



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 24 OF 2015

WIL DEVELOPERS & CONSTRUCTION LIMITED.....1ST PLAINTIFF
BRONKHO INVESTMENT LIMITED.....2ND PLAINTIFF
JOHNSON MWANZIA WAMBUA.....3RD PLAINTIFF
ALICE WANGARI MWANZIA.....4TH PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs' Notice of Motion dated 30th June 2015 and filed on even date was brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 (Laws of Kenya), Order 51 Rule 6 of the Civil Procedure Rules and all enabling provisions of law. It sought the following orders:-

1. **Spent**
2. **Spent**
3. **THAT this Honourable Court do grant the Plaintiffs a sixty (60) day extension of time within which to complete the payment of the amount agreed as due to the Defendant;**
4. **THAT costs of the application be in the cause.**

THE PLAINTIFFS' CASE

2. The application was supported by the Affidavit of Johnson Mwanzia Wambua, the 3rd Plaintiff herein, that was sworn on 30th June 2015. The Plaintiffs' Written Submissions were dated and filed on 10th July 2015.

3. The Plaintiffs were basically seeking a sixty (60) days extension within which to complete the payment of the amount agreed as due to the Defendant. Their case was that the Defendant intended to proceed with the exercise of its Statutory Power of Sale despite being aware of the difficulties they faced in light of the

slow payment for services already rendered by them to their various clients. They averred that some payments from the said services had been made directly to the Bank and that some outstanding payments were expected to be made very soon.

4. They further averred that in the midst of the said challenges, they had already paid a sum of Kshs 10,800,000/=. With regard to the securities charged for sale, it was their contention that they had secured an offer of Kshs 62,500,000/= for L.R No. Dagoretti/Rirutta/3901 while the Defendant had secured their best offer at Kshs 40,000,000/= for the same property which meant that they risked losing over Kshs 20,000,000/= should the subject property be sold by the Defendant and pointed out that it was evident that the Defendant did not intend to conduct the private treaty sale in good faith.

5. It was therefore their case that it was an act of bad faith for the Defendant to insist on an undervalued sale of the securities while the Plaintiffs had a higher and better offer.

6. In view of the foregoing, the Plaintiffs urged the court to intervene and grant them a reasonable extension of time to enable them pay the outstanding monies to the Defendant.

THE DEFENDANT'S CASE

7. In opposition to the said application, on 8th July 2015, Erick Mugambi, the Defendant's Relationship Manager, swore the Replying Affidavit on behalf of the Defendant herein. It was filed on the same date. The Defendant's Written Submissions were also dated and filed on 8th July 2015.

8. The Defendant indicated to the court that they had on several occasions indulged the Plaintiffs to make payments but the same were not forthcoming. It stated that on 27th January 2015, a public auction was cancelled and a consent recorded on express terms of payment. However, no payments were made. On 24th March 2015, another consent was recorded extending the time line for compliance to 1st April 2015. This timeline was also not complied with whereupon by a letter dated 25th June 2015 the Defendant's Advocates informed the Plaintiffs that they would proceed with the sale of the subject property by public auction.

9. It was its assertion that it had not been shown any Agreement for Sale to the Plaintiff by a potential buyer, regarding the offer of Kshs 62,500,000/= and that it would not decline any offer so long as there was a sale agreement and a deposit of twenty five (25%) per cent paid to it.

10. The Defendant's argument was that no grounds for extension of time had been demonstrated as the Plaintiff had persistently reneged on the terms of both consents which had to date not been set aside and which had to be obeyed.

11. In light of the foregoing, the Defendant urged the court to dismiss the present application with costs to it as the Plaintiffs were abusing the court process by filing the same.

LEGAL ANALYSIS

12. The Plaintiffs brought the current application under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act seeking an extension of time within which to complete the payment of the amount agreed as due to the Defendant. Section 3A of the said Civil Procedure Act gives this court inherent powers to make such orders that are necessary for the ends of justice while Sections 1A and 1B of the same Act introduces the principle of overriding objectives, whose purpose is to facilitate the just and expeditious disposal of civil disputes.

13. The Plaintiffs' submissions were that they had fully explained the circumstances leading to the breach of the consents on payments. They further submitted that even in the midst of the challenges they had managed to pay a sum of Kshs 10,800,000/= which was an indication of their seriousness and commitment to pay the outstanding monies.

14. The Plaintiff's main argument was that they were facing difficulties in light of the slow payment for services already rendered by them to their various clients. This may very well have been the position. However, there was no certainty as to when the difficulties the Plaintiff was facing would end in order for it to pay the debt owed to the Defendant.

15. It was not in dispute that the Plaintiffs have reneged on the various consents and that the Defendant's Statutory Power of Sale had arisen. There were no grounds for setting aside or varying the said consents that had been shown by the Plaintiffs. As it is, no sufficient grounds had also been advanced by the Plaintiffs to restrain the Defendant from exercising its Statutory Power of Sale.

16. Clearly, the court's hands are tied as the parties had executed a consent with timelines for making payments. In the event that the Plaintiffs had not made payments within the agreed timelines, the Defendant was at liberty to exercise its Statutory Power of Sale.

17. It is worthy to note that this court was being called upon to balance the rights of both parties. Having established that the Defendant's Statutory Power of Sale had arisen and that there was nothing to fetter the same, it would not be in the interest of justice for this court to restrain the Defendant from enforcing its rights. Any indulgence to the Plaintiff at this point can only be obtained from the Defendant and not this court whose duty is only restricted to enforcing the parties' rights.

18. Indeed, this court was of the view that allowing the Defendant to enforce the rights that it was rightfully entitled to would be in furtherance of the overriding objective principle as envisaged under Section 1A and 1B of the Civil Procedure Act as was expounded in the case of **C.A Application No. Nai 190 of 2009 Caltex Limited vs Evanson Wanjihia** (unreported).

19. Appreciably, the Plaintiffs filed their present application on 30th June 2015. It would be expected that all the payments they were expecting as was shown in Paragraph (e) of their Supporting Affidavit must have been received by now. It is expected that they have obtained a serious offer for the purchase of the subject property. Notably, the Defendant was categorical that it was open to accepting serious proposals that would be demonstrated by payment of a deposit of twenty five (25%) per cent into its account.

20. The Defendant was clear that it would not sell the subject at an under value and that the sale must be conducted in a public auction with the discretion of selling the same by private treaty if it received a price reflecting the market price.

21. Having considered the pleadings, affidavit evidence, written submissions and case law that was relied upon by the parties herein, the court found itself in agreement with the Defendant's submissions that the Plaintiff's application was an abuse of the process of court and was intended to buy time and/or stifle the Defendant's exercise of its Statutory Power of Sale. The Defendant is therefore at liberty to exercise its Statutory Power of Sale provided it fully complies with the law.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's ruling was that the Plaintiffs' Notice of Motion application dated 30th June 2015 and filed on even date was not merited and the same is hereby dismissed with costs to the Defendant.

23. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of July 2015.

J. KAMAU

JUDGE