



IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO 453 OF 2012

HARROGATE LIMITED.....PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK.....1ST DEFENDANT

KEYSIAN AUCTIONEERS.....2ND DEFENDANT

RULING

INTRODUCTION

1. On 13th February 2014, the Plaintiff filed a Notice of Motion application of even date. Subsequently, it filed an Amended Notice of Motion dated 6th March 2014 of the same date. The Plaintiff's application was premised on the provisions of Sections 103 (1) & 104 (2) of the Land Act 2012, Section 34 of the Civil Procedure Act, Rules 14, 15 and 16 Civil Procedure Rules (sic) and Rules 10 & 25 Auctioneers Rules 2012 and Inherent jurisdiction of the court. It sought the following orders **THAT:-**
 - a. **This Honourable Court be pleased to discharge the Plaintiff of the decretal amount herein and costs and declare that the Plaintiff has fully satisfied the decree of this Honourable Court of 14th May 2013.**
 - b. **This Honourable Court be pleased to order the 1st Defendant to execute a discharge of charge over L.R. No 2327/252 Karen and direct that the said discharge of charge and title be released to the judgment debtor or his advocate within 14 days.**
 - c. **This Honourable Court be pleased to cancel, vary, suspend or postpone the sale of the Land Parcel Number 2327/252 Karen pending the hearing and determination of this suit.**
 - d. **This Honourable Court be pleased to order the 2nd Defendant to provide the plaintiff with current valuation report of L.R. No 2327/252 Karen.**
 - e. **The 1st Defendant be condemned to pay the costs of this application.**

PLAINTIFF'S CASE

2. The Notice of Motion was supported by the Affidavit of Shreedhar Girdharlal Hirji sworn on 13th February 2014 while the Amended Notice of Motion was supported by a Further Affidavit of

- Boniface Njiru, its advocate. The same was undated.
3. Its case was generally that despite it having fully paid the decretal sum plus the auctioneers and advocates costs, the Defendant had threatened to sell the subject property on 14th February 2014 and further that the Defendant had refused to discharge the said subject property and to release to it the title in respect of the said subject property.
 4. In its Supporting Affidavit, the Plaintiff contended that it paid the Defendant the last amount and costs in the sum of Kshs 4,490,000/= vide a cash deposit of Kshs 2,9750,000/= and cheques for Kshs 715,000/= and Kshs 800,000/= as was evidenced in copies of payment slips it had attached to its Affidavit. It also annexed a copy of the 1st Defendant's letter to its advocates dated 17th February 2014 indicating that the subject property would be sold on 14th February 2014. It also attached a Valuation Report showing the market value of the said property.
 5. In a Supplementary Affidavit sworn by Shreedhar Girdharlal Hirji on 3rd March 2014 and filed on the same date, the Plaintiff averred that it had fully paid the amount of Kshs 15,000,000/= that had been recorded on 14th May 2013. In the table of payment in Paragraph 4 of the said Supplementary Affidavit, the Plaintiff contended that as at 12th February 2014, it had paid a sum of Kshs 15,490,000/=, the sum of Kshs 490,000/= being the amount of interest that was shown in the consent recorded on 18th October 2013.
 6. In its written submissions dated and filed on 6th May 2014, it was categorical that there was no consensus on the variation of interest that it was to pay and that it was only its advocates who could enter into negotiations that could bind it and that any such negotiations undertaken out of court were of no effect.
 7. It referred the court to Section 85(1) of the Land Act 2012 which provides that the chargee, shall upon receipt of the money secured by a charge discharge the charge at any time before the charged land has been sold. It therefore prayed that its application be allowed as prayed.

1ST DEFENDANT'S CASE

8. The 1st Defendant pointed out that this was the fourth application that had been filed by the Plaintiff herein seeking injunctive orders. It termed the same as an abuse of the court process. Its case was that when the Plaintiff defaulted in making payment for the sum of Kshs 7,000,000/= as per the consent that was recorded in court on 18th October 2013, the Plaintiff approached it for further extension which it granted on condition that the Plaintiff would pay to it accrued interest and principal sum totalling to Kshs 8,140,147.41 as at 13th January 2014.
9. It argued that the Plaintiff was still indebted to it in the sum of Kshs 1,965,719.80 as per the Statement of Accounts that it had attached to its Replying Affidavit that was sworn on its behalf by Stella Mbuli, its Legal Manager on 25th February 2014 and filed on the same date.
10. It contended that the court was *functus officio* as judgment in the matter herein had been issued. It said the only remedy that was available to the Plaintiff was for it to apply to the Court of Appeal for a stay of execution of the judgment herein. It argued that the Plaintiff had failed to establish a *prima facie* case and consequently, the balance of convenience lay in allowing it to enforce the judgment that had been obtained herein.
11. In a Further Affidavit sworn by Stella Mbuli on 17th March 2014 and filed on even date, the 1st Defendant averred that the Plaintiff had not been honest in obeying the consents recorded in court. Although it admitted that it had received two (2) cheques in the sum of Kshs 950,000/= each in part settlement of the interest accruing, it contended that there were amounts that were still outstanding.
12. In its Grounds of Opposition dated and filed on 25th February 2014, the Defendant prayed for the dismissal of the Plaintiff's Amended Notice of Motion application on the ground that the same was a gross abuse of the court process, that the same was scandalous, frivolous, vexatious and incurably defective.
13. On 6th June 2014, it filed a Notice of Preliminary Objection dated 5th June 2014 on the ground that the Plaintiff had filed its Amended Notice of Motion without leave of the court but abandoned the said argument during the oral highlighting of the written submissions after the court confirmed that it had granted the Plaintiff leave to amend the said Notice of Motion application.

14. In its written submissions dated 5th June 2014 and filed on 6th June 2014, the Defendant submitted that the monies secured by the Charge included the Prescribed maximum Debt together with interest thereon as had been indicated in the Instrument of Mortgage that was dated 22nd July 2006 and that it was therefore wrong for the Plaintiff to have purported to exclude accrued interest from the monies that had been secured under the Charge. It relied on the cases of **Panthon Limited vs Industrial & Commercial Development Corporation (2008) eKLR** and **Silas Obengele vs Kenya Ports Authority (2004) eKLR** in this regard.

LEGAL ANALYSIS

15. It was correct as the 1st Defendant submitted that this court is *functus officio* in that it cannot revisit the merits of the case as the same was compromised once the consent of 18th October 2013 was recorded. However, as the Plaintiff also submitted, the court has jurisdiction to determine any question between the parties in which the decree was passed and relating the execution, discharge and satisfaction of the decree in the suit herein as was contemplated in Section 34 (1) of the Civil Procedure Act. The question of interpretation of the consent order is one that this court can consider with a view to finally resolving the issues in dispute.

16. The cases of **Panthon Limited vs Industrial & Commercial Development Corporation** (Supra) and **Silas Obengele vs Kenya Ports Authority** (Supra) relied upon by the 1st Defendant were distinguishable from the facts of this case in that the courts therein held that they had discretion to make an award for interest order from the date that would meet the interests of justice. In this case, the amount of interest was by consent capped at Kshs 490,000/= for the period 15th September to 30th November 2013.

17. The court noted the 1st Defendant's submissions that it would be unfair if the Plaintiff did not pay the interest as it failed to adhere to the timelines that had been agreed upon because it relied on the Plaintiff representations that it would pay the accrued interest. It had said that it would be unfair if the Plaintiff were to benefit from its misrepresentations. While that may have been true, the 1st Defendant was under a duty to mitigate its losses immediately the Plaintiff defaulted in making the payments in the several consents that were recorded in court by proceeding with sale of the subject property.

18. Indeed, in the consent that was recorded by the Deputy Registrar of the High Court of Kenya Milimani Law Courts Commercial & Admiralty Division, Clause 8 specifically stated as follows:-

“In default of no 4 and 7 above the 1st defendant shall become entitled to proceed with the sale of the charged property without further notification.”

19. As was correctly submitted by the counsel for the Plaintiff, the terms of the consent recorded by the parties on 18th October 2013 could only be varied or set aside by another consent or if on application to the court, the court was satisfied that the same had been obtained by fraud, mistake, duress, coercion or misrepresentation. Parties could negotiate however they wanted to but if the same was not reduced in writing and executed by both parties or adopted and endorsed as an order of the court, the communication remained just that, communication. It could not bind the parties so long as the consent recorded on 18th October 2013 was not varied.

20. The 1st Defendant was to blame for not taking any action. It slept on its rights. It ought to have moved swiftly to enforce its rights under the consent of 18th October 2013 to mitigate its losses but chose not to do so. As equity does not aid the indolent, the court is disinclined to agree with it that it was entitled to additional accrued interest apart from the sum of Kshs 490,000/= that had been agreed upon on 18th October 2013. In any event the Admission of Liability it purported to rely upon was not executed or dated by either of the parties. The email and the said Admission of Liability had very little probative or evidentiary value and cannot be relied upon by the court to vary the terms of the said consent.

21. The 1st Defendant had no business entering into any out of court negotiations with “Shree” as at 16th January 2014 or to execute the Admission of Liability. In other words, it was under no

- the court make an informed decision. However, any amounts due to the 1st Defendant should only be within the parameters of the consent judgment recorded on 18th October 2013.
29. There was no evidence of a scheduled sale as was alleged by the Plaintiff. A perusal of the letter from the Bank dated 17th January 2014 only stated that the auction would proceed as scheduled but did not specifically state it would be on 14th February 2014 as was alleged by the Plaintiff.
30. In view of the fact that the court found that there were outstanding monies due to the 1st Defendant by the 1st Plaintiff and the court cannot issue orders in vain as there was no proof of a scheduled sale, the Plaintiff would not be entitled to Prayer No 3 in its Amended Notice of Motion application. What issues would the Plaintiff wish to ventilate in a full trial when the consent judgment of 18th October 2013 was clear as to what would happen in the event the Plaintiff defaulted in complying with Clauses 4 and 7 therein?
31. For the reason that the Plaintiff owes the 1st Defendant monies, the court is unable to grant orders for the discharge of the title as the Plaintiff had sought in Prayer No 2 of its Amended Notice of Motion.
32. Turning to the prayer for a valuation report, it is clear that the court cannot grant the other Prayer also indicated as 3 but relating to the valuation report. The law does not obligate an auctioneer to furnish a Chargor with a Valuation Report. The 2nd Defendant is merely an agent and/or servant of the Plaintiff. In any event, the Plaintiff did not show that it had requested for a copy of the said Valuation Report and it was denied the same.
33. Section 97 (2) of the Land Act Cap 280 (laws of Kenya) provides as follows:-

“A chargee shall before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.”

34. Rule 11(1)(b) of the Auctioneers Rules, 1997 stipulates as follows:-

“A court warrant or letter or instruction shall include in the case of immovable property-

....the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.”

35. It was evident that the Plaintiff was a perennial defaulter and rushed to court whenever the 1st Defendant wanted to exercise its statutory power of sale. Having considered the parties' affidavits, written and oral submissions and the case law in support of their respective cases, the court agrees with the 1st Defendant that the Plaintiff's Amended Notice of Motion was a gross abuse of the court process, frivolous and vexatious.
36. As the Plaintiff did not even remotely demonstrate that it was entitled to injunctive orders or the other prayers it had sought, this matter ought to be brought to a close to enable the 1st Defendant proceed with realisation of its security in the event the Plaintiff does not redeem its security. Indeed, the equity of redemption is open to the Plaintiff before the hammer falls in an auction of its property.
37. Notably, the court did not consider the Plaintiff's Further Affidavit that had been sworn by Boniface Njiru as the same was not dated as was mandated by the provisions of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya)

DISPOSITION

38. The upshot of this court's ruling is that the Plaintiff's Amended Notice of Motion dated and filed on 6th March 2013 is not merited and the same is hereby dismissed with costs to the 1st Defendant.
39. The court hopes that this will be the last application to be filed by the Plaintiff as regards the interpretation of the consent order of 18th October 2013 or any other consent order already recorded herein as litigation must come to an end. However, in the event it will be necessary for any party to file any further application herein, it is hereby directed that no such application shall be filed without leave of this court. This will be to avoid abuse of court process as has been

evidenced in this matter.
40.It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 29th day of September 2014

J. KAMAU

JUDGE