



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND ADMILARTY DIVISION

CIVIL CASE NO 436 OF 2014

MARGARET WANJIKU KAMAU..... PLAINTIFF

VERSES

JOPA VILLAS (IN RECEIVERSHIP) 1ST DEFENDANT

JOPA VILLAS LLC 2ND DEFENDANT

WALL STREET BUSINESS PARK LIMITED.....1ST INTERESTED PARTY

COMMISSIONER OF DOMESTIC TAXES.....2ND INTERESTED PARTY

VARTUS COMPANY LIMITED.....3RD INTERESTED PARTY

R U L I N G/DIRECTIONS

1. This ruling/directions is made pursuant to a ruling delivered herein on 31st August 2016. However, before I go into the substance of the same, I wish to outline the historical background of this matter. The 2nd Defendant, Jopa Villas LLC (herein “Jopa”) entered into a loan agreement with Overseas Private Investment Corporation (herein “OPIC”). The 2nd Defendant then charged its property L.R. NO 27253/42 to Overseas Private Investment Corporation (OPIC), in consideration of the loan facility of USD 7,100,000.00. A Debenture and a Charge was created in favour of OPIC on 16th March, 2006. Jopa defaulted on the repayment of the loan facility and OPIC sent a demand notice for repayment of the loan arrears. However, Jopa failed to repay the amount demanded as a result of which OPIC appointed Mr. Haween Gadhoke and Mr. Daniel Ndonye as Receivers and Managers on 13th November 2008 pursuant to a Deed of Appointment under the security debenture dated 16th March 2006.

2. The appointment of the Receiver and Managers led to a filing of numerous Applications in an effort to stop the sale. This is evidenced by the following matters filed in Court:

i. HCC No. 215 of 2008 filed at Machakos High Court

ii. CA No. 147 of 2009 filed at Nairobi

iii. HCC No. 83 of 2012 filed at Nairobi

iv. HCC No. 458 of 2013 filed at Nairobi

v. HCC No. 436 of 2016 filed at Nairobi

3. On 4th December 2016, Honourable Justice Ogola delivered a ruling on four Notice of Motion Applications filed in this matter and by then, six injunction applications had been filed in Machakos HCC 215 of 2008. By the time the ruling of 4th December 2015 was being delivered, a total of 10 applications had been filed in relation to the subject matter of this suit. Apparently, most of these applications were heard and dismissed.

4. Subsequently, the 1st Defendant was allowed to exercise its statutory right of sale over the suit property, sometime in the month of February 2016. The property was sold at Kshs.960,000,000. The said sum was distributed as follows:

i. The sum of USD 5,814,341.46 was disbursed to OPIC being the total loan amount and interest which had accrued from the default date.

ii. The undisputed sum of Kshs.168,145,043 was deposited in an interest earning joint account opened in the names of the advocates of the Plaintiff and the 2nd Defendant.

iii. The disputed amount of Kshs.193,842,237.80 was deposited in a joint account in the names of the advocates representing the parties at NIC Bank.

iv. Pursuant to the orders made by this Court on 31st August 2016, the sum of Kshs.18,682,030 was transferred to OPIC as reimbursement for some of the costs it incurred.

v. The amount that is therefore held in the account is Kshs.175,160,207.80 (plus interest).

5. On 26th February 2016, the Court delivered a ruling which dealt with *inter alia* the distribution of the above proceeds of sale. The Court further ordered that the parties submit themselves to the Deputy Registrar for the purposes of taking accounts with respect to the balance of the proceeds of sale. The matter was then mentioned before the Deputy Registrar for directions on the said accounts. In the meantime, the 1st Defendant being dissatisfied with the above said ruling of the court, moved to appeal against it and at the same time filed a Notice of Motion Application in Court on 11th May 2016 seeking that the order relating to the taking of accounts be stayed on the ground that the Deputy Registrar has no jurisdiction to take accounts in respect of this matter. As a result of the said Notice of Motion Application dated 11th May 2016, the Deputy Registrar referred the matter back to Court. Upon hearing the said application, the Court directed in the ruling dated 26th February 2016 that the Deputy Registrar proceed with the taking of accounts and any matters relating thereto even in the nature of taxation. The Deputy Registrar was empowered to exercise her discretion and make appropriate allowance for the filing of any documents, and hear witnesses, if necessary for the purpose of settling the accounts.

6. The matter proceeded before the Deputy Registrar who rendered her ruling on the same on 5th August 2016. She dealt with a total of 14 items and made provision in respect to eleven. Three other claims were referred back to Court for directions. These claims were in relation to KRA Capital Gains Tax, KRA Withholding Tax and Vartus Company's Claim. Subsequently, the parties appeared before the Court on 11th August 2016, and after hearing the learned counsels for the respective parties, the Court requested the parties to furnish it with further submissions on the disputed items. In the meantime, the parties agreed that the sums awarded by the Deputy Registrar, in the ruling dated 5th August 2016, in relation to the following claims be released forthwith. These claims are:

a) expenses Kshs.5,203,627.20.

b) Electricity Bills Kshs.81,101.38.

c) Expenses Kshs.361,312.00

d) Land and Rent Expenses Kshs.877,550.00

e) Valuation Expenses Kshs.364,500

f) OPIC Disbursements USD.115,626.86

7. The following items were left as pending for determination by the Court.

a) Receivership fees

b) KRA Capital Gain Tax

c) KRA Withholding Tax

d) Company's Claim

e) Litigation fees

f) Conveyancing fees

These are now the subject of this Court's ruling/direction. I shall address these items in two categories. Those that were referred to the Court, items no. 10, 11 & 12 and those whose amount as awarded by the Deputy Registrar is contested by the 1st Defendant, items no. 8, 13 & 14. While addressing items no. 10 and 11, the Deputy Registrar stated as follows in her ruling.

"The witness was unable to give explanation on the basis of the calculation. I find that, the Court has not been given the proper accurate information to assist in getting the correct figure. The correct amount of the Capital Gains Tax cannot be established by estimates. When it is possible to get the correct information. Even after the determination there is a question of who is to pay".

8. The Court had the benefit of hearing the parties on these two claims. The Learned Counsel, Mr. Nyachoti appearing for the Plaintiff submitted that, the sum sought under these items should be held until the Court makes a determination and in particular where it should be paid from. He suggested that, it should be paid by the 1st Defendant from the sum of money they have already earned. Ms. Kimani, the Learned Counsel, holding brief for Ms. Opiyo for the 1st Defendant, was of the view that, the appeal that the 1st Defendant has filed against the Deputy Registrar's ruling should be heard first. The Learned Counsel, Mr. Makori for the 2nd Defendant, associated himself with the submissions made by the counsel for the Plaintiff. The Learned state Counsel, Mr. Nyangweso appearing for the Commissioner of the Domestic Taxes, told the Court that, the sum claimed by KRA as Capital Gains Tax is Kshs.18,660,067 plus penalty and interest amounting to Kshs.22,765,281, and as Withholding Tax is Kshs.39,897,537. 80 inclusive of Penalty and interest totalling kshs.45,779,314. That the Capital Gains Tax was based on self-assessment done by the Receiver Manager on the basis of sale transaction of the suit property being Kshs.960,000,000. He referred to the provisions of Section 51 and 52 of the Tax Procedures Act no. 29 of 2015 (herein "the Act") to the effect that the 1st Defendant lodged an objection to taxation of the amount payable outside the statutory period of 30 days and therefore the claim is admissible. He submitted that, under Section 17 of the Act, it is the owner of the property (in this case the receiver) to pay, however I note that under Section 17 (2) of the Act, it is the Commissioner to notify in writing any person appointed, in this case the Receiver, the amount of tax that is payable. It then becomes the responsibility of the Receiver to set aside the amount notified by the Commissioner out of the process of a sale of an asset or a lesser amount as subsequently agreed by the Commissioner. It is therefore not correct for the Learned Counsel appearing for KRA to say that the amount herein was based on self-assessment by the Receiver. It is not surprising then that the Deputy Registrar could not deal with this issue. And even when given an opportunity, the Commissioner of Domestic Taxes has not complied with the provisions of Section 17 of the Act.

9. Having heard the parties on 3rd November 2016, the Court directed that any party who wanted to file any documents in response to issues raised by the other party, proceed and do the same by 8th November 2016 and set the matter for ruling on 10th November 2016. However, on the said date, the Learned Counsel Mr. Gachui appearing for the 1st Defendant, informed the Court that the 1st Defendant had filed a Notice of Motion Application, seeking to *inter alia* strike out the Plaintiff entirely, and that would affect all other pending matters. This move by the 1st Defendant, was opposed by all the other Counsels, who sought that all other pending matters be dealt with first. The argument being that, if the 1st Defendant was aggrieved by the findings of the Deputy Registrar, they should appeal against it. The parties who desired to file their further documents were allowed to proceed.

10. The third claim that was referred to the Court by the Deputy Registrar was in relation to the Vartus Company. Mr. Murugara, the Learned Counsel, who appeared for the 3rd Interested Party submitted that, the Court should determine the amount of money payable to the claimant whose claim is based on a commission earned, after it identified the buyer of the suit property. That the money should be paid from the proceeds of the sale. The Counsel further submitted that, the 3rd Interested Party's claim is distinct from the other claims. However, this claim was vehemently opposed by the Plaintiff and the Defendants on the grounds that it was never among the items that were referred to the Deputy Registrar for consideration. That if this party wants to be paid, they need to file a pleading, and/or follow the procedure under the civil procedure rules to enable the Court determine *inter alia* whether the agent was lawfully instructed, and whether it is duly registered and licenced. In response Mr. Murugara argued that, the 3rd Interested Party's claim is straight forward and that it cannot be encumbered by technical objections. He stated that the 3rd Interested Party has a pending Notice of Motion dated 6th July 2016, where the Court has to determine the validity of the contract between the 2nd Defendant and the 3rd Interested Party. The Counsel further stated that if there is a challenge on the Deputy Registrar's ruling, it should be channelled through the Appeal. As the matter is still pending in Court, the amount claimed by the 3rd Interested Party should be retained.

11. In the ruling delivered by the Court on 31st August 2016, the Court ruled that, Vartus Company was only joined in the matter as an interested party for the purpose of taking of accounts and not in relation to the prove of its claim. Therefore the admission of the claim by the Deputy Registrar was an error on the face of the record. In my considered opinion, I find that the three items that were referred to the Court, were so referred due to insufficient/inadequate information that would have enabled the Deputy Registrar to make her finding thereon. These claims are a subject of two pending Notice of Motion Applications dated 2nd June 2016 filed by the Commissioner of Domestic Taxes, (2nd Interested Party), and Application dated 6th July 2016 filed by Vartus Company (3rd Interested Party). These applications have not been heard. The only prayers therein, which was allowed by consent of the parties, was to allow these interested parties join these proceedings. The only way then to determine the validity of these claims, is to allow these applications to be heard and in particular, the 3rd Interested Party's application. It is rather disappointing that straight forward claims, has herein filed by the 2nd Interested Party, can become a subject of such a protracted dispute. The 2nd Interested Party was directed to lay the basis of the claim in terms of assessment, having failed to convince the Deputy Registrar on the same. That has not been done. The Court is left with no other option other than to allow these Notice of Motion Applications to be heard. In the meantime, to preserve the rights of Commissioner of Domestic Taxes, I direct that the sum claimed be set aside pending the hearing and determination of their application. Its in the determination of these applications, that the Court will determine *inter alia*, proof of the claims, the amount owing if any, and who is liable to pay.

12. This leads me to the other three items nos. 8, 13 & 14. My findings on the same is that the Deputy Registrar has made a finding thereon and if the parties in whose favour are aggrieved by that finding, the best cause of action to take is to challenge the same through an Appeal or otherwise provided for by the law.

13. The last thing I would like to deal with before I conclude this ruling/directions is to make a comment

on the conduct of the parties in this matter. As already mentioned herein, this matter has been a subject of endless applications. I have already made a reference to an Application that has been filed by the 1st Defendant seeking to strike out an entire Plaintiff. This is an application that is coming after the parties have filed, canvassed and allowed the Court to make a ruling on various applications founded on the pleading in this matter. The question that arises is this, if the Court were to allow the Plaintiff to be struck out, what would be the legal effect on the orders that have been made in this matter. In addition to this application to strike out the Plaintiff, a Chamber Summons Application dated 12th May 2016 by the firm of Nyiha, Mukoma and Co. Advocates allegedly for the proposed 2nd, 3rd and 4th Plaintiffs/Interested Party(s) to be joined in the suit. The latest application so far hopefully, is dated 30th January 2017 and filed in Court on 31st January 2017 seeking to stay execution of the Court's Ruling dated 12th January 2017. As to how many more applications the parties are intending to file, your guess is as good as mine. This conduct has been heavily condemned by the Court as evidenced by the sentiments of Hon. Justice Ogola in the ruling he delivered on 4th December 2016 at paragraph 18

“Perhaps what indeed this Court needs to add is that the continued applications for injunction against the sale of the suit property must now be fully condemned, and the chargee given a free reign to sell the suit property in line with the charge and debenture both dated 26th March 2006, under which the said loan was advanced.”

14. What is clearly coming out is that a matter that was purely between a lender and a borrower, a Chargor and a Debenture holder/Chargee has been turned into an arena of contest by all sundry. Even the third parties who purchased properties in the suit property and filed numerous applications and were dismissed are attempting to find room into this matter. Unfortunately, this suit as a matter of fact, is basically concluded. What is at issue is merely disbursement of proceeds of sale. Even parties with distinct and independent claims what to join in this matter. This kind of conduct cannot be allowed by the Court. In my opinion, it cannot amount to anything else other than an abuse of the Court process. It is even evident in the submissions filed by the 1st Defendant dated 8th November 2016, titled the “*Receivers supplementary submissions*”, they term the Plaintiff's claim as amounting to a gross abuse of the courts process, as Honourable Justice Njagi and Justice Kamau have already dealt with issues of depositors/purchasers of unit in the suit property. On the other hand, the Plaintiff accuses the 1st Defendant as being a stabling block to the final settlement of this matter by resisting the taking of accounts and filing numerous applications. The 1st Defendants on their part, have made reference to several notices of appeal but there is no indication to how these appeals have gone. And even then, they still file an application to strike out the Plaintiff.

15. Under the provisions of Section 1A and 1B of the Civil Procedure Act, parties are required to assist the Court with expeditious disposal of cases. This is not the case herein. The Court indeed requested the parties herein to negotiate the matter with a possibility of recording a consent settlement. That did not yield any fruits. As a result of this, this matter has dragged for unnecessarily too long time in Court and denied the Parties the opportunity to enjoy the fruits of their earning.

16. The upshot of the foregoing is that, I direct that:

i. The pending applications by the Interested parties herein be set down for hearing forthwith by the applicants filing written submissions thereon within seven (7) days of this order and the Respondents filing their response within seven days of service. The matter will then be mentioned after 14 days for giving directions and/or ruling. The purpose of this order is to establish the merits or otherwise of these applications to enable final orders as to the distribution of the surplus of the purchase price so far not utilized.

ii. As the parties have completely failed to be of assistance to the Court, there will be no further release of funds until disputed items are dealt with and finalized. In that regard, and to preserve the rights of the 2nd Interested party who has a statutory right to whatever sum is due, I order in accordance with provisions of Section 17 of the Act, the sum assessed be set aside by the Receiver

and be deposited in Court until the claim by the 2nd Interested Party is heard and determined. In view of the fact that, the claim by the 3rd Interested party is between itself and the 2nd Defendant is still to be proved, I make no order for setting aside funds for the same.

iii. As this matter was referred to Court for directions, the issue of costs does not arise.

17. Those then are the orders of the Court.

Dated, signed and delivered on this 28th day of June 2017 at Nairobi

G. L. NZIOKA

JUDGE

In open court in the presence of;

Mr. Nyachoti for the Plaintiff

Ms. Opiyo for the 1st Defendant

Mr. Makori for the 2nd Defendant

Not Applicable for the 1st Interested Party

Mr. Nyangweso for the 2nd Interested Party

Mr. Fraser for the 3rd Interested Party

Teresia - Court Assistant