



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 74 OF 2011

CHRISTOPHER NDOLO MUTUKU1ST PLAINTIFF

CAROLINE NJOKI MUTUKU.....2ND PLAINTIFF

Versus

CFC STANBIC BANK LIMITED..... DEFENDANT

RULING

Taking of accounts

[1] I have been called upon to determine whether accounts between the parties herein should be taken by the Deputy Registrar. That request is made through a Motion dated 12th February, 2012. By law, once accounts are taken, invariably, the court should order that any amount certified to be due to either party to be paid to the said party within a time to be specified in the order. Except, where such order is not possible due to some legal or circumstantial limitation, say, where obligations by set-off or cross-demand or attachment or assignment etc. exist.

[2] According to the Plaintiffs' counsel, Mr Mutuku, it became necessary to canvass the Motion dated 12th February, 2012 following the ruling by Justice Mabeya dated 15th February, 2013 in which the learned judge after determining the issue of the rate of interest applicable to the loan facility herein further ordered:-

“...that the parties be at liberty to prosecute the rest of the motion if they deem necessary.”

[3] The “rest of the Motion” is 1) taking of accounts and (2) an order for the repayment of what is due to the plaintiffs. Counsel submitted that an order for repayment is only possible after determining what exactly is owed. It is only the taking of accounts which will ascertain the amount of overpayment made by the Plaintiffs to the Defendants.

[4] Mr Mutuku pressed on; that the taking of accounts is a non-issue in light of the Consent Order by me on 4th January, 2014, in the following terms:-

“That by consent the parties herein do file and exchange their respective submissions

within seven days, on the question of whether the Deputy Registrar should take accounts as prayed under Prayer 1 of the application dated 12th February, 2012. The matter be mentioned on 12th February to confirm compliance.”

[5] To him, the only bone of contention is whether the accounts should be taken by the Judge or the Deputy Registrar. Mr Mutuku is of the view that the only competent authority to take accounts is the Deputy Registrar; Registrars also determine matters of accounts in Taxation and there should be no difficulties in them determining other accounts. Counsel insisted that is the law and practice; there has never been any occasion in the country’s jurisprudence where a Judge has sat down to take accounts, except in the exercise of appellant jurisdiction.

[6] Counsel reinforced his arguments and urged that the application before court is brought under Sections 1A, 1B, 3, 3A and 63(e) and Order 20 Rules 1, 3 and 4 of the Civil Procedure Rules. He made a pointed interpretation of the provision in Order 20 that the Court has power to ***“order that an account be taken and may also order that any amount certified on taking the accounts to be due to either party be paid to him within a time specified in the order.”*** According to Mr Mutuku, although the rule does not expressly state who should take the account, the implication in the term ***“order that an account be taken”*** is that it should be done by someone else other than the judge making the order; the only competent authority being the Deputy Registrar.

[7] Again, the Plaintiffs’ counsel argued, under Section 52(c) the court has powers to issue a commission to a judicial officer of a lower rank or to an advocate to examine or adjust accounts. Therefore, the Court should order that accounts be taken by the Deputy Registrar of the Court after which, the court may also order that any amount certified on taking the accounts to be due to either party be paid to him within a time specified in the order. That course ensures a just and expeditious determination of this matter.

The Defendant Opposed the Application

[8] Walker Kontos Advocates filed submissions in opposition to the application. In those submissions they argued that the direction sought by the Plaintiffs to have accounts taken before the Deputy Registrar in this matter is not available in law as the Deputy Registrar lacks jurisdiction to entertain the matter. The powers of the Deputy Registrar are detailed in Order 49 of the Civil Procedure Rules which does not confer upon the Deputy registrar to take accounts. Taking of accounts in the manner sought by the Plaintiff is effectively determining who owes the other how much.

[11] The Defendant’s counsel urged that if the Plaintiffs contend they are owed any money, then they should properly formulate appropriate pleadings laying basis for the claim and lead evidence to support it before a Judge. The court having made pronouncement on what interest rates were applicable it is for the Plaintiff to consider and pursue a formal claim if it so wishes. A determination of alleged amounts owed cannot be made where pleadings claiming an amount are not in place. At any rate one of the prayers sought in the amended Plaint is an account and the proper way of determining the prayer is not through the application by the Plaintiffs.

COURT’S RENDITION

[12] The issue for determination is whether the Court can order accounts to be taken by the Deputy Registrar. The Plaintiffs contended that the Court has power to so order and draws legal support from the implication in the provisions of Order 20 rules 1, 3 and 4 of the CPR. The Plaintiffs seem to suggest that no judge has ever taken accounts perhaps because the law implies it or it is tedious for a judge to do it or it is a convenient way of attaining a just and expeditious disposal of cases. A quick judicial rejoinder to that formulation by the Plaintiffs: If I understood it well, I do not want to ordain that a judge cannot take accounts under Order 20 of the CPR. However, the fundamental question is whether the Deputy Registrar of the Court can take

accounts in this matter.

[13] The Defendant submitted that the Deputy Registrar does not have jurisdiction to take accounts under Order 49 of the CPR, and more so because taking of account is an integral part of the trial which can only be done by the court. I observe that Order 49 of the CPR expressly lists Order 20 of the CPR as one of the provisions of the Civil Procedure Rules where Registrars may exercise delegated authority. In light thereof, the above submission by the Defendant may not be entirely defensible. But it is tenable to ask whether taking account is one of the things a registrar can do in Order 20 of the CPR?

[14] Rule 1 of Order 20 of the CPR offers some important indents in resolving the problem I have formulated above. The court is supposed to make such inquiries as are necessary in taking accounts under the said rule. Those inquiries involve other mediums and experts in the subject of accounts. One way of doing it would be for the Court to appoint an umpire who professes expertise but with the consent of the parties to carry out the exercise and file a report on the accounts and what is due to any party. The Report is then adopted by, as the order of the court, and the court may order that any amount certified on taking the accounts to be due to either party be paid to him within a time specified in the order. Under the said rule and Order 49, the Court could still require the Deputy Registrar to carry out the inquiries on accounts and to file a report thereof indicating the amount owing. The Report of the DR becomes part of the record of the Court on which consequential or attendant orders may be issued including an order that any amount certified on taking the accounts to be due to either party be paid to the party within a time specified in the order. In such circumstances, the Registrar will not be acting without jurisdiction or usurping the jurisdiction of the Court; it will be exercise of a delegated authority and ordain under the Civil Procedure Act and Rules. In the exercise of that authority, the Registrar will also be entitled to the benefit of experts witness or witnesses; have power and authority to administer oaths, direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the purposes of taking the accounts between the parties.

ORDERS

[15] The upshot is that the application dated 12th February, 2012 is allowed strictly on the following specific terms:

- a) The Deputy Registrar, High Court Nairobi, will take accounts between the parties herein and specifically determine the total sum paid by the Plaintiff to the Defendant on the loan facility in issue; and applying the rate of interest determined by the Court on 15th February, 2013, certify whether there was any overpayment;**
- b) The Deputy Registrar shall summon and examine such expert witness, administer oaths, direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the purposes of taking the accounts between the parties;**
- c) The above inquiries on accounts should be completed within a period of 30 days and a report thereof filed forthwith not later than seven (7) days of the completion of the inquiry; and**
- d) Costs of the application dated 12th February, 2012 shall be in the cause.**

Dated, signed and delivered in open court at Nairobi this 27th day of June, 2014

F. GIKONYO

JUDGE