



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 305 OF 2013**

**SHOWCASE PROPERTIES LIMITED ::::: PLAINTIFF/APPLICANT**

**- VERSUS -**

**KENYA COMMERCIAL BANK LTD. ::: DEFENDANT/RESPONDENT**

**R U L I N G**

**INTRODUCTION**

1. Before this court is a **Notice of Motion** application dated **8th December 2014** filed by the Plaintiff and is supported by the Affidavit of **Francis Muhoro Gachanja** who is a director in the Plaintiff Company. The application seeks an array of orders the major one being the extension of the 10 months grace period granted on 13th March 2014 before the Applicant commences repayments of the loan granted by the Defendant, and that such extension be pegged to the determination of **HCCC No. 577 of 2011 Showcase Properties Limited – Vs – Bamburi Special Products Limited**. The application also seeks in the alternative or in addition to the above, orders of review of this court's Ruling of 13th March 2014, *inter-a-lia* on the basis of the doctrine of frustration.
2. The application is opposed by the Respondent vide a replying affidavit.
3. Before proceeding further, it is important to briefly go into the history of this application. On or about 7th September 2010, the Plaintiff applicant secured a loan facility of Kshs.200,000,000/= from the Defendant the purpose of which was to finance construction of serviced apartments in L.R. No. 2/61/Kilimani, Nairobi, which was also offered as the security for that loan. Upon completion of the said serviced apartments, the Plaintiff/Borrower undertook to open a rent collection account with the Defendant Bank and to channel all the rent through the said account, and this was part of the continuing security for the advanced loan. In furtherance to the said contract the Plaintiff serviced the loan, and by the time of filing this suit in July 2013, the Plaintiff alleges to have paid a total of Kshs.69,613,325.44, but fell into arrears when the Plaintiff encountered construction problems with its supplier of ready mix concrete which led to cracks in some of the constructed apartments, and finally the entire works stalled causing the Plaintiff to file suit (HCCC NO. 577 of 2011) against Bamburi Special Products (supplier of the ready mix concrete). The works at the suit property therefore stalled pending the finalisation of the said suit. This had the effect of causing the Plaintiff to lag behind in the repayment of the loan. By its application dated 17th July 2013, the Plaintiff came to this court and prayed a myriad of injunctive remedies to restrain to the Defendant from foreclosing on the suit property and/or an extension period of 12 months before continuing with the loan repayment. This court in its Ruling dated 13th

March 2014 made orders dismissing the application but allowing an extension of 10 months period under Section 104 (2) (b) and (c) of the Land Acts, 2012. That period was due to expire in January 2015. This application filed in December 2014, prays for the extension of that period, and a review of the orders of 13th March 2014.

4. From the above background, it is clear that there is a close connection between this particular suit and the said HCCC NO. 577 OF 2011. This is the connection: The Plaintiff was advanced loan facilities to enable it construct serviced apartments over the suit property which was also under mortgage arrangement as security to the Defendant. Upon construction of the suit property, the Plaintiff was to open rent collection account with the Defendant. The purposes of the loan was therefore clear ie. to construct the serviced apartments, whose rent was partly to be used as continuing security. What appears to have upset this arrangement was the process of construction of the suit property. Due to alleged construction defects caused by suppliers of ready mixed concrete, parts of the suit property have cracked, and indeed this has caused the entire works to stop. The effect is that the Plaintiff has lagged behind in the repayment of the loan, and now pleads for a further extension, now alleging even frustration of contract of mortgage. It so happens that the said HCCC NO. 577 of 2011 is also before this court, and this court has visited the suit property to see firsthand the said cracks and how the works have been stopped. In fact, in the said Ruling of 13th march 2014, this court observed as follows:-

***“Before I proceed further in this matter I must note for the record that there is the HCCC NO. 577 of 2011 Nairobi – Showcase Properties Limited –vs – Bamburi Special products Limited which is currently going on before my Court and which is intricately related to the matter before the Court. In that case the Plaintiff/Applicant has sued the Defendant therein Bamburi Special Product limited for damages arising from alleged negligence the result of which has altogether as we speak stalled the progress of the works in the suit property. The stalling of the works on the suit property has a bearing in the matter before the Court in that due to the said delay the Plaintiff is unable to complete the works in the suit property, and hence in a way, unable to meet it’s financial obligation to the Defendant in this particular case. I mention this fact because in the said suit HCCC No. 577 of 2011 the Court has moved to the suit premises and has observed the state of the affairs in those premises. It is possible that the knowledge gained by the Court in that visit may play a role in the current proceedings given that Courts are composed of human beings. Be that as it may I will be as objective in this matter as I can”.***

5. When the court granted the 10-month extension, it was on the assumption that the Plaintiff would be able to recover favourable financial position to enable it continue with the loans repayment. This also included the possibility that within that time the said suit HCCC NO. 577 of 2011 would have progressed. It now appears that there has been no progress in the said suit, and that the Plaintiff has no means of repaying the loan. On that basis the Plaintiff/Applicant approaches this court in two different ways, firstly, that a review of the orders of 13th May 2014 are necessary because:-
  - a. ***Neither the Plaintiff nor his Advocate were aware that HCC 577 OF 2011 would not be or was unlikely to be concluded within one (1) year from the time the Application dated 17<sup>th</sup> July, 2013 was made.***
  - b. ***Neither the Plaintiff nor his Advocate anticipated that the Loan facility with the Defendant would not be re-financed by other financial institutions in view of the pendency of the suit.***
  - c. ***The site visit report carried out on 28<sup>th</sup> January, 2014 by this Honourable Court made the following finding at page 7 paragraph (g) Quote:-***

***“The Court at this stage was not able to know which party was the cause of the said cracks. This is a matter to be determined in the normal Hearing”.***

***This Honourable Court having made that finding, it is only a matter of adducing evidence***

***before the trial Court, which information this Honourable Court did not take into consideration while making its Ruling dated 13<sup>th</sup> March, 2014.***

- d. ***That the Plaintiff has now discovered that the six (6) blocks already completed and ready for occupation cannot be leased out as the Nairobi City County has declined to issue any Occupation Certificate to the suit property.***

The second reason alleged is that the loan agreement between the Plaintiff and the Defendant has been frustrated because under Clauses:-

3.1 Term Loan Facility was granted to finance construct of serviced apartments on the suit property.

- The Valuation of the property being constructed was to be done by a Valour in the bank's panel upon completion to ascertain the market value latest by 30th November 2012.
- The Borrower was to undertake to open rent collection account with the bank and channel all the rent through the said account.

The Applicant submitted that all the above conditions subsequent have not been performed thereby causing the construction to be frustrated.

6. The Defendant/Respondent in its submission opposed the application and submitted that neither review process or the doctrine of frustration is applicable herein, and that the simple fact is that the Plaintiff has defaulted under the mortgage contract and the Defendant is now at liberty to exercise its statutory power of sale and the court cannot stop this, especially after the court had intervened and given the Plaintiff a grace period of 10 months. During those 10 months, and upto date, the Plaintiff, has not made even a single repayment instalment. The Plaintiff therefore has come to court in bad faith and with unclean hands and the court should not allow this application.
7. The Defendant submitted that this Application being a review, the same ought to be guided by the provisions of Section 80 of the Civil Procedure Act, Cap 21 of the Laws of Kenya which provides as follows;

***“Any person who considers himself aggrieved -***

***by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***

***by a decree or order from which no appeal is allowed by this Act,***

***may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”***

Order 45 Rule 1 of the Civil Procedure Rules, 2010 further provides as follows;

***“(1) Any person considering himself aggrieved—***

- a. ***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
- b. ***by a decree or order from which no appeal is hereby allowed,***

***and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”***

8. The Respondent submitted that the Applicant has not met the threshold for grant of the review orders sought herein. The applicant has not shown that it has discovered new and important matters which were not within its knowledge at the time the Order was made, or, that there is some mistake apparent on the face of the record, or, for other sufficient reason.

The Respondent cited the case of **MICHAEL MUNGAI v FORD KENYA ELECTIONS & NOMINATIONS BOARD & 2 others [2013] eKLR**, where a 5-judge Bench of the High Court stated thus;

***“The scope for review of a decree or order is therefore limited to a situation where an applicant has discovered new and important evidence which was not available at the time the decree was passed or where there is a mistake or error apparent on the face of the record or for any other sufficient reason.”***

9. The Respondent submitted that the foundation of the present suit is the performance of the contractual obligations pursuant to a financial facility given to the Applicant by the Respondent. The Applicant did willingly offer its property as security. The essence of security in a loan agreement is that when the borrower is unable to fulfil the contractual obligations in terms of repayment, the security is sold to recover the outstanding amount.

In the case of **Paul Gichimu Waweru v Equity Bank of Kenya Ltd [2015] eKLR**, Justice R. Limo expressed himself as follows;

***“Even if this Court were to consider the second principle in the GIELLA case (supra), it is clear that even if an injunction is not granted, damages would be an adequate remedy should the trial Court eventually find in favour of the plaintiff/applicant. Once a property is given as security, the same becomes a commodity subject to a sale and whose value can be ascertained and therefore, any loss suffered by the plaintiff/applicant upon the sale of the property is remediable by an award of damages. ...”***

10. The Respondent further submitted that the present Application is majorly anchored on the performance of a contract between the Applicant and Bamburi Special Products Limited. The Respondent herein is not a party in **HCCC No. 577 of 2011 Showcase Properties Limited v Bamburi Special Products Limited** and this Court cannot make adverse orders affecting the Respondent herein by mere existence of the other suit. It is trite law that Court cannot issue orders touching on rights of parties who were/are not parties to a suit as that would amount to condemning them unheard as it was held by the Court of Appeal in the case of **Pashito Holdings & Another v Ndungu & 2 Others Civil Appeal No. 138 of 1997**. The Respondent submitted that the contract founding the cause of action in this suit is separate and distinct from the contract founding the cause of action in the other suit. The contract founding the basis of this suit was a financial facility advanced to the Applicant by the Respondent whereas the contract founding the cause of action in the other suit was a supply agreement between the Applicant and the Third Party.

The Respondent reminded the court that the issue of the nexus of this suit and the other suit were considered by this Court during the determination of the Applicant’s Injunction Application and *the Court stated that it would nonetheless remain objective*. The court must continue to be objective.

11. The Respondent also submitted that the doctrine of frustration does not apply herein, and cited the case of **Davis Contractors LTD -vs- Farehum U.D.C, (1956) A.C 696, Lord Radcliffe** at page. 729 held:

***“...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that***

***which was undertaken by the contract. “Non haec in foedera veni”. It was not what I promised to do”.***

12. The Respondent submitted that the contract founded on the financial facility advanced to the Applicant by the Respondent has not become incapable of being performed. The mere fact that the Applicant has faced hardship is not frustration in itself.

The Contract has not altered in its nature. It is still a financial facility agreement and the security that was offered is still available. What needs to be done in the event of breach, such as this, is to allow the Respondent to exercise its statutory power of sale which it seeks to exercise. Further, it was submitted that the principles for grant of review orders are clearly set out by the Civil Procedure Rules and case law. Frustration does not fit in any of them. Ipso facto, frustration of a Contract is not a ground for review and because of that, this prayer, it was submitted, should fail.

13. I have carefully considered the application and opposing submissions of the parties. There are only two issues to be considered by this court to reach a determination.

i. ***Whether the remedy of review is available.***

ii. ***Whether the doctrine of frustration applies.***

14. As regards the first issue, it is to be noted that the application for injunction is denied in my Ruling of 13th March 2014, and the reason for the same are stated in the Ruling. The court having rejected the prayers for injunction, it cannot now be submitted that new evidence or important matters have come up, which, if the court had considered, the court would have allowed the prayer for injunction. The court is always aware that matters take many months to conclude. The extension which was given of 10 months was not meant to enable the Plaintiff conclude HCCC NO. 577 of 2011. It was meant to enable the Applicant secure funds to restart the repayment of the loan. How or where those funds were to be secured was not known or stated. The second ground that neither the Plaintiff nor this advocate anticipated the loan facility with the Defendant would not be re-financed by other financial institutions, is related to the first reason above, that is, the court did not give the said 10 months because some other known or unknown financial institution would refinance the loan. The third alleged new matter is that this court had observed during the said site visit that it would not, at that stage, know which party was responsible for the said cracks, and that this was a matter to be determined in the normal hearing. That is correct. But it is the hearing of HCCC No. 577 of 2011, and I do not understand its relevance in this particular application. The last alleged new evidence is that the Nairobi City County has declined to issue any occupation certificate to the suit property. Again, I do not understand how, on that basis of refusal by the County of Nairobi to issue occupation certificate, this court should now review its Ruling and issue injunction against the Defendant back. I therefore dismiss the applicability of the option of review as a remedy as prayed in this application.

15. The second issue is whether the doctrine of frustration applied herein. The doctrine of frustration, as I know it, is a complex one in the law of contract. It provides a vent for each party to bear the loss or gains of a contract which cannot be performed at a particular point in time. The Court of Appeal recently in ***Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR*** stated as follows;

***“This now leads us to the issue of whether the agreement was genuinely frustrated.***

***In Halsbury's Laws of England, Vol. 9(1), 4th Edition at paragraph 897:-***

***“As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This***

*assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea."*

*In the case of;- Davis Contractors LTD -vs- Fareham U.D.C, (1956) A.C 696, Lord Radcliffe at page. 729 held:*

*"...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. "Non haec in foedera veni". It was not what I promised to do".*

- 16.I agree with the Respondent that the contract founded on the financial facility advanced to the Applicant by the Respondent has not become incapable of being performed. The mere fact that the Applicant has faced financial hardship is not frustration in itself.
- 17.From the foregoing, it is clear that the Defendant has the right to exercise its statutory power of sale over the suit property. It is evident that the Plaintiff suffered serious construction inconveniences caused by a Third Party. Any remedy the Plaintiff can get cannot be imposed by an order of this court. It can only be as agreed between the Plaintiff and the bank. In the exercise of its right to sell the security under the charge, the Defendant has the liberty of the mode of exercising such a right. The liberties, depending on a particular mortgage instrument range from selling the security in a public auction, or by private treaty. In other cases the chargee can appoint a Receiver over Borrower if it is a corporation. It is upon the Defendant to choose how it will do that, and this court will not impose a particular mode of exercise of such a right.
- 18.Finally, it is clear that the Plaintiff's challenges emanate from the reasons found in HCCC NO. 577 of 2011. It is also clear that the repayment of the loans in this suit cannot await the finalisation of the said HCCC No. 577 of 2011. If this court were to order that to happen, this court would in essence be writing a new contract for the parties. Because it is likely to take a while before the issues in HCCC No. 577 of 2011 are resolved, and because in the meantime the loan and interest thereon will be growing at an alarming rate, this court urges that the most appropriate remedy for the Plaintiff is to discuss with the Defendant how the suit properties can be disposed off in a manner most beneficial to the Plaintiff.
- 19.In light of the above findings, the only order that commends itself to this court is to dismiss the Plaintiff's application by way of Notice of Motion dated 8th December 2014 with costs to the Defendant/Respondent.

Orders accordingly.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 17TH DAY OF APRIL 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Kamau holding brief for Mugambi for Plaintiffs/Applicant

Mr. Kiche holding brief for Ondati for Defendant/Respondent

Teresia – Court Clerk