



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.376 OF 2015

COMMERCIAL BANK OF AFRICA LTD.....PLAINTIFF

VERSUS

GREEN FUTURE LIMITED.....1ST DEFENDANT

FREDRICK OKUMU SEWE.....2ND DEFENDANT

MICHAEL MUINDE KIMIYU.....3RD DEFENDANT

MICHAEL OKUMU KASERA.....4TH DEFENDANT

RULING

1. The Notice of Motion dated **9th April 2018** is filed by the plaintiff, **Commercial Bank of Africa Limited**. By that application the plaintiff seeks a review and variation of the decree dated **31st May 2017** and issued on **19th July 2017** and of the mediation settlement agreement dated **16th February 2017**. The plaintiff prays that after such review judgment be entered against the defendants, jointly and severally.

BACKGROUND

2. The plaintiff by the plaint filed on **30th July 2015** sought judgment against the defendants jointly and severally for **kshs.8,00,846.57** plus interest and costs. The claim was defended by the defendants whereby they denied the plaintiff's claim.

3. The matter was referred to Mediation process in accordance with The Mediation (Pilot Project) Rules 2015.

4. Parties were able to settle this matter through Mediation. The mediation settlement agreement dated **16th February 2017** is long winded but what the parties agreed was that the 2nd defendant would sell his property known as Villa No. 8 on **LR No.205/26 Olive Point Riverside**. The defendants by that settlement agreement made an undertaking that the said Villa was registered in the 2nd defendant; and that it was free from, any encumbrances, third party claims, lien, suits or other competing interest. Parties agreed that the proceeds of that sale would be utilized to settle the outstanding liabilities accrued to the plaintiff. Later the parties agreed that the plaintiff would sell the property by public auction or private treaty.

5. Following that agreement the plaintiff instructed auctioneers to advertise the Villa for sale. The auction was advertised in the newspaper but it was stopped by an order of the court made under ELC case, case No.661 of 2017. It transpired that the title is in the name of **Krishma Jitesh Charda** pursuant to a vesting order issued in the case HCC No.502 of 2013. The property was transferred to **Charda** on **14th December 2016**.

6. As a result of that property not being in the 2nd defendant's name the plaintiff has been left with a decree it cannot execute. It is on that basis the plaintiff seeks review and variation of the decree.

ANALYSIS & DETERMINATION

7. The Mediation Rules, under Rule 16, parties cannot appeal against a Mediation settlement agreement. In this case the plaintiff does not seek to appeal but rather to review and vary the decree.

8. The defendants when they entered into the mediation settlement agreement well knew that Villa did not belong to the 2nd defendant. By the time the Mediation Settlement agreement was concluded, on **30th May 2017**, the villa had been transferred to **Charda**. **Charda** was registered as the owner of the Villa on **14th December 2016**.

9. The defendant's action to enter into a mediation settlement over the Villa which was not in the 2nd defendant's name was an abuse of this court's process. In the case **Tana and Athi Rivers Development Authority Vs Jeremiah Kimigho Mwakio & 3 others [2015] eKLR** the court of appeal had this to say about abuse of the court process:

“Muchanga Investments Ltd Vs Safaris Unlimited (Africa) Ltd & 2 Others[2009] Eklr, as follows:

“What does constitute an abuse process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of ‘abuse process’. It can be said in general terms however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

10. The circumstances of this case show that that indeed the defendants abused the process of the court in entering into a settlement agreement over a property not owned by the 2nd defendant. The court is not powerless to act where there has been an abuse of court's power. The court can invoke its inherent power as provided under section 3A of the Civil Procedure Act. That section provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

11. This court can make orders as sought by the plaintiff. The court can review/vary the decree to the extent that the defendants deceived the plaintiff and this court in offering the sale of a property not owned by them to settle their liability with the plaintiff. By that mediation settlement agreement all the defendants acknowledged their indebtedness to the plaintiff. It is important to state that the defendants did not oppose the plaintiff's application for variation and for entry of judgment.

12. Accordingly on invoking this court's inherent powers, this court find that there is merit in the plaintiff's application. Since the orders sought will be granted the plaintiff is also entitled to costs of the application.

13. These then are the orders of this court:

a) The decree dated 31st May 2017 and issued on 19th July 2017 as well as the Mediation settlement agreement dated 16th February 2017 are hereby reviewed and varied as follows:

(i) Judgment is hereby entered against all the defendants, jointly and severally, as prayed in the plaint.

b) The costs of the Notice of Motion dated 9th April 2018 are awarded to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of November, 2018.

MARY KASANGO

JUDGE

Judgment read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE