



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 189 OF 2016

KCB BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

ELSEK AND ELSEK LIMITED.....1ST DEFENDANT

OSMAN ERDINC ELSEK.....2ND DEFENDANT

DENIZ ELSEK.....3RD DEFENDANT

RULING

1. In an Application dated 24th June 2016 and expressed to be brought under Articles 25(c) and 159 (2) (b) of the Constitution and Sections 1A, 1B, 3A & 6 of The Civil procedure Act and Order 4 Rule 1 (c) & 2 of the Civil Procedure Rules this court is asked by the Defendants to strike out this suit with costs.

2. The substantial ground upon which the Application is premised is that there already exists a suit being Nairobi HCC No. 236 of 2015 **Elsek & Elsek Ltd Vs. Kenya Commercial Bank Ltd** (hereafter HCC 236 of 2015) over the same subject matter and that the mounting of this suit is therefore a gross abuse of the Court process.

3. The Plaintiff herein is KCB Bank of Kenya Limited. It is explained by Tom Okoth Ogola (a Legal Manager of the Plaintiff Company) in an Affidavit sworn on 3rd August 2016 in answer to the Application before Court that:-

i. That the Plaintiff was incorporated on 20.4.2015. It only changed its name in the year 2015 from Kenya Commercial Bank Limited to KCB Bank Kenya Limited as a result of corporate restructure of Kenya Commercial Bank Group (KCB Group).

ii. Kenya Commercial Bank Limited transferred to KCB Bank Kenya Limited its wholly owned subsidiary, all its banking business, assets and liabilities via Kenya Gazette Notice No. 9652 dated 31st December, 2015 by virtue of which all assets and liabilities of Kenya Commercial Bank Limited including the credit facility that is subject to this suit and are now vested in the Bank with effect from 31st December, 2015.

iii. The Credit facilities advanced to the 1st Defendant by Kenya Commercial Bank Limited and guaranteed by the 2nd and 3rd Defendants was part and parcel of the assets and liabilities transferred

to KCB Bank Kenya Limited (the Plaintiff herein).

4. It would therefore seem that the proposition by the Defendants herein that, for purposes of this suit and HCC No.236 of 2015, the Plaintiff herein and the Defendant therein are one and the same entity is well founded.

5. It is on that understanding that Osman Erdinc Elsek, a Director of the Elsek & Elsek Ltd (Elsek Ltd (the 1st Defendant) herein, avers that HCC 236 of 2015 is based on the same alleged guarantees, Letters of offer, charge and further charge which is said to be the subject matter of this suit (Mr. Elsek's Affidavit of 24th June 2016). The Plaintiff retorts that the two suits are not in respect to the subject matter.

6. Let me consider the opposing positions taken by the two sides in affidavits filed on their behalf and submissions made by Counsel.

7. In Civil Suit No. 236 of 2016 (which was formerly Machakos Environment and Land Court Civil Suit No. 140 of 2015) the action by Elsek Ltd against the Plaintiff herein substantially revolves around the charge over **Kajiado/Kisaju/7941** and a facility granted to Elsek Ltd by KCB. In that suit Elsek Ltd seeks the following prayers:-

a. A declaration that the defendant advocate did not explain to the Plaintiff's directors the effect of section 90 of the Land Act 2012 and the remedies and the right and the section 82 and 83 of that Act or any other section before they executed the charge and further charge and that therefore the Defendant does not have a statutory power of sale.

b. A declaration that the Defendant is in breach of the terms of the further charge by failing to release to the Plaintiff the full amount secured by the charge and further charge and being in breach it cannot exercise statutory power of sale.

c. A declaration that the market value of suit premises is Kenya Shillings 204,000,000.00 and forced sale value is Kenya Shillings 153,000,000.00 and not Kenya Shillings 125,000,000.00 market value and Kenya Shillings 93,750,000.00 forced sale value and that therefore it would be oppressive and invalid to auction the suit premises without an accurate valuation report.

d. A declaration that the advertisement contained in the Daily Nation of 4th may 2015 is not an accurate description of the suit premises and that it violates the provisions of the Auctioneers Act and Rules and that therefore the threatened auction based on that description is unlawful and illegal.

e. An order of specific performance compelling the defendant to release to the Plaintiffs the sum of Kenya shillings 8,000,000.00 together with interest under the terms of further charge inclusive of penalty rates.

f. A declaration that the Defendant cannot exercise statutory power of sale or sue the Plaintiff or demand payment of any part of the principal and interest until 3 months after it has released Kenya Shillings 8,000,000.00 together with interest to the Plaintiff.

g. A declaration that the charge and further charge contain an inbuilt or inherent clause designed to limit, forestall, preclude and frustrate the Plaintiff's equity or right of redemption in so far as the clause prohibits the sale of individual houses and in so far as charge and further charge failed to provide for sale, transfer and registration of individual houses and that therefore the court should re-open the charge and further charge to provide for the sale of individual houses.

h. A declaration that it is not necessary, convenient to both parties or equitable for the defendant to sell the entire property when it can be saved any amount due and payable by releasing the balance and allowing 8 more units to be completed and sold to pay the entire debt.

i. A declaration that it is not necessary for the defendant to prejudice the construction and sale of

480 houses when it can recover any money due from the sale of only 12 houses.

j. A declaration that the parties intended under clause 9.2 (b) (ii) of the charge and further charge that in the event of a default the defendant would sell individual house to recover its money and not the entire property.

k. A declaration that by refusing to release Kenya Shilling 8,000,0000.00 to the Plaintiff the defendant delayed the construction of the houses from which it would have been paid and therefore curtailed the plaintiff's right to redeem the property.

l. A declaration that the maximum rate of interest allowed by the charge and further charge was 29% and not 32% or 40% and that the rate was not varied under section 84 of the Land Act.

m. A declaration that the defendant cannot recover credit card debt incurred after card was reported as stolen.

n. A permanent injunction restraining the defendant from selling or offering for sale by auction or private treaty the suit premises or any part thereof other than 5 months after releasing Kenya Shillings 8,000,000.00 with interest to the Plaintiff and even so to proceed to sell individual houses in accordance with the Plaintiff's pricing.

o. An order compelling the Defendant to either register individual transfers of houses to the Plaintiff's customers or release the title with the necessary consents to allow the sale, transfer and registration of the houses to the Plaintiff's customers conditional upon the purchase price for each house being paid directly to the defendant until the debt is recovered to the extent found due.

p. A declaration that the Plaintiff is entitled both under the Constitution of Kenya, the Land Registration Act and the Land Act to redeem the suit premises and to be heard on this dispute before the defendant carries out threatened auction".

8. KCB filed a Defence to that claim. KCB denies the claim and asserts, inter alia, that :-

a. The Plaintiff through its Directors executed a Legal Charge for Kshs.28,000,000 over Kajiado/Kisaju/7947 and later, a further charge.

b. Some credit facilities were granted to Elsek Ltd.

c. As additional security, Directors of Elsek Ltd executed Deed of Guarantee and Indemnity for the advances.

d. That KCB performed its side of the Contract and that the rate and method of charging interest on the advances is lawful.

Importantly, KCB averred that the loan was in huge arrears and its Statutory power of Sale over the charged property had accrued.

9. The current suit, undoubtedly, is in respect to the same facility. KCB seeks to recover the outstanding facility which is said to have stood at Kshs.58,021,347.73 as at 11th April, 2016 and which continues to attract interest at the rate of 22% per annum until full payment. KCB seeks to recover this money from Elsek Ltd and Osman Erdinc Elsek (the 2nd Defendant) and Deniz Elsek (the 3rd Defendant) as Guarantors to the loan.

10. In the oral argument before Court, Ms. Mathenge for the Bank conceded that the claim for recovery may have been a proper subject of a counterclaim in HCC. No. 236 of 2016. Perhaps a proper Counterclaim against Elsek Ltd and a claim against Osman Erdinc Elsek and Deniz Elsek! (see order 7 Rules 8 and 9 of the Civil Procedure Rule) as the latter two are not parties to that suit.

11. Counsel then makes a critical revelation. That if an injunction had been granted to Elsek Ltd then KCB would have mounted the Counterclaim in HCC 236 of 2015 but that the recovery effort by the KCB was frustrated when the proceedings in HCC. 236 of 2015 were stayed. In the written submissions by its Counsel, Elsek Ltd reveals that the stay Order had been made on an Application by an Interested party who claims ownership of the charged property. The stay was made pending hearing and determination of ELC 977/2015, (**Dr Benny Ben Otim Vs. Elsek & Elsek Ltd & KCB Ltd**) in respect to ownership of the charged property.

12. Now, since the 2nd and 3rd Defendants herein were (and are) guarantors of the facility to Elsek Ltd, KCB could, inter alia, sue the Chargor and Guarantors for money due and owing under the charge or sell the charged land (see the Remedies of a Chargee. Section 90 (3) of the Land Act). Of course, with the rider that the Court may order postponement of a chargee's action for money secured by the charge until the chargee has exhausted all other remedies relating to the charged land, unless the Chargee agrees to discharge the charge (Section 91 (2) of the Land Act).

13. So there is no doubt that, notwithstanding that the controversy in HCC No. 236 of 2016 is in respect to the charged property, KCB is entitled to pursue an action for recovery of money against Elsek Ltd and the 2nd and 3rd Defendants herein. But it is also clear to this Court that as there is an inseparable link between the money sought to be recovered and the charge, the action for recovery of the money ought to have been mounted as a counterclaim against Elsek Ltd and a Claim against the 2nd and 3rd Defendants here in HC No. 236 of 2016.

14. And the Court agrees with the submissions of the Defendant's Counsel that KCB should have sought to lift the stay order in HCC No. 236 of 2015 before filing a separate suit. In my view, even if a stay can be maintained in respect to the issues surrounding the charged property, there should be no reason why a claim and counterclaim in respect to recovery of the alleged outstanding debt should not be allowed to proceed.

15. What then are the appropriate Orders to make? Although this Court is asked to strike out the suit, the Court is quick to notice that the Application is also brought under the Provisions of Section 6 of the Civil Procedure Act which provides:-

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

A suit that offends the Provisions of Section 6 of The Act need not be struck out, it can be stayed.

16. The remedy that endears itself to this Court is to give an opportunity for KCB to seek appropriate orders in HCC 236 of 2015.

17. These are the final Orders of the Court.

- i. This suit is stayed.
- ii. Either party at liberty to apply.
- iii. Costs of the Application of 24th June 2016 to the Defendant.

Dated, Signed and Delivered in Court at Nairobi this 23rd day of March, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Mathenge for Plaintiff

N/A for Defendants

Alex - Court Clerk