



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

CIVIL CASE NO. 543 OF 2015

LANDBANK REAL ESTATE INVESTMENT TRUST LTD ..... PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED ..... DEFENDANT

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**RULING OF THE COURT**

**1. INTRODUCTION**

There are two applications before the court. The Plaintiff's Application for Summary Judgment is dated 20<sup>th</sup> November 2015 and is supported by the Affidavit of Kenneth A. Omolo sworn on 20<sup>th</sup> November 2015. The Defendant's application to strike out the plaint is dated 6<sup>th</sup> January 2016 and is supported by the Affidavit of Nancy Oginde sworn on 6<sup>th</sup> January, 2016. The Defendant has also filed Grounds of Opposition and the Replying Affidavit of Nancy Oginde sworn on 6<sup>th</sup> January 2016 in answer to the Summary Judgement application by the Plaintiff. The Plaintiff has filed the Supplementary Affidavit of Kenneth A. Omolo sworn on 14<sup>th</sup> January 2016 in respond to M/s Oginde's Affidavits in both applications.

2. Before I proceed any further in this ruling, I must state that I have considered both applications. They both seek short cut summary proceedings to end the suit. However, what is to be noted is that this suit has a close nexus to suit ***No. HCCC No., 381 of 2015 – Sichuan Huashi Enterprises Corporation East Africa Ltd – vs – Landmark Real Estate investment Trust Limited.*** This Defendant is the Plaintiff in the instant suit. The Plaintiff seeks to enforce the terms of a performance Bond which was given by the Defendant Bank herein to support a bid put forth by the Plaintiff in the said ***HCCC No. 381 of 2015*** in favour of the Plaintiff in this matter. The bond was for Kshs.15,018,493/=. Both applications turn on the effect of the orders which have been made in ***HCCC No. 381 of 2015***. Justices Ochieng J, Kamau J, Sewe J, all of this Division have made orders in the said cause. Justice Ochieng in his order of 4<sup>th</sup> August 2015 stated;

***“Standard Chartered Bank should withhold payments”***

The said order was extended by the subsequent orders of Kamau J on 11<sup>th</sup> August 2015, and Sewe J of 17<sup>th</sup> September 2015. It must be emphasized that while those orders were in force there was indisputable prohibition on the Defendant herein making any payment on the bid Bond.

3. Whether these injunction orders should have been granted is a matter for the plaintiff to take up in **HCCC 381 of 2015**. It was not for the Defendant to enter into the fray and decide whether the injunction orders should have been made. The submissions by the plaintiff on when such injunctions may be granted have no relevance to the present case. I agree with the Defendant's submissions that the issue in the present case is the effect of the Orders and whether the defendant was obliged to obey those orders. The Order which Sewe J made on 2<sup>nd</sup> October, 2015 is addressed to the plaintiff, but specifically prohibits the plaintiff from calling or receiving any payments from the Defendant on the Bid Bond. It is of significance that this Order required that **"the entire sum of the Bid Bond of Kshs.15,018,493/= which the defendant was poised to pay"** be deposited. I agree with the Defendant that the effect of this order was firstly that the plaintiff was barred from illegally and irregularly calling and/or receiving any payments from the defendant in respect of the Bid Bond and secondly that the amount of the Bid Bond was to be deposited in the joint names of the plaintiff and the plaintiff in HCCC 381 of 2015.

4. Apparently, the Plaintiff is trying to make an issue out of the words "illegally and irregularly calling and/of receiving" and suggesting that the filing of these proceedings is not illegal or irregular. The Defendant submitted that in the context of the full Order, particularly the requirement of the provision of security for the payment of the amount of the Bid Bond, the effect of the Order is that no call or receipt for payment should be made until the court had determined whether the call could be made. It could not be the intention of **Sewe J** that the defendant should have to determine whether a call by the plaintiff for payment was illegal or irregular. The plaintiff filed the present case on 2<sup>nd</sup> November, 2015. The Defendant submitted that the filing of these proceedings by the plaintiff was in direct defiance and contempt of the Order of **Sewe J of 2<sup>nd</sup> October, 2015**. It is submitted that the action of the defendant in withholding payment on the bid bond was in compliance with the Orders of the Court. That submission makes sense to me in the context of this application.

5. The court is mandated to promote the overriding objective of S.1 A and 1 B of the Civil Procedure Act. It is the finding of this court that the filing of this suit, while the **HCCC No. 381 of 2015** is still pending was an abuse of the process of this court.

6. However, it is clear to this court that there are triable issues raised in both the plaint and the defence. The two applications before the court therefore must both fail. However, this court in exercise of the discretion given to it under S 3 A of the Civil Procedure Act, to do justice, hereby stays this suit pending the hearing and determination of the said **HCCC No. 381 of 2015**.

There shall be no order on costs.

Orders accordingly.

**READ, DELIVERED AND DATED, AT NAIROBI THIS 16<sup>th</sup> DAY OF MAY 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

Mr. Midenga for Plaintiff

Mr. Fraser for Defendant

Teresia – Court Clerk