. It was intimated that the Applicants did not deny that they are in default of repayments of the facility. In addition, that the parties are engaged in another matter in this Court and the cases ought to have been consolidated.

The Court was on the verge of delivering Ruling on the same and had recorded that Applicants confirmed indebtedness and the Respondent confirmed proper service of statutory Notices; but before the Court Ruling parties entered into a self- recorded and signed Consent that is the subject matter of the instant application.

APPLICATION DATED 6TH FEBRUARY 2019

The Plaintiff approached the court through a notice of motion for the orders;

a. The court be pleased to set aside, rescind and expunge from the court record, the consent date 15th June 2017

b. Application be heard on priority basis

The application was based on the following grounds that;

a. The consent on record dated 31st January 2019

b. The said consent was given without sufficient material facts in misapprehension of the fact that the 40 day notice dated 26th June 2019 was not served on the 4th Plaintiff in accordance with Section **96(3) of the Land Act,2012**

c. The said consent was obtained in a manner contrary to the policy of this Court. It is the policy of the Court to uphold the law and discharge its functions. The effect of the Consent as recorded on 31st January 2019 falsely and incorrectly crystallized the 1st Defendant's statutory power of sale as there was no proper service under the law.

d. On 31st January 2019 the 1st Defendant's advocate produced copies of the 40days and 90days statutory notices and their respective certificates of postage. Counsel for 1st Defendant was categorical that all statutory notices for 90days, 40 days and 45 days were properly and lawfully served.

e. The Applicant's advocate had only had the opportunity to see the said statutory notices for the first time and had not had the opportunity to properly study the same.

f. It was on the floor of the Court that Counsel saw the notices produced by Counsel for the Respondents for the 1st time, and had not sufficient time or opportunity to properly study the same and understand the same.

g. It was on the strength of this incorrect and misleading assertions that the Court was convinced that proper service had been effected and was minded to direct Counsel for respective parties to explore and attempt consent.

h. Unknown to Counsel for 1st Defendant as well as Counsel for the Plaintiffs, the 40 days Notice dated 26th June 2018 was in fact not served on Pinnacle Projects Limited, the 4th plaintiff, as required under **Section 96(3) (h) of Land Act**. The same was apparent from the attendant certificate of postage.

The said consent condemned the Applicants to pay colossal sums of money to the tune of **Kshs 12,000,000** in 7 days which was unreasonable and unrealistic. Upon default, the 1st Respondent was to sell the charged properties upon exercising the statutory power of sale after 31st January 2019.

The Applicants are apprehensive that the 1st Respondent is likely to sell the suit properties unless the aforesaid consent is set aside.

The Applicant's constitutional right to property is under real and imminent danger.

The Court should not visit a mistake by the Applicant's Counsel on the Applicants who are willing and are amenable to alternative orders.

APPLICATION DATED 11TH FEBRUARY 2019

APPLICATION DATED 22ND FEBRUARY 2018

The Applicant herein through an amended notice of motion filed on 11th February 2019 approached the court for the orders;

a) Pending hearing and determination of this application, the Court issues an order for stay of Consent Order recorded on 31st January 2019.

b) The Court sets aside, rescinds and/or expunges from Court record the Consent recorded on 31st January 2019,

c) The Application be heard on priority basis.

The Applicants relied on grounds of the earlier application above.

The Applicant herein through an amended notice of motion filed on 22nd February 2019, approached the court for the orders;

a) A temporary injunction is issued on the Respondent restraining themselves, their proxies, servants or agents form selling, transferring, leasing or dealing in any manner with parcel land known as **UNIT 3, 4 and 5 on 6th FLOOR of TOWER TWO in**

"THE MIRAGE" on LR NO. 209/18559, Nairobi registered in the name of the 1st Plaintiff, pending the hearing and determination of the Applicant.

b) An alternative order or remedy do issue for the preservation of the parcel of land herein in line with **section 104(2)(c) of the Land Act.**

The application was supported by the affidavit of David Kabubii Kuria.

The Applicants relied on grounds of the earlier application above

REPLYING AFFIDAVIT BY THE RESPONDENT

The Respondent filed a replying affidavit dated 6th March 2019 to the notice of motion dated 6th February 2019.

Mr. Prestone Wawire, Counsel for the Defendants stated that, he personally appeared in court on the date the consent was drawn. He conceded that the Defendants had not filed their replying affidavit due to short notice but had however, informed the court that the bank had served the required statutory notices. The bank had evidence to show that the statutory notices were served to the Applicants.

The advocate requested for leave to present the said notices and upon grant of the said leave, presented to the court, the said notices and their certificates of posting which the court confirmed after perusal and agreed that the Notices were served.

Upon perusal of the said notices, Mr. Gitonga, the Counsel for the Plaintiffs confirmed that indeed the notices had been served upon the Applicants.

He stated that it was upon the admission by the Plaintiff's counsel that the court directed the parties to discuss on the way forward. Parties then recorded a consent after negotiations and consultations between the advocates and their clients.

In the circumstances, the Court placed the Court file aside on request of Counsel to enable consultations with their Clients prior to recording Consent. The Legal Officer of the 1st Defendant Bank Mr. Alexander Wokabi Advocate was in Court. The Legal Officer called the Bank Debt Recovery Manager; Mr. Musa Nganga Dumbuya who directed a sum of Ksh 12,000,000/- be paid by the Applicants within 7days failure to which, the property herein would be sold.

Mr Mwamba called his client in the presence of Mr. Gitonga and Mr. Wokabi Advocate and explained what transpired in Court. Mr. Mwamba Advocate informed them that his client accepted the Bank proposal and hence the Consent was drawn and signed on 31st January 2019.

The counsel for the Respondent claimed that the issue of lack of service was therefore an afterthought meant to scuttle the terms of the consent; on the following grounds;

Mr. Gitonga Advocate called the deponent and sought indulgence and extension of time within which to pay the amount or alternatively, pay by installments. He informed him that that his Clients experienced challenges in settling the amount. Mr. Wawire asked him to write to him and he would seek Client's instructions and he did not receive the formal letter. He also stated that the advocates for the Plaintiffs should bear the consequences for their own professional negligence and therefore have no good reason to set aside the consent recorded and the application should be dismissed with costs.

Mr. Alexander Wokabi Advocate Legal Officer I & M Bank filed affidavit in support of the Respondent's Affidavit on 7th March 2019 and corroborated the facts of what transpired in Court on 31st January 2019.

SUPPLEMENTARY AFFIDAVIT BY 1ST DEFENDANT

In opposition to the notice of motion dated 6th February 2019, 11th February 2019 and 22nd February 2019, the Counsel for the Defendant stated that the 4th Plaintiff could not purport that it was not served with the statutory notices as the official postal address of the 4th Plaintiff was similar to that of the 2nd Defendant and had not been disputed.

Counsel for the Defendant also stated that the Plaintiffs were unable to comply with the consent order as they had deposited Kshs 500,000 instead of Kshs 12,000,000 as per the terms of consent. He pleaded with the court to then set aside the consent as the Applicants had not given valid reasons to set aside the consent.

DEFENDANTS SUBMISSIONS ON COSTS OF THE AUCTIONEERS

The Defendants submitted to the court that pursuant to the courts directions, the Plaintiffs were to pay the auctioneer costs at the tune of Kshs 1,446,799.00. The Plaintiffs on 29th March 2019 settled the amount Kshs 435,000 leaving an outstanding balance of Kshs 1,011,799 which the Defendants now sought to be settled with regard to 1st sale of 31st January 2019 and 2nd sale of 20th February 2019.

The 1st Defendant relied on the case of;

Ibrahim Hussein Mahadi & Anor vs Gulf Afican Bank Ltd HCCC 285 of 2017 **on assessment of Auctioneers Fees.**

1ST AND 2ND DEFENDANTS SUBMISSIONS

In the submissions dated 29th March 2019, the Defendants submitted the disputed issues as follows;

1. The Applicants have given no plausible reason to set aside the consent

The Respondent relied on the case of ***Board of Trustees National Social Security Fund vs Michael Mwalo[2015]eKLR*** and ***Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Ltd [2015]eKLR*** it was established that an Applicant may only set aside the consent upon proving bias, injustice, fraud, collusion, by agreement consent contrary to the policy of the Court or consent given without sufficient material facts, misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.

The Respondent claimed that the Plaintiff had however not proved the existence of fraud or collusion at the time the consent was drawn.

2. The consent was obtained with sufficient material facts

The Defendants submission was that both parties had material facts at the time of entering into the consent as the Plaintiff's Counsel confirmed that the notices had indeed been served on the Plaintiffs and the same confirmed in open court. The 4th Plaintiff was duly served as they shared the same postal address as the 2nd Plaintiff. The basis that the consent should be set aside because there was lack of sufficient material facts has therefore no basis in law.

3. The consent does not override any mandatory statutory requirements

The Defendants submitted that the above issue could only be true if there was proof that the Applicants were not served notices.

4. The consent is not against public policy

The Respondents submitted that the consent was not against public policy as the Respondents did not conceal any information with regard to the 40 days statutory notice as claimed by the Plaintiff.

5. The Plaintiffs cannot set aside the consent by hiding behind the veil of mistake of counsel

The Respondent relied on the case of ***Josphat Nderitu Kariuki vs Pine Breeze Hospital Ltd [2006]*** where the court held that;

> ***" That aside, the defendant chose their advocate who failed to attend court. This is a proper case where an advocate should bear the consequences of their own professional negligence of failure to attend court on behalf of their client. Similarly, the client should bear the consequences for the choice of his legal counsel. I am not satisfied that there are good reason to unseat the plaintiff from his judgment. I decline to exercise my discretion, as there are no plausible reasons advanced by the applicant for me to do so."***

The Respondent submitted that if the actions of the Plaintiffs advocates occasioned the Plaintiffs any loss, they ought to recover the same from their advocates.

6. The decision to challenge the consent is an afterthought

The Respondent submitted that if indeed the Plaintiff had genuine reasons to set aside the consent, the Plaintiff would have not paid the sum of Kshs 500,000/- towards the settlement of Kshs 12,000,000/- as was agreed in the consent. The Plaintiffs should have waited until the consent was set aside to pay any amount.

APPLICANTS WRITTEN SUBMISSIONS

The Applicant submitted their main issue arising from the application herein as **whether the consent order ought to be side**.

The Applicant submitted that the consent was irregular in fact and law on the ground that the consent was obtained without sufficient material facts and in misapprehension of the law. The Applicants further submitted that the material fact in the application was the lack of proper service of the 40days notice. The Applicants relied on the **Halsbury's Laws of England**, **Vol. 11(2015**) at paragraph 1225 that stated;

> ***"A judgment given or an order made by consent may be set aside on any ground which would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy, or was obtained by fraud or misrepresentation , or non- disclosure of a material fact which there was an obligation to disclose or by duress, or was conducted under a mutual mistake of fact, ignorance of a material fact, or without authority…"***

The Applicant submitted that the Respondent did not make full and frank disclosure regarding the documents in their possession. This would therefore lead to an illegal and unlawful exercise of the Respondents' statutory power of sale without proper service of the 40days statutory notice, if the consent was to remain in effect.

The Applicant relied on the case of ***Lordship Africa vs Public Procurement Administrative Review Board & 2 others [2018]*** where the court in relation to illegality held;

> "*In **Standard Chartered Bank of Kenya Limited v Intercom Services Limited & 4 others [2004]eKLR** cited in **Kenya Pipeline Company Limited v Glencore Energy (U.K.) Limited [2015] eKLR** the Court of Appeal in both cases made it clear that **no court in this country can aid a party who is guilty of an illegality.** The Court also relied on the old case of **SCOT Vs. BROWN, DOERING McNAB & CO. [1892] 2 QB 724** where the English Court of Appeal held that an action founded on an illegal contract could not be maintained.*
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> *In **FESTUS OGADA Vs. HANS MOLLIN [2009] eKLR;** the Court of Appeal took the position that even if the issue of illegality were to come to a court's attention by a side wind, the court must ensure it deals with it so as not to aid any flouters of the law to benefit from their illegal acts, which would be offensive to public policy."*

The Applicant posits that the Consent was/is contrary to public policy as the Respondent contravened the law. The Applicants claim that the Respondent contrary to **Section 96(2) & (3) (h) of Lands Act 2013,** failed to serve the statutory notices to the 4th Plaintiff, one of the guarantors of the Plaintiff. Secondly, relying on the case of ***Gotv Kenya Ltd vs Royal Media Services [2015] eKLR*** that the Respondent failed to disclose this material fact on 31st January 2019, and made the Applicants' advocate without sufficient facts as he saw the notices in Court that day, to be induced to agree to Consent. The Court was satisfied that the Respondent served the requisite notices and hence asked the parties to negotiate. They drew a Consent in spite of improper service contrary to law.

DETERMINATION

> **The court has considered the submissions by the parties and finds that the issue for determination is whether the consent dated 29th January 2019 should be set aside.**

The court is guided by the case of ***Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982] KLR 485***, where the court held that;

> "***A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement."***

Dalu Company Ltd and I & M Bank by the charge entered into on 17th February 2016 charged Unit Number 3,4, & 5 on 6th Floor of Tower 2 in Mirage Reference Number 209/18559 as security for payment of Ksh 29 m. The 2nd & 3rd Plaintiffs, directors of 1st Plaintiff signed the Charge which included Chargor's acknowledgement of Effect of **Section 90 of the Land Act.** The Statement of Account of the plaintiff Company with effect from 1st January 2018- 10th January 2019 shows the Applicant's repayments of the loan and default/nonpayment. The Notice of 26th October 2018 by Purple Royal Auctioneer showed that Ksh 27,013,136.65/- was due and owing so as to redeem the suit property and halt the impending auction. It is noted from the Statement of Account the Plaintiff Company paid almost Ksh 2m from the date of service of the requisite Notices.

On 31st January 2019, when the matter was mentioned *inter partes*, the Plaintiff/Applicants, did not contest validity of the Charge, the fact of obtaining facility from 1st Defendant, servicing the loan and thereafter defaulting. The only issue in contest by Applicants was that the Statutory Notices were not served.

The Respondent brandished in Court the Notice of Default to pay Under **Section 90 of Lands Act**, The Notice to exercise the power of sale under **Section 96 of Lands Act** sent to the 1st, 2nd & 3rd Plaintiffs via Registered Post. The contention is that contrary to **Section 96 of Lands Act**, the Respondent did not disclose to Court and actually did not serve the 4th Plaintiff, Pinnacle Projects Limited.

> ***Section 96 Lands Act reads;***
>
> ***(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise thepower to sell the charged land.***
>
> ***(3) A copy of the notice to sell served in accordance with subsection (2) shall be served on—***
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>
> ***(g) any guarantor of the money advanced under the charge;***

The documents of guarantee dated 14th October 2015 attached to affidavit's Notice of Motion of 29 January 2019 at paragraph 7 indicate that joint and several personal guarantees for the loan sum shall be executed by 2nd and 3rd Plaintiffs. Corporate Guarantee and Indemnity is by the 4th Plaintiff for the secured sum. At the signage page of the Guarantee documents; the 2nd & 3rd Plaintiffs duly signed as Directors of both Dalu Company Ltd & Pinnacle Projects Ltd.

The Respondent's explanation that they served all Plaintiffs as they gave the same address holds true. Even if they did not name Pinnacle Properties Ltd by name in the Notices and Registered Posts as they named the 3 other Plaintiffs; the compliance of **Section 96 (3) (h) Lands Act** is complied with; the 2nd & 3rd Plaintiffs were served as guarantors of the 1st Plaintiff. Secondly, it is not mandatory to serve all guarantors but any guarantor in this case the 2nd & 3rd Plaintiffs.

Thirdly, in the case of ***Mugenyi & Company Advocates vs The AG[1999] 2EA*** the Court cited 10 instances under which the corporate veil maybe lifted. In this case the relevant instances are;

a) In abuse of law in certain circumstances

b) Where the device of incorporation issued for some illegal or improper purpose.

In the instant case, the Court shall lift the veil of Corporate personality of Pinnacle Projects Ltd. This means that the mask of incorporation is lifted with the result that the shareholders and/or Directors who are the will and mind of the Company are directly and personally accountable and not the Company. In this case, I find that the Directors 2nd & 3rd Plaintiffs were served with the statutory notice with the same address contrary to their claim that under the guise of the 4th Plaintiff Company they were not served.

From the above outline, the Respondent did not conceal any material fact or disclosure on proper service of the Plaintiffs with the requisite notices. In fact the Plaintiffs filed all relevant facts in Court when they moved the Court and there was nothing for the Respondent to conceal. The Consent was reached amicably without duress, misrepresentation or collusion between parties but that proper service of notices was done as evidenced by the copies presented to Court and Counsel for the Applicants to confirm.

It was insinuated that this Court induced/coerced/forced parties to draw consent. The said consent obtained in a manner contrary to the policy of this Court. It is the policy of the Court to uphold was also the law and discharge its functions. On the contrary, this Court was about to make its findings based on evidence presented of satisfactory service of the notices and admitted indebtedness as demonstrated by parties through their Counsel on 31st January 2019. The Consent terms were self -recorded by parties after discussions and the Court endorsed the same.

On the issue that the Plaintiffs 's Advocate was professionally negligent by agreeing to negotiate and record a Consent that had the effect of crystallizing the statutory power of sale, with respect, it is not a position borne out by the facts and events of 31st January 2019. On the contrary, Mr. Gitonga ably represented his clients and laid out their claim and redress to the Court. Upon perusing the copies of notices just as the court did the impugned notices were served. When the Court requested parties through Counsel to negotiate the way forward, they left Court briefly and from the detailed affidavit of Mr. Wawire for the Respondent they consulted all round including the Clients and the Bank and came to an agreement. The auction would be called off if Ksh 12milion was paid in 7 days. This Court finds that there was sufficient relevant material from the submissions made in Court and are on record and the events that took place outside Court as outlined by the Respondent's advocate Mr. Wawire and the 1st defendant's Legal Officer Mr.Wokabi who was present and swore and affidavit. The Plaintiffs visited on their Counsel their wishes and/or demands for him to deliver a definite/desired result inspite of the facts of the case.

Counsel for the Plaintiffs cannot therefore rely on the allegation that he did not have the material facts as per the time the consent was entered by the parties. The counsel for the Plaintiff has also not proved to the court that the consent was obtained by fraud or collusion. The court is therefore inclined to agree with the Defendants position as per the case of ***Board of Trustees National Social Security Fund vs Michael Mwalo[2015]eKLR*** paragraph 292(Supra),as the counsel for the Plaintiff has not established the conditions precedent in setting aside a consent.

With respect, Ksh 12 million was /is half the amount due and owing as per the notice by the 2nd Defendant. Whether the amount was/is stipulated in the impugned Consent or not, it was due and owing to be paid by the defendants. Although thereafter, from the statement of Account the Plaintiffs made frantic efforts to reduce the loan by payments made to the Respondent, they ought to have approached the 1st Defendant for restructuring of the loan or with a proposal to pay by installments and stagger the auctioneers fees, interest, penalties and principal sum instead of pursuing to set aside the Consent they all willingly negotiated and entered into.

The counsel for the Plaintiff confirmed that service of the 40 days statutory day notice was indeed served on the Plaintiffs and a confirmation of the same made in open court on the 29th of January 2019.

From the evidence considered above, this Court finds that the instant application is/was an afterthought and notices were duly served to the Plaintiffs. If the Plaintiffs contest service to guarantors, the 2nd & 3rd Plaintiffs are already served with the notices. The 4th plaintiff, it is 2nd & 3rd Plaintiffs who are Directors and had been served with notices.

The Consent is/was not contrary to law, public policy and was/is not illegal. There was full and frank disclosure by Respondents but even more so by the plaintiffs.

DISPOSITION

1. I find no plausible reasons or legal basis to stay, set aside the Consent by parties of 31st January 2019 and dismiss the application of 6th February with costs to Respondents.

2. As a result, the consent dated 29th January 2019 shall not be set aside as per the reasons thereof discussed above.

3. The Plaintiffs have demonstrated efforts to defray the default amount as confirmed from the statement of account and by the Respondent's advocate affidavit, that after the Consent they paid Ksh 500,000/=.

4. For these efforts; they have 60 days to approach and discuss with the 1st Defendant restructuring of the loan facility with a view to entering into a variation of the Consent of 31st January 2019 pending hearing and determination of the pending application *interpartes* and suit.

DELIVERED DATED & SIGNED IN OPEN COURT ON 27TH SEPTEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. KATISYA H/B MWAMBA FOR PLAINTIFF /APPLICANT

MR. KABUGO HOLDING BRIEF WAMAE - 1ST & 2ND DEFENDANT

COURT ASSISTANT: JASMINE