



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND AND ENVIRONMENT NO.27 OF 2013

WASHINGTON MWAGAH BONYO

BEATRICE AKINYI BONYO.....PLAINTIFF

VERSUS

K-REP BANK

JANE ANDHOGA STAUSI.....DEFENDANTS

RULING

1. This ruling follows filing of submissions by both sides on an application dated 4/2/2013 and filed on the same date. The application is a Notice of Motion and is brought under Sections 1A, 1B and 3A of Civil Procedure Act (Cap 21) and Order 40 Rules 1 and 2 of Civil Procedure Rules and all other enabling law. In all, seven (7) prayers are sought but at this stage, prayers 1,2 and 4 are not for consideration, having been intended to run until determination of the application, which is what this ruling is all about.

2. For consideration therefore are prayers 3,5,6 and 7, which are as follows:-

Prayer 3: That a temporary injunction be granted restraining the 1st defendant, its agent, servant and/or employees from demanding back the title of Land Parcel No. **KISUMU/PANDPIERI/1648** and **KISUMU/PANDPIERI/1649** until the suit is heard and determined.

Prayer 5: That a temporary injunction be granted restraining the 2nd defendant, agents, servants and/or employees from handing over the title of land parcel No. **KISUMU/PANDPIERI/1648** and **KISUMU/PANDPIERI/1649** already charged with Kenya Commercial Bank to the 1st defendant until the suit is heard and determined.

Prayer 6: That the court be pleased to order that accounts be taken in this matter.

Prayer 7: That the costs of this application be provided for.

3. The application is premised on the grounds, inter alia, that the 2nd defendant can handover the titles to the aforementioned land parcels (hereafter suit properties) to the 1st defendant;

that the 1st defendant has arbitrarily inflated the monthly instalments from Kshs.243,480/= to

Kshs.352,000/=; that the interests have been inflated from 21% to 31%; and that the loan amount, which is the subject of the whole dispute, has been increased from 9,214,140/= to 10,700,905/=. The 2nd defendant is said to be in possession of the titles and it is feared that she might hand them over to 1st defendant.

4. The supporting affidavit to the application is actually a narrative that provides the background to the suit and the justification of the application. From it, it is clear that the plaintiffs procured a loan of about 9 million shillings from the 1st defendant but at some point, the plaintiffs desired that Kenya Commercial Bank takes over the loan from the 1st defendant. The disagreement giving rise to the suit occurred during the process of take-over and the 2nd defendant is brought on board because she played a facilitative role as counsel for Kenya Commercial Bank.

5. The parties, who are **WASHINGTONE MWAGAH BONYO** and **BEATRICE AKINYI BONYO** as plaintiffs while **K-REP BANK** and **JANE ANDHOGA STAUSI** are defendants, are disagreed on the loan amount owed, interest rates, and where the titles to the suit properties are.

6. According to the plaintiffs, the loan amount and interests rates are inflated while the titles are said to be with 2nd defendant – **JANE ANDHOGA STAUSI**. The 1st defendant – **K-REP BANK** – is also accused of merging the loan borrowed with another borrowed separately on different terms. Another accusation concerns changing monthly instalments from Kshs.243,480/= to 352,000/=.

7. The 1st defendant filed a 28-paragraph replying affidavit. It termed the application as misplaced, misconceived, incompetent, defective and an abuse of the court process. The loan of 9 million is admitted as borrowed but the interest rate was to be based on the base lending rate as fixed by the Central plus 8% per annum. Such rate had to seesaw according to variations in base lending rates. And should the plaintiffs decide to pay the loan earlier than agreed, that would attract a fee which was an additional sum to the amount payable.

8. When the intimation to take over the loan was made to the 1st defendant, a response was made stating the owed amount as Kshs.10,726,903/=. The 2nd defendant, acting for Kenya Commercial Bank, then gave an undertaking that that amount would be paid with interests at 31% within a fortnight upon successful registration of discharge of charge.

9. What followed was release of titles to 1st defendant by 2nd defendant but the Kenya Commercial Bank only paid Kshs.9000,000/= instead of the 10,726,903 intimated as owed. That left an unpaid balance of Kshs.1,881,696 which continued to generate interest at 31%.

10. The 1st defendant admitted that the plaintiffs borrowed a second loan but denied merging that loan with the earlier loan of 9 million shillings. The plaintiffs are said to be misleading the court in this respect.

11. The second defendant filed her replying affidavit on 15/7/2015. Her response is essentially a narrative as to what happened. She explained her role and her critical averment is that she is not in possession of the titles to the suit properties, having passed them on to Kenya Commercial Bank to become securities for the loan taken over from 1st defendant.

12. The responses of 1st and 2nd defendants elicited the filing of a further affidavit by the plaintiffs. The affidavit refutes allegations of bad faith attributed to plaintiffs by 1st defendant. It also avers that failure to avail amortization schedule has caused confusion. The plaintiffs maintained that they have availed the correct information; and that the 1st defendant is wrong on issues of amount owed, the interests chargeable, and on virtually every other thing raised in the 1st defendant's replying affidavit.

13. The 1st defendant replied to plaintiffs further affidavit vide a further replying affidavit filed on 3/9/2015. it averred, inter alia, that though the plaintiffs borrowed 9 million shillings, that amount continued to incur interests and by the time of take-over, what was owed was Kshs.10,726,903. It was also averred that the amortization schedule, which the plaintiffs fault it for not availing, is a month-by-

month breakdown of loan repayments which changes as changes in interest rates occur. The plaintiffs, it was deposed, were shown the amortization schedule and they were also shown how it works. In particular, they were told that the amortization schedule would change if interests rates happened to change. It was emphasized too that the 1st defendant had not merged the second loan with the first loan.

14. The plaintiffs filed submissions on 10/9/2013. The submissions are generally a re-statement of what the application and its accompanying affidavits contain. But the submissions go further by availing some authorities to support the various averments.

15. The 1st defendant's submissions were filed on 4/10/2013. The submissions reiterate the various positions advanced in the responses made. A repeat here would be a redundant endeavour.

16. There are also submissions by the 2nd defendant. The submissions highlight the background to the case; reiterate that the 2nd defendant is not in possession of titles; and advances the 2nd defendant's position on the various issues to be determined.

17. In this matter, it seems to me that the application is premised on the presumed fact that the 2nd defendant is in possession of the titles to the charged properties and that there is the real likelihood of the 1st defendant demanding back the titles. I have deliberately avoided going into details of what the submissions contain because the plaintiffs have not done a good job of demonstrating that the 2nd defendant possesses the titles. I have also looked at the decided authorities availed by the plaintiffs and realized that they apply to factual situations which are totally different from the situation here. In particular, the authorities availed concerned situations where the statutory notices of sale had been issued, which is not the situation here. It is worth pointing out that issuance of such notice makes the threat or fear of sale of the charged property real and imminent. Such a situation does not apply here.

18. This matter does not depend on the suitability of the submissions or authorities availed but on whether the premise on which the application is based has been shown to exist. If the premise is not shown, it is pointless to go to other issues raised. The position I take here concerns mostly the restraining orders sought. And so I ask: Has it been shown that the 2nd defendant has the titles? This is the crucial issue.

19. The 2nd defendant has asserted that she does not have the titles. She says she forwarded the titles to Kenya Commercial Bank which took over the plaintiffs loan from 1st defendant. This position of the 2nd defendant is clear from paragraphs 10,11, and 13 of the 2nd defendant's replying affidavit. The plaintiffs failed to respond to these assertions vide their further affidavit. The 2nd defendant's position therefore remains credible as the plaintiffs further affidavit does not displace it. This credibility is further boosted by the letter dated 14/1/2013 from the 1st defendant to 2nd defendant (the letter is item No.5 in the 1st defendant's list of documents) which, inter alia, complains that the 2nd defendant has already forwarded the titles to Kenya Commercial Bank.

20. This being the position therefore, it becomes impossible to restrain the 2nd defendant from releasing what she does not have. If the plaintiffs wanted the court to believe them, a clarification of this issue from Kenya Commercial Bank would have been of much help. I believe it would not be difficult for the plaintiffs to get that clarification. It is that bank which took over their loan. It is highly unlikely that the bank would take-over and pay the money to 1st defendant without the securities being in place. The plaintiffs are customers of that bank. I do not think such information would be withheld. This is more so when it is borne in mind that the information concerns an arrangement in which the bank taking over was also involved.

21. The 1st defendant is also sought to be restrained from demanding the titles from 2nd defendant. Following from what I have observed so far, such a demand would be idle. It is not worth any restraining order as it is shown that the titles have already been forwarded to Kenya Commercial Bank. It seems to me that the 1st defendant had even made such a demand vide its letter of 14/1/2013. But it is that same letter that complains that the titles have already been forwarded to Kenya Commercial Bank. So on this issue, the 1st defendant is also being sought to be restrained from making a demand it had already made.

A restraining order would therefore be a vain order.

22. When the premise upon which the restraining orders are sought is shown not to exist, it is a futile exercise to try and articulate the law sought to be relied upon. The law can only apply to demonstrated facts. It is not necessary to delve into the law given the position in this matter. That is why I don't see the need of even attempting an analysis.

23. Prayer 6 asks for taking of accounts. The accounts as they are reflect a big contention between the parties. Each party has held to its position and only evidence can shed light on the matter. Such evidence can only be availed during trial. It is therefore premature for the plaintiffs to ask for accounts when all evidence is not yet in.

24. But there is even more to this issue of taking accounts. Prayer (b) in the plaint is also asking for taking accounts. So which accounts would be taken at the determination of the suit if the same accounts are to be taken at the interlocutory stage? The plaintiffs miss the point by thinking that accounts should be taken at the interlocutory stage. They have already made such a prayer in the main suit and they are jumping the gun by making a similar prayer in the application. This prayer therefore, like the injunctive prayers sought, must be rejected.

25. The substantive prayers sought in the application are 3,5 and 6. I have endeavoured to show why the prayers should not be granted. It is necessary to state clearly here that I reject the prayers. The other prayer sought is that of costs. The plaintiffs have lost the application and there is no reason why they should not pay costs. Accordingly, the application is hereby dismissed and the plaintiffs should pay the costs.

A.K. KANIARU – JUDGE

29/1/2015

29/1/2015

A.K. Kaniaru – Judge

Dianga G. - Court clerk

No party present

Kouko for 1st defendant/Respondent

P.D Onyango for Mwamu for Applicant

Ogutu Mboya (absent) for 2nd defendant

Interpretation – English/ Kiswahili

COURT: Ruling on application dated 4/2/2013 read and delivered in open **COURT.**

Right of Appeal – 30 days

A.K. KANIARU – JUDGE

29/1/2015