



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 576 of 2014

THRIFT ESTATES LIMITED.....1st PLAINTIFF/ RESPONDENT

DAKAGI HOLDINGS LIMITED.....2nd PLAINTIFF/ RESPONDENT

VERSUS

EQUATORIAL COMMERCIAL BANK LIMITED.....DEFENDANT

AND

ETRADE LIMITED APPLICANT/ INTERESTED PARTY

R U L I N G

1. The Matter now before the Court was an application in a suit commenced by a Plaintiff. The Plaintiff was brought under the Fast Track and was filed on 9th December 2014. The Summons to Enter Appearance have still not been signed by the appropriate officer. The Application was brought under a Certificate of Urgency dated 8th December 2014 and filed on 9th December 2014. Due to a variety of reasons the matter did not come before the Court until 11th December 2014 when an interim order was made relating to the sale and any subsequent action relating to the suit property. I will deal with those below. Following the Order, there was an application by the Interested Party to be joined. That was dealt with summarily and Etrade Limited, the purported purchaser at the auction of the Suit Property was joined as an Interested Party. The Interim Orders made on 11th December 2014 were served on 13th December 2014 and extended on 19th December 2014.

2. Shortly, thereafter, on 21st January 2015, the Interested Party filed an Application for the Orders “*made on 19th December 2014 to be discharged to facilitate the transfer of the suit property to the purchaser and or the proposed interested party.*” That Application was supported by the Affidavit of an officer of the Defendant Bank (a Susan Ndungu). It went into length in relation to a previous suit between the First Plaintiff and the Defendant herein together with the Auctioneer, ***High Court Civil Case No. 403 of 2013*** The Interested Party’s position is that it purchased the Property at Auction from an Auctioneer.

3. The Interested Party/Respondent then filed a Second Application on 10th February 2015 seeking Orders that the Orders issued restraining transfer of the suit property be reviewed and set aside. The Court delivered a Ruling on that issue on 30th April 2015. In that Ruling, the Application was not successful. The Interested Party then filed a Notice of Appeal under ***Rule 75 of the Court of Appeal Rules*** in this Court on 11th May 2015. It was subsequently filed in the Court of Appeal on 22nd May

2016. The outcome of the appeal, if any was argued, is unknown, at the date of drafting and delivery of this Ruling. Thereafter, the Plaintiffs/Applicants, sought a Hearing Date for their own Application.

4. The background facts to this matter were set out in the earlier Ruling but reaction to that Ruling suggests that there is advantage in repeating some of them here. The Plaintiff's Application seeks the following Orders:

1. *Superseded by events/spent*

2. *Temporary Injunction do issue restraining the Defendant, its agents duly appointed auctioneers, servants and/or any other persons acting at their behest from disposing or selling by way of public auction of otherwise, transferring, alienation and or in any other way dealing with the 2nd Plaintiffs property known as L.R. No 14902/70 (IR N89871) pending the inter partes hearing*

3. *Compliance with both the express and implied terms of the CONSENT ORDER signed between the 2nd Plaintiff and the Defendant on 9/10/2014 and filed with this Court on 21/10/2014*

4. *An Order directing the Defendant to furnish the Plaintiffs and file in Court for scrutiny all the Bank Statements, a detailed account on how the amount now demanded was arrived at and the interest rates that were applied at different times from the date the loans were advanced.*

5. *The title documents held by the Defendant for Land Reference Numbers KAJIADO/KAUPUTIEI NORTH 68164, 68165, 68166, 68167, 68168, 68169, 68164, 68170 AND 68171 be released to the Plaintiffs on an undertaking, terms and conditions that are fair and just to all the parties so as to enable the plaintiffs to source prospective buyers of the properties without any unnecessary challenges.*

5. The Grounds relied upon are set out at length in the application and are not repeated here. However, it is noteworthy, that Ground (n) states that the Defendant, in breach of the Consent Order and the law, had advertised the Kajiado/Kaputai properties for sale without any right to do so. There being no Charge over those properties. The Defendant is said to be in breach of the Consent Order.

6. The Application is supported by the Affidavit of Daniel Kamita Gachuhi who describes himself as a Director of the 1st and 2nd Plaintiffs. The 1st Defendant is the Borrower who obtained an advance of KShs30,000,000/= from the Defendant pursuant to a term Loan and an Overdraft. The terms of that borrowing is contained in the Offer Letter and has been set of in the earlier Ruling of this Court. The Second Plaintiff is the owner of the Property at LR No 14902/70 (IR No.89871). The 2nd Plaintiff was guarantor of the borrowing.

7. The Plaintiffs complain that the Defendant is in breach of the Consent Order entered into in ***High Court Civil Case No. 403 of 2013*** filed on or about 21 October 2014 and also the Charge Deed. The 1st Plaintiff asserts that the Defendant is in breach of the Offer Letter. The Defendant filed a Notice of Appointment of Advocates dated 11th November 2014 and filed on 11th December 2014, perhaps in response to the Mention Notice of the same day. The Defendant has not filed a Replying Affidavit but the Supporting Affidavit to the Interested Party's Application is sworn by an officer of that Bank. The Parties have made a number of allegations and counter allegations. It is clear that there is a dispute between the Parties as to the process leading up to the auction on 9th December 2014 and the procedure that was followed. As set out in the Ruling of 30th April 2015, there are a number of issues for trial in this matter. Those Listed were:

(1) the correct interest rate applicable,

(2) the validity of the Notice of Sale and therefore the Consent Order,

(3) Whether the Auction was lawful and therefore whether it passed good title to Buyer, and

(4) whether there was a sale at an undervalue.

8. The issues that arise for resolution from even the limited factual background and competing allegations now before the Court are as follows: -

(i) What were the exact terms of the Consent Order, both in relation to the express terms and implied terms?

(ii) What was the basis on which the Bank held the additional title documents?

(iii) Did the Bank act in bad faith as alleged?

(iv) Can an unlawful/illegal contract become enforceable by reason of Entry of a consent order?

(v) Was the Consent Order freely entered into or was it obtained by economic duress?

(vi) What is the correct interest rate applicable to the debt(s) outstanding? Can it be ascertained from the various references in the documentation? Alternatively, was it possible for the Plaintiffs (Debtor/Chargeor) able to comply with the conditions when the only person who had knowledge of the applicable rate was the Bank?

(vii) Was the notice issued in and the subject of the Consent Order, legal and valid?

(viii) If not can the Plaintiff be said to have consented to an illegality?

(ix) Was there a sale at an undervalue, as alleged by the Plaintiff? The Bank has not provided a valuation. The contemporaneous valuation from the Plaintiffs gives a value of KShs130,000,000/=. A previous valuation gave a value of KShs45,000,000/= and the Memorandum of Sale alleges to have sold the Property at the price of KShs42,750,000/=.

(x) If so, can the Bank pass on good title at the Auction?

(xi) Is the interested party a bona fide purchaser for value? Alternatively is there a connection between the Bank and the Interest Party as alleged?

(xii) Whether res judicata applies to matter the facts of which arose after the Consent Order?

(xiii) Whether a unilateral change of interest without notice is lawful and/or enforceable, Hon A. Mabeya J Ruled upon this issue in **High Court Civil Case No. 403 of 2013**

(xiv) Is damages an adequate remedy for the loss of the equitable right of redemption?

In addition, there are the issues of:

(xv) Whether the changes in the terms of the original lending or borrowing without notice to the Guarantor discharge the guarantee?

(xvi) Whether the Interested Party is a Bona Fide Purchaser for value without notice?

(xvii) Whether the conduct of the Defendant gives rise to a claim of ex turpi causa and whether this extends to the Interested Party?

(xviii) Whether any of the issues raised are res judicata the earlier suit?

9. The Application before the Court is for an order pending hearing of the suit. Therefore what is applicable are the principles laid down by the **Civil Procedure Rules Order 40** and the well known

authority of *Giella v Cassman Brown (1973) EA LR 359, 360 D-F*. Again, this was dealt with in the earlier Ruling of this Court Delivered on 30th April 2015.

10. As stated in the Ruling taking into account the evidence and legal argument before the Court at that point in time the Court formed the view that the Plaintiffs have demonstrated a prima facie case. The Defendant and Interested Party have countered by raising arguments relating to the Consent Order and res judicata. The legal principles enunciated appear to have been accepted by the Plaintiffs and are sound, however dealing first with the Consent Order. Both Parties state that the other has failed to comply with the Consent Order. That means both the terms and interpretation, as well as enforceability of the Consent Order are not completely certain. There is then the question of enforceability by a party in the face of its own breach. Although a consent order is an order of the Court it encompasses an agreement of the parties. It is that agreement that is enforced. In this case, the Consent was entered by the Deputy Registrar. From the record it is clear that she simply recorded what the Parties put forward as an agreement. She did not apply a critical eye to the agreement, she simply copied it out. That is an administrative rather than judicial exercise. As the Parties correctly assert, they should be bound by their agreement.

11. The Defendant relies heavily on Clauses 5 and 6 of the Consent. In addition the Respondents have produced a number of authorities which state that sale of the suit property can be compensated for in special damages. That may have been the case on the facts of those authorities, but the position here is different.

12. The Interested Party relies on **Section 99 of the Land Act** which it interprets as providing that a sale by auction cannot be impeached in any circumstances whatsoever (Ground of Opposition 2 and 5).

13. On 11th December 2014 the Court made an interim Order. That Order was served upon the Defendant on 11th December 2014. That Order was made in the following terms:

1. *The Defendant is forbidden from selling or instructing any person whether its servants agents or whomsoever from arranging or entering into the sale of the Land known as LR No 14902/70 (IR No 89871)*
2. *In the event that such a even or sale has taken place the Defendnant whether through its servants, agents, assigns or persons claiming through it are forbidden from registering such sale or disposal or transfer.*
3. *In the event that the Defendant has received any sums of money for the sale such sums shall be held in a separate account to the Order of this Court*
4. *Paragraphs 1, 2 and 3 to continue until the next inter partes hearing*
5. *The Respondent do have leave to file and serve a Replying Affidavit within 14 days*
6. *The Applicant do have leave to file and serve a Supplemental Affidavit in response if considered necessary within 7 days of service.*
7. *List for Mention after 28 days excluding the Christmas period per Order 50*
8. *Costs Reserved.”*

As envisaged in the Order, the Court anticipated that the auction may have taken place. In the circumstances, the Court made a second order stating (paragraph 2). Following (that is, after) service of that order the Defendant accepted the balance of the purchase price with a view to completion of the sale. That is in direct contravention of the Order.

The Land Act

14. The transactions in question are governed by the **Banking Act** and the **Land Act 2012**. At this stage of the proceedings, namely where a chargee claims to have exercised its power of sale, the scope of the Land Act is more relevant. The Plaintiff has raised issues on the validity of the Charge etc and those have been dealt with in the earlier Ruling. The Plaintiffs' case is that the auction was conducted unlawfully. The Defendant disputes that. The Second Plaintiff was the guarantor and therefore the chargeor of the property. Under **Section 89** of the **Land Act 2012**, the Chargeor has a right of redemption. **Section 89** provides:

89. (1) Any rule of law, written or unwritten, entitling a chargee (chargee) to foreclose the equity of redemption in charged land is prohibited.

(2) Upon commencement of this Act, a chargee shall not be entitled to enter into possession of the charged land or a charged lease or to receive the rents and profits of that land or lease by reason only that default has been made in the payment of the principal sum or of any interest or other periodic payment or of any part thereof or in the performance or observance of any agreement expressed or implied in the charge, other than in accordance with the provisions of this Act.

15. Although that Section relates to entering into possession, it gives the reader an idea of the spirit of the legislation, namely that the Chargee's rights must be exercised in accordance with the law and not in an arbitrary way.

16. The other issue raised is the rates of interest applicable to the borrowing. **Section 84** of the **Land Act** provides that:

84. (1) Where it was contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice served on the chargor by the chargee,—

(a) giving the chargor at least thirty days notice of the reduction or increase in the rate of interest; and

(b) stating clearly and in a manner that can be readily understood, the new rate of interest to be paid in respect of the charge. (emphasis added)

Whether or not that was done, and in the appropriate way is a matter for trial. The Second Plaintiff has raised a prima facie case that the interest rate was changed. Whether it was informed and/or whether those changes discharged the security are matters for trial and to be decided with the benefit of evidence.

17. If there is default – in this case it was by the borrower, not the chargor, the Chargee must serve a **Section 90 Notice**. The Notice must inform the defaulter what he must do to remedy the default. **Section 90(2)(b)** provides:

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

And the need to specify a period for compliance is set out in **Section 90(2)(c)** as follows:

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

The Defendant relies upon the Consent Order in the earlier proceedings to assert that the Parties' agreement is that those Notices would apply. The Defendant goes to great length about those proceedings. It says; "6. In the event of default in making any one of the payments as they fall due under 5 above, the 1st Defendant shall proceed to exercise its statutory power of sale under the Notices dated

26/3/2014 and 1/7/14". It is correct that is agreed, however, it is equally clear that what is said is a statement of fact. There is nothing in the Consent that states that such notices are within the parameters of the **Land Act 2012**. Do the notices give rise to **Section 96** powers? That Section provides

96. (1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90 (1), a chargee may exercise the power to sell the charged land.

18. Again, that is a subject for trial. Given the age, it is unlikely that they inform the Chargor – who was not a party to those proceedings, what he needs to do to remedy the default. There is, currently no evidence of notice served on the Second Plaintiff.

19. The Defendant raises the argument of res judicata. It refers to the earlier Suit **HCC 403 of 2013**. However, before the Consent was entered the Judge there (Mabeya J) also delivered a Ruling on the validity of the Notices now being relied upon. In addition, it would have been advisable for the Parties to seek enforcement and/or performance of the consent order in those proceedings. Neither has chosen to do so. In any event, the 2nd Plaintiff was not a party to the suit. Again, that raises an issue as to whether there was a change in the terms of the lending without notice to the guarantor sufficient to discharge the guarantee? Those issues are not res judicata. This is a new suit with new parties. The consent in **HCC 403 of 2013** may give rise to an estoppel argument against the 1st Plaintiff but it cannot prevent the 2nd Plaintiff from access to the Court. Further, the Defendant owes the 2nd Plaintiff a duty of care under **Section 97(1) of the Land Act 2012**. In addition, the default that now gives rise to the right of sale was default of the Consent Order and not the original charge. Where is the Notice referring specifically to that default?

20. The Defendant, and Interested Party rely on **Section 99** and it is quoted at page 7 of the Written Submission, however, the Submissions skirt around the latter part of **Section 99(3)** which provides:

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice. (emphasis added)

To that extent the authorities relied on by the Defendant and Interested Party which predate the Act are distinguishable for current law and this suit.

21. In relation to the 2nd Plaintiff, the position taken is that the conduct falls into those exceptions. The Defendant must have an opportunity to defend that claim. However, if the Court finds there is a completed sale at this stage, any Judgment in favour of the Guarantor 2nd Plaintiff will be rendered nugatory. Damages may be sufficient recompense for the property but not for the loss of the Right of Redemption, which the 2nd Plaintiff was not afforded if the facts pleaded are proved. In the circumstances, the argument for rest judicata does not apply to this case.

22. In the event that any of the grounds of “dishonest conduct” are made out, the Act requires that the buyer must have actual and/or constructive notice of that conduct before the sale can be impugned. Fraud and collusion have been alleged and must be proved. However, under the doctrine of *ex turpi causa non oritur actio*, the right to conduct a sale could also be impugned, independently of the **Land Act 2012**. In the circumstances, the only way to ensure restitution in integrum is to preserve the Suit Property.

23. The purported order said to have been made on 11th December 2014 and extracted on 12th December 2014 contained a forgery. The Order, in fact, made was:

1. THAT the Defendant is forbidden from selling or instructing any person whether its servants agents or whomsoever from arranging an entering into the sale of the Land Known as LR. No.

14902/70 (IR No. 89871).

2. *THAT in the event that such an event or sale has taken place the Defendant whether through its servant's agents, assigns or persons claiming through it are forbidden from registering such sale or disposal or transfer.*

3. *THAT in the event that the Defendant has received any sums of money for the sale such and shall be held in a separate account to the order of this Court.....” The remaining parts of the Order gave directions.”.*

Prayer and Decision

24. The Defendant has of its own admissions, and those of the Interested Party, breached paragraphs 2 and 3 of the Order. The Plaintiffs have not sought any penalty for contempt or breach of the Order.

25. In the Notice of Motion the Plaintiffs seek the following Orders:

1. *This Application be heard ex-parte and service of the same be dispensed with in the first instance due to the urgency and the nature of its circumstances.*

2. *Temporary Injunction do issue restraining the Defendant, its agents duly appointed auctioneers, servants and/or any other persons acting at their behest from disposing or selling by way of public auction or otherwise, transferring, alienation and or in any other way dealing with the 2nd Plaintiffs property known as L.R. No 14902/70 (IR N89871) pending the inter partes hearing*

3. *Compliance with both the express and implied terms of the CONSENT ORDER signed between the 2nd Plaintiff and the Defendant on 9/10/2014 and filed with this Court on 21/10/2014*

4. *An Order directing the Defendant to furnish the Plaintiffs and file in Court for scrutiny all the Bank Statements, a detailed account on how the amount now demanded was arrived at and the interest rates that were applied at different times from the date the loans were advanced.*

5. *The title documents held by the Defendant for Land Reference Numbers KAJIADO/KAUPUTIEI NORTH 68164, 68165, 68166, 68167, 68168, 68169, 68164, 68170 AND 68171 be released to the Plaintiffs on an undertaking, terms and conditions that are fair and just to all the parties so as to enable the plaintiffs to source prospective buyers of the properties without any unnecessary challenges.*

6. *Costs be in the cause.”.*

26. Dealing with each Prayer in turn

(i) Prayer 1: that has been superseded by events/Spent

(ii) Prayer 2 is granted in the terms set out in the Order of 11th December 2014

(iii) Prayer 3 is dismissed. The appropriate application is to seek enforcement in that suit namely HCC 403 of 2013

(iv) Prayer 4 is not appropriate for a certificate or application. The Plaintiffs should file a notice to produce. It is dismissed.

(v) Prayer 5 is also more appropriately brought within **HCC 403 of 2013** for enforcement. It is also dismissed

27. Paragraphs 1-3 of the Order made on 11th December 2014 is repeated to extend till Hearing and final resolution of this Suit.

28. Costs follow the event. Although the Plaintiff's have been successful in their Application dated 8th December 2014, they have only been successful in part. In the circumstances, the appropriate order would be an apportionment of costs. It is therefore ordered that the Defendant to pay 75% of the Plaintiff's costs of the Application.

29. The Deputy Registrar is directed to sign the Summons to Enter Appearance under **Section 47** of the **Fair Administrative Action Act**.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED and DELIVERED AT NAIROBI THIS 21st day of December 2016

Further Orders made:

1. Certified Copies of the Ruling and Proceedings to be made available to the Parties on the usual terms.
2. Each of/All the Parties are granted leave to appeal. The time for appealing to run from the date the Ruling is certified.

Note:

The proceedings in draft are typed and have been placed on the Court file.

In the Presence of:

Isaiah Otieno – Court Assistant

Applicants: No Appearance

Respondents: Mr Maraba

Interested Party: Mr Nderitu Holding Brief for Mr Njuguna