REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 8 OF 2016

PARAGON ELECTRONICS LIMITED……..…….…….....APPLICANT

- VERSUS -

INVESTMENTS & MORTGAGES BANK LIMITED……..…….RESPONDENT

RULING

1. The case before me was brought by way of an Originating Summons. The applicant, **PARAGON ELECTRONICS LIMITED,** has asked the Court to order the respondent, **INVESTMENTS & MORTGAGES BANK LIMITED,** to discharge the Charge dated 17th January 2008.

2. The applicant also asks the Court to order the respondent to execute a registrable Memorandum of Satisfaction of Debenture for the Debenture dated 17th January 2008.

3. The applicant wants the respondent to deliver to it, the duly executed Discharge of Charge; the memorandum of Satisfaction of Debenture and the Original Lease in respect of **BLOCK 1C** on **L.R. No. 209/16027.**

4. It is the applicant's case that it had met its obligations under the Deed of Settlement and Compromise which the parties executed in December 2012. Therefore, the applicant insists that the respondent was under an obligation to comply with the terms of the Deed of Settlement and Compromise.

5. In answer to the application, the respondent acknowledges the Deed of Settlement and Compromise.

6. However, the respondent expressed the view that the applicant did not meet the terms of the said Deed within the prescribed time. In effect, the respondent said that the applicant defaulted.

7. Following the alleged default, the respondent says that it had to issue a Demand Notice to the applicant, to remit the outstanding balances.

8. The respondent's advocates, who issued the Demand Notice were paid legal fees. The payment of the said legal fees was made by the respondent, through debiting the applicant's account.

9. The consequence of the debit to the applicant's account was that it was in debit.

10. It was the respondent's case that until and unless the applicant paid the legal fees, the respondent was entitled to retain or to withhold the documents cited in the Deed of Settlement and Compromise.

11. It was the respondent's further case that the outstanding balance continued to attract interest. That would explain why the original debit of Kshs. 215,350/- had accumulated to Kshs. 309,000/- as at 10th September 2015.

12. The question that I must now determine is whether or not the respondent was entitled to withhold the Title Document, together with the Discharge of Charge and the Memorandum of Satisfaction of Debenture.

13. In the understanding of the applicant, the sums demanded by the respondent had no correlation whatsoever with the Deed of Settlement and Compromise.

14. But the respondent believes that the sums demanded have everything to do with the Deed, because the respondent paid legal fees to its advocates when they sent a demand notice to the applicant, after the applicant had defaulted on the terms of the Deed.

15. In the replying affidavit sworn by **NINA ADISA MADANGUDA**, the Senior Manager of the bank's Legal Department;

> **"…the Respondent was under obligation to deliver to the Applicant, originals of the Debenture, the Further Debenture, the Charge, the Mortgage, the Guarantee and the Original Lease in respect of Block 1C on L.R. No. 209/16027 and the Reconveyance in respect of L.R. No. 330/355 only upon payment by the Applicant of the sums agreed in the Deed of Compromise and Settlement as well as the associated costs, including additional legal costs incurred thereto".**

16. By necessary implication, therefore, it is clear that the respondent appreciates the fact that the *"associated costs, including additional legal costs",* were not an integral part of the Deed of Compromise and Settlement.

17. The respondent made the following point in its written submissions;

> ***"4. We submit that notwithstanding the express terms of the Deed of Settlement, the Applicant defaulted on payment of the amounts thereto, which necessitated the issuance of further demands for payment of the sum of USD 40,073".***

18. In my understanding, that submission is a further acknowledgement that the extra costs or legal charges were not incorporated in the Deed. That implies that the parties had not envisaged the extra charges.

19. It is nonetheless arguable that if the applicant defaulted, resulting in a demand being made by the respondent's lawyers, it would be deemed to be reasonable that the applicant ought to have expected the respondent to pass on to it, the legal costs incurred as a consequence of the default.

20. But if that position be arguable, one wonders why it was not incorporated into the Deed.

21. The parties had definitely anticipated the possibility of a default. They therefore incorporated into the Deed, clause 4, which was in the following terms;

> **"In the event that Paragon and the Guarantor fail to perform their obligations under clause 1(a) and (b) hereinabove, this Deed shall automatically terminate and the demanded sum shall become due and payable together with interest as demanded in the Statutory Notice and I & M shall be at liberty to sell Paragon's Properties namely Block C on Land Reference Numbers 209/16027 and L.R Number 330/355 by Public Auction in addition to enforcing the Guarantee. In the event the default occurs after due performance by Paragon of its obligations under 1(a) and (b), I & M shall be at liberty to sell Paragon's Properties namely Block C on Land Reference Numbers 209/16027 to recover the balance of the settlement sum**

together with interest thereon at Eight per centum per annum (8% p.a.) calculated from the date of the receipt of the Sums in 1(a) and (b) together with costs of conducting the public auction and shall thereafter recover the balance of the Settlement Sum together with interest and costs as aforesaid".

22. The Deed was drawn up by the advocates for the respondent. And they specified the costs and interest which would become payable by the applicant, in the event that the applicant defaulted, and the respondent then took steps to realize the securities.

23. By taking that unique step of specifying the costs which would become payable by the applicant in the event of a default, the respondent must be deemed to have excluded other costs. Therefore, even if such other costs were reasonable, the parties consciously excluded them.

24. I so find because clause 9 of the Deed makes the following point;

"This Deed constitutes the whole agreement between the parties hereto and no variations hereof shall be effected or effective unless made in writing and executed by all the parties hereto".

25. In my considered opinion, the applicant cannot be faulted for having thought that the sums debited to its account were in relation to the insurance of the property. The applicant had no reason to expect a demand for more costs.

26. By her replying affidavit, Nina Adisa madanguda said;

"The Respondent agreed to release the Conveyances, Indentures and Mortgage over L.R. No. 330/355 upon payment of the sums detailed in clause 6 and 7 above, which was duly done in January 2013".

27. According to the respondent, its lawyers debited a fee on 14th May 2014. The feenote was for Kshs. 215,350/-.

28. The respondent said that it paid that feenote on 3rd June 2014.

29. However, as the respondent said, it was not until 10th and 30th of September 2015, that the respondent issued a demand notice to the applicant, seeking payment of Kshs. 309,000/-.

30. The applicant responded on 1st October 2015, saying that it was ready and able to settle that sum. However, the applicant sought further and better particulars of that amount, together with documentation, showing how the amount was incurred.

31. Thus the applicant was equivocal, when it said that it was ready to settle the amount.

32. In answer to that request for further and better particulars, the respondent's advocates wrote back on 15th October 2015, saying that they were taking instructions.

33. Surely, if the issue was expected to have been understood by the applicant, it would not have sought further and better particulars, including supporting documentation.

34. And, certainly, the respondent's advocate would not have needed to seek instructions, when the sums demanded from the applicant, were said to have been paid to those lawyers.

35. The fact that the beneficiary of the amount being claimed had to seek instructions about it, before reverting to the applicant, is a clear reflection of how unclear the situation was. The advocates could not readily connect the sums they were demanding from the applicant, to the fee of Kshs. 215,350/- which

they had charged! How then could the applicant have been expected to know that the debit to its account was for legal fees?

36. The parties had expressly agreed as follows;

> **"In full and final settlement of the Settlement Sum of USD 968 056.61 and interest accruing thereon at 8% p.a I & M shall:-**
>
> > **a) Complete, execute and deliver to the Paragon registrable Memorandum of Satisfaction of Debentures (Companies Act Form Number 218) in respect to the Debenture and Further Debenture;**
> >
> > **b) Execute and deliver to the Paragon registrable Discharge in respect to the Charge;**
> >
> > **c) Execute and deliver to Paragon registrable Reconveyance of Mortgage;**
> >
> > **d) Deliver to the Paragon the Originals of the Debenture, the further Debenture, the Charge, the Mortgage, the Guarantee and the Original Lease in respect of Block 1C on L.R. No. 209/16027".**

37. In my understanding, the applicant has paid the Settlement Sum. Therefore, the respondent is obliged to honour its obligations under clause 3 of the Deed of Compromise and Settlement, as set out above.

38. In other words, I find and hold that the respondent cannot impose any conditions to the execution and delivery up to the applicant, of the Discharge of Charge; the Memorandum of Satisfaction of the Debenture; the Reconveyance of Mortgage; and the delivery up of the Originals of the Debenture; Further Debenture; the Charge; the Mortgage; the Guarantee and the Original Lease in respect of Block **1C on L.R No. 209/16027.**

39. I therefore grant the reliefs sought in the Originating Summons.

40. The respondent is directed to deliver all the requisite documents to the applicant within the next **SEVEN (7) DAYS.**

41. The respondent is also ordered to pay to the applicant, the costs of this case.

42. Before concluding this Ruling, I am obliged to indicate that if I had rejected the application, I would have directed that the feenote be subjected to taxation. I would have done so, because there is a dispute over the fee that would have been payable in respect to the Demand Letter which the respondent's advocates wrote to the applicant.

43. Finally, if I had rejected the application, I would also have directed that the costs found be payable should not have been subjected to interest in the manner in which the respondent did. It would be very unreasonable to condemn the applicant to pay interest on an amount which was not brought to its attention until much later after the sum had been debited to its account. Therefore, if I had rejected the application, I would require the parties to address me further, on the issue of the applicable rate of interest as well as the date from when such interest should be payable.

44. In conclusion, I reiterate that the Originating Summons is successful, and that the respondent has not more than **SEVEN (7) DAYS** from today, to comply.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **27th day** of **September** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Anzala for the Applicant

Kiche for the Respondent

Collins Odhiambo – Court clerk.