



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 54 of 2008

URBAN VILLAGE ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

BANK OF INDIA.....DEFENDANT

RULING

There are two applications which were to be argued simultaneously. The 1st application is dated 3rd September, 2008. It expressed to be brought under Section 3, 3A and 28 of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order XXIV, rule 6 (1) and (2) and Order L rules 1 and 2 of the Civil Procedure Rules. It seeks two orders namely:

1. The adjustment and satisfaction of the Plaintiff's suit in terms of the orders of 11th February, 2008 and 18th June, 2008 be recorded as a final judgment.
2. The costs of the suit, auctioneers charges and costs of this application be paid by the Plaintiff.

That application is supported by grounds on the face of the application and the affidavit sworn by DURGA PRASAD MISHRA, the Defendant's Chief Manager filed in court on the 5th September, 2008. This application is unopposed as no grounds of opposition or replying affidavit was filed to oppose it.

The 2nd application is a notice of motion dated 9th September, 2008 brought under order I rule 9, 10, 13 and 22 Order XLIV rules 1 and 2 of the Civil Procedure Rules and section 3A , 63 (e) and 80 of the Civil Procedure Act. It seeks two orders namely:

1. That the Applicant herein, Vanessa Gathoni Kamau, be enjoined as an interested party in this suit.
2. That the consent order entered into between the Plaintiff and the Defendant on 11th February, 2008 be varied, reviewed and/or set aside and the dispute herein be determined on its merits amongst the three parties.

There are several grounds in support of the application. The application is also supported by the affidavit of Vanessa Gathoni Kamau who is the Applicant dated 9th September, 2008.

This application has been made by a party who seeks to be joined to the instant suit as an interested party. In that application, the Applicant is not only seeking to be enjoined as an interested party but is

seeking to have the consent order entered on 11th February, 2008 varied, reviewed or set aside. Despite this application being listed for hearing by Mr. Nyachoti for the Applicant/Interested party, Mr. Nyachoti did not come to court to prosecute the application. The application was therefore not prosecuted by the Applicant. I note that the Plaintiff and the Defendant's Advocate made submissions opposing that application. However, since the Applicant did not prosecute the application, the proper order to make is to dismiss with costs the application dated 9th September, 2008 for non-attendance of the Applicant and its Advocate, which I hereby do.

I have perused the record of the proceedings and of the file and I note that the parties to this suit entered a consent order on 11th February, 2008 before Hon. Warsame, J. in the following terms:

1. THAT a temporary injunction be and is hereby granted to the defendant by itself, its agents and/or servants (including its auctioneers M/s Dalali Traders) or any other Auctioneers from offering/advertising, selling by public action or otherwise, alienating, disposing and/or dealing in whatsoever manner with the premises known as LR. No. NAIROBI/BLOCK 91/50 pending the hearing and final disposal of the suit herein.
2. THAT the applicant be and is hereby given 90 days from today's date to liquidate the outstanding balances with the respondent.
3. That Lloyd Masika Limited do pay all proceeds of sale to the Respondent through the Applicant's Advocates, all the monies equivalent to liquidate the outstanding balances with the respondent from the sale of the following properties.
 - a) 30 acres of the land located at Juja along Thika Nairobi highway and that the applicant shall provide to the Respondent copy of an official search within 7 days from today.
 - b) Two plots at Muthaiga North estate L.R. Numbers and certified copies of the searches to be availed to the respondent within the next 7 days.
 - c) L.R. No. 209/2889/47 at Pangani in Nairobi, certified copy of official search to be provided within 7 days.
 - d) The list of the motor vehicles to be sold and copies of the logbooks to be served on the respondent within the next 7 days.
4. THAT failure to comply with one (1) above, the Respondent be at liberty to sell the charged property forthwith and the charger and the applicant herein are deemed to have notice that the statutory period of sale begins to run from today.
5. THAT the applicant to meet the auctioneer charges, which shall be agreed upon or to be taxed by the court. The applicant to also meet the costs of this application to be agreed or taxed by Court.

The Plaintiff did not pay the agreed balance of the decretal sum within the 90 days period agreed in the consent. On 16th May, 2008 the Applicant filed a notice of motion under order XLIX rule 5 and Order XXXI rule 1 of the Civil Procedure Rules and sections 95 and 3A of the Civil Procedure Act seeking an order of the court to vary the terms of the consent entered between the parties on the 11th February, 2008. The application sought to enlarge time upon which the Applicant could comply with the said order for a further 60 days. That application was heard before Kimaru, J. who allowed it in the following terms:

"In the premises therefore, I will allow the application. The period which the applicant is required to comply with the consent order of 11th February, 2008 is hereby extended by a further period of 60 days with effect from today's date. The sum of Kshs.100,000/- deposited by the applicant in a joint interest earning account shall be released to the respondent as part payment of the outstanding loan. The applicant shall pay to the respondent the sum of Kshs.10,000,000/= which it confirmed to the court it had

already received from the purchases of the properties that its directors had already sold. The said amount shall be paid within ten (10) days of today's date. The default clause of the consent entered on 11th February, 2008 shall apply in the event that the applicant shall fail to comply with the order of this court regarding the mode of payment."

In the current application, Mr. Osundo for the Applicant urged the court to enter as a final judgment the adjustment and satisfaction of the Plaintiff's suit in the terms of the orders of 11th February, 2008 and 18th June, 2008.

Mr. Nyaburi for the Plaintiff/Respondent in the application dated 3rd September, 2008 made submissions on points of law as his client did not file any papers in response to the said application. Learned counsel submitted that the application cannot be allowed since the orders of 18th June, 2008 were not consent orders but were orders made by the judge after hearing the application dated 16th May, 2008. Counsel submitted that the application could only be granted if the parties had consented to the orders.

Order XXIV rule 6(1) stipulates:

"Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith."

The court has the power under this rule where it is satisfied after hearing the parties that the suit has been adjusted, whether wholly or in part, to order that such adjustment be recorded and entered as a judgment in accordance thereon. The two parties in this suit entered into a consent order before Hon. Warsame, J. on 11th February, 2008. That consent order compromised the entire suit between the parties. When the Plaintiff failed to meet the terms of that compromise it made an application on the 16th May, 2008 as stated above. That application culminated into further orders being made by the court 18th June, 2008. The orders of June 2008 were in addition and supplemental to and not in substitution of the orders of 11th February, 2008. The Applicant's contention is that by those two orders the current suit has been adjusted wholly and that the orders made on these two dates (11th February 2008 and 18th June, 2008) should be made final judgment in the case.

There is no serious opposition to this application. The only issue raised by Mr. Nyaburi for the Respondent is that the order of 18th June, 2008 was not a consent order and that therefore it cannot form the basis of a final judgment as requested by the Defendant/Applicant. Order XXIV rule 6(1) nowhere refers to a consent order as the basis upon which a suit can be declared adjusted. The basis upon which final judgment can be entered under this rule is if there has been an agreement or a compromise between the parties or a satisfaction of the suit, whether wholly or in part. The consent order 11th February, 2008 was an agreement between the parties. As for the order of 18th June, 2008, it was a compromise of the earlier consent agreement between the parties and this compromise was made by the court on the application of the Plaintiff in which the Plaintiff's application for extension of time to comply with the consent order was granted on terms.

Having considered this application and having heard both parties, I am satisfied that the suit herein has wholly been adjusted by the consent agreement of 11th February, 2008 and the court order of 18th June, 2008.

Having come to this conclusion I will allow the application in the following terms.

1. That the application dated 3rd September, 2008 be and is hereby allowed.

2. I enter as a final judgment the orders of the 11th February, 2008 as set out herein below.
3. THAT a temporary injunction be and is hereby granted to the defendant by itself, its agents and/or servants (including its auctioneers M/s Dalali Traders) or any other Auctioneers from offering/advertising, selling by public action or otherwise, alienating, disposing and/or dealing in whatsoever manner with the premises known as LR. No. NAIROBI/BLOCK 91/50 pending the hearing and final disposal of the suit herein.
4. THAT the applicant be and is hereby given 90 days from today's date to liquidate the outstanding balances with the respondent.
5. That Lloyd Masika Limited do pay all proceeds of sale to the Respondent through the Applicant's Advocates, all the monies equivalent to liquidate the outstanding balances with the respondent from the sale of the following properties.
 - (a) 30 acres of the land located at Juja along Thika-Nairobi highway and that the applicant shall provide to the Respondent copy of an official search within 7 days from today.
 - (b) Two plots at Muthaiga North estate L.R. Numbers and certified copies of the searches to be availed to the respondent within the next 7 days.
 - (c) L.R. No. 209/2889/47 at Pangani in Nairobi, certified copy of official search to be provided within 7 days.
 - (d) The list of the motor vehicles to be sold and copies of the logbooks to be served on the respondent within the next 7 days.
6. THAT failure to comply with one (1) above, the Respondent be at liberty to sell the charged property forthwith and the charger and the applicant herein are deemed to have notice that the statutory period of sale begins to run from today.
7. THAT the Applicant to meet the auctioneer charges, which shall be agreed upon or to be taxed by the court. The applicant to also meet the costs of this Application to be agreed or taxed by Court.

In addition and supplemental to and not in substitution for the above, I enter final judgment in terms of the order of 18th June, 2008 as set out herein below:

8. The period which the Applicant is required to comply with the consent order of 11th February, 2008 is hereby extended by a further period of 60 days with effect from today's date.
9. The sum of Kshs.100,000/- deposited by the Applicant in a joint interest earning account shall be released to the Respondent as part payment of the outstanding loan.
10. The Applicant shall pay to the Respondent the sum of Kshs.10,000,000/= which it confirmed to the court it had already received from the purchases of the properties that its directors had already sold. The said amount shall be paid within ten (10) days of today's date.
11. The default clause of the consent entered on 11th February, 2008 shall apply in the event that the Applicant shall fail to comply with the order of this court regarding the mode of payment.

Dated at Nairobi, this 28th day of November, 2008.

LESIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Moya holding brief Mr. Osundo for the Applicant

Mrs. Kariuki holding brief Mr. Nyaburi for the Plaintiff/Respondent

LESIIT, J.

JUDGE

Mrs. Kariuki: We apply for leave to appeal.

LESIIT, J.

JUDGE

Court: Leave to appeal granted.

LESIIT, J.

JUDGE