



REPUBLIC OF KENYA



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Ocean Engineering Works Limited v SBM Bank Kenya Ltd (Environment & Land Case 112 of 2021) [2023] KEELC 20778 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20778 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 112 OF 2021
LL NAIKUNI, J
OCTOBER 12, 2023

BETWEEN

OCEAN ENGINEERING WORKS LIMITED PLAINTIFF

AND

SBM BANK KENYA LTD DEFENDANT

RULING

I. Introduction.

1. The Honorable Court was moved formally by the Plaintiffs/Applicants Ocean Engineering Works Limited and Sheraz Mohamed Adam through filing of a Notice of Motion application dated 7th August, 2023 for the Court's determination. The application was brought under the dint of Sections 1A, 1B, 3, 3A and 63 (c) and (e) of the *Civil Procedure Act* and Order 40 Rules 1, 2, 3, and 4 and Order 51 Rule 1 of the Civil Procedure Rules 2010.
2. Upon effecting service, the Defendant/Respondent by way of vehemently opposing filed replies in form of a Replying Affidavit dated 2nd October, 2023.

II. The Plaintiff's/Applicant's case

3. The Plaintiffs/Applicants herein sought for the following orders:-
 - a. Spend
 - b. That this Honorable Court be pleased to issue an order for the refund of a sum of Kenya Shillings Two Millions (Kshs. 2,000,000/=) held by this Honorable Court to the Plaintiffs herein through his Advocates on record M/s. Marende Necheza & Co. Advocates.



- c. That the Honorable Court be pleased to issue any other order it deems fit in the circumstances.
 - d. That the costs of this application be in the cause.
4. The application is based on the grounds, testimonial facts and the averments made out in the Nine (9) paragraphed Supporting Affidavit of Mohamed Sheraz Adam sworn and dated 7th August, 2023 together with three (3) annexures marked as “MSA – 1 to 3” annexed thereto. He averred as follows:-
- a. He was the 2nd Plaintiff/Applicant with authority from the other directors to swear this Affidavit and hence competent to do so.
 - b. The dispute between him and the Defendant had since been resolved and made reference to a letter dated 29th June, 2023 marked as “MSA - 1” annexed thereto.
 - c. The Plaintiff had since withdrawn the suit against the Defendant through the Notice of Withdrawal of suit dated 2nd August 2023 and marked as “MS - 2” is a copy of the Notice of Withdrawal.
 - d. He urgently required the funds to settle a medical bill and any further delay was punitive to him.
 - e. He had previously written to the Deputy Registrar requesting the said funds - through letters dated 3rd August, 2023 and 4th August, 2023 respectively – marked as “MSA - 3”
 - f. He was advised That the Defendant/Respondent would not suffer any prejudice if the application was allowed as prayed.

III. The Defendants/Respondent’s Responses

5. The Defendant/Respondent while opposing the application by the Plaintiffs/Applicants, filed a 21 Paragraphed Replying Affidavit sworn by Beline Ochiel dated 2nd October, 2023, together with an annexure marked as “SN - 1” annexed thereto. The Deponent averred as follows:-
- a. She was the Defendant/Respondent’s Debt Recovery Manager competent and duly authorized to swear this Affidavit.
 - b. She was advised That the entire Application herein was frivolous, vexatious and an abuse of the court process. It was also aimed at defeating the Defendant/ Respondent’s rights as enshrined under the Letter of Offer dated 13th March 2019 which included but not limited to realizing the principal amount together with interest and penalties. Annexed and marked as “SN - 1” is a copy of the Letter of Offer dated 13th March 2019.
 - c. She invited the Court to take judicial notice of its own proceedings particularly the following flow of events leading to the deposit of the Funds in Court:-
 - i. The Plaintiff/Applicant filed an Application dated 16th June 2021 together with the Plaintiff.



- ii. The Court in allowing the dealing with the said Application issued interim Orders as admitted by the Plaintiff/Applicant and the said Orders herein annexed by the Plaintiff/Applicant.
 - iii. The stay with respect to auction and the hearing of the Plaintiff/Applicant's application dated 16th June 2021 was dependent on the Plaintiff/Applicant depositing the sum of Kenya Shillings Two Million (Kshs. 2,000,000.00/=).
- d. That this Honourable Court took note That default in paying the loan forming the subject matter of the suit was not denied as per Order 1 of the Order issued on 21st June 2021.
 - e. That the said Application still stood undetermined.
 - f. That the Plaintiff/Applicant led the Defendant/Respondent into believing That the entire amount would be settled out of Court by way of the sale of the Properties by way of Private Treaties.
 - g. That by virtual of the aforesaid, the Parties informed the Court of this position and the Honourable Court granted Parties leave to attempt settling the matter out of Court.
 - h. That the Parties have made advance progress in negotiations which has led to sale of various properties as correctly admitted by the Plaintiff/Applicant vide Annexure 1.
 - i. That by dint of Order Number 1, this Honourable Court took note That the Defendant/Respondent herein had a legitimate Claim in light of its pronouncement That default in repayment of the loan was not denied.
 - j. She stated That by dint of the ongoing negotiations, there was a legitimate expectation by the Defendant/Respondent That there was no proper cause to file a Defence in light of the admission of default, debt and the Defendant's right to proceed with the statutory sales.
 - k. As admitted by the Plaintiff/Applicant herein, the Parties agreed to dispose the Plaintiff/Applicant's securities with the aim of clearing the outstanding funds comprised of the principal amounts, interest and penalties.
 - l. She was aware That the Defendant/Respondent proceeded with the sales as itemized herein below:-
 - a. L.R. No. Group/V/1548 at a sum of Kenya Shillings Eleven Million Five Hundred (Kshs. 11,500,000.00/=)
 - b. L.R. No. Group/V/1547 at a sum of Kenya Shillings Thirty Two Million Five Hundred (Kshs. 32,500,000.00/=)



- m. She knew That the funds realized from the aforesaid sales were not adequate to cover the Plaintiff/Applicants outstanding which still stood at the sum of Kenya Shillings Four twenty Two Million Five Fifty Four Thousand Five Ninety two Hundred (Kshs. 422, 548, 592.00/=). Annexed and marked as “SN - 2” are copies of the Statements evidencing the balance afore - stated after the sale of the securities held by the Defendant/Respondent herein.
- n. She stated That Plaintiff/Applicant's withdrawal of suit and the instant application was in bad faith as the same was being done after the Plaintiff/Applicant had realized That the sales did not settle the outstanding facility.
- o. In light of the aforesaid progress of proceedings, it would amount to defeating the Defendant/Respondent's legitimate and already materialized claim in the event the funds were released to the Plaintiff/Applicant on the pretext That the Defendant/Respondent never had a Defence while taking into account the fact That the failure to file the Defence in time was due to the ongoing negotiations.
- p. Without prejudice to the aforesaid and in light of the Plaintiff's dishonest conduct, the Defendant had since filed and served a Defence and Counterclaim claiming the sum of Kenya Shillings Four twenty Two Million Five Fifty Four Thousand Five Ninety two Hundred (Kshs. 422, 548, 592.00/=). Annexed herewith and marked as “SN - 3” is a copy of the Defence and Counterclaim duly filed and served upon the Defendant/Respondent.
- q. She invited the Court to note That the Notice of Withdrawal of Suit had not taken effect as the same had not been served upon the Defendant/Respondent hence the matter was still validly before the Court and the Defendant/Respondent had the platform to file the instant Defence and the Counterclaim as pleaded herein above.
- r. She also invited the Court to note That the Defendant/Respondent had incurred costs with respect to instructing its Advocates who had attended Court and negotiated out of Court settlements hence the Defendant/Respondent was entitled to costs prior to withdrawal of the suit by the Plaintiff/Respondent herein.
- s. In exercising its discretion in determining the Plaintiff/Applicant's instant Application, she invited the Court to make the determination taking into account the totality of the aforesaid circumstances and what seems just, fair, right, equitable and reasonable in the circumstances pleaded herein.
- t. She was advised by her Advocates on record That in circumstances where a Party needed leave of court to withdraw their suit, the Court would allow the application subject to just terms. Although she asserted being alive to the fact That the Plaintiff/Respondent was at liberty to withdraw the Suit under the provisions of Order 25 Rule 1 of the Civil Procedure Rules.
- u. She was advised by her Advocates That in the event a Plaintiff/Applicant withdraws the suit wholly, the suitor must as a general rule pay to the Defendant/Respondent the costs of the suit.



- v. Based on the aforesaid and seeing That the Plaintiff/Applicant had not made any proposal on payment of costs, they urged the Court to disallow the Plaintiff's Application seeking release of the funds deposited in Court and further make Orders That the same be utilized towards either offsetting the balance on the loan facility or in the alternative be utilized for purposes of settling the Defendant/Respondent's costs upon determination of the same.

IV. Analysis and Determination: -

6. I have keenly read through the filed pleadings being the Notice of Motion application dated 7th August 2023 by the Plaintiffs/Applicants and the vigorous responses by the Defendants/Respondents, the relevant provisions of the Constitution of Kenya 2010 and the statutes.
7. For the court to arrive at an informed, reasonable, just and fair decision, it has condemned the subject matter into 3 broad issues:-
 - a. Whether the Notice of Motion application dated 7th August, 2023 by the Plaintiff/Applicants seeking for the release of funds – Kshs. 2,000,000/= held by Court upon the withdrawal of its suit – under Order 25 Rule 1 has any merit and what is the effect of the said order.
 - b. Whether the parties are entitled to the reliefs sought.
 - c. Who will bear the costs of the application?

Whether the Notice of Motion application dated 7th August, 2023 by the Plaintiff/Applicants seeking for the release of funds – Kshs. 2,000,000/= held by Court upon the withdrawal of its suit – under Order 25 Rule 1 has any merit and what is the effect of the said order.

8. Under this sub heading, the main Substrata of this matter at hand is the effect of withdrawal of a Civil suit and its consequences to other consequential and/or previous orders emanating from the said suit. Before embarking on the factual issues of this matter, I wish to deliberate on the legal issues on the withdrawal of suits.
9. The governing provision of law is founded under Order 25 Rules, 1, 2, 3, 4 and 5 of the Civil Procedure Rules, 2010. The main distinction on this provision is on the issue of when one withdrawing should be made to bear the costs. A party is at liberty to withdraw any part or the whole suit at any time and if it's done before the closure of pleadings or the matter being fixed for hearing then the withdrawal does not attract any costs. However, the contrary is when the pleadings have closed and matter fixed for hearing. Order 25 Rule 1 Holds: -

“ At any time before the setting down of the suit for hearing the Plaintiffs may be Notice in writing which parties wholly discontinue his suit against all any of the Defendants of may withdraw any part of his claim and such discontinuance or withdrawal shall not be a defence to any subsequent action”
10. From the instant suit, there are two aspects from this application. Firstly, has the suit by the Plaintiff/Applicant been properly withdrawn or not? To answer That query, it's not in dispute That Plaintiffs/Applicants filed and served the Notice of Withdrawal of suit dated 2nd August, 2023 under the



provision of Order 25 Rule 1 of the Civil Procedure Rules, 2010. Under Paragraph (t) and (u) above of the Replying Affidavit, the Deponent states as follows:-

“.....She was advised by her Advocates on record That in circumstances where a Party needed leave of court to withdraw their suit, the Court would allow the application subject to just terms. Although she asserted being alive to the fact That the Plaintiff/Respondent was at liberty to withdraw the Suit under the provisions of Order 25 Rule 1 of the Civil Procedure Rules.

She was advised by her Advocates That in the event a Plaintiff/Applicant withdraws the suit wholly, the suitor must as a general rule pay to the Defendant/Respondent the costs of the suit.

This confirms the concurrence of the Respondent on the withdrawal of the suit only That its their view That the same should be conditional. I shall be dealing on these issue s later on herein below.

11. Based on the evidence available here, the suit had not been set down for hearing neither had the pleadings closed whatsoever. Indeed, the Defendant filed their Defence and Counter Claim on 2nd October, 2023 exactly two (2) months after the Plaintiff/Applicant had withdrawn the suit altogether without order to costs. The explanation provided for here for this occurrence has been made by the Respondent under Paragraphs number (j) above of the Replying Affidavit as stated herein:-

“ She stated That by dint of the ongoing negotiations, there was a legitimate expectation by the Defendant/Respondent That there was no proper cause to file a Defence in light of the admission of default, debt and the Defendant's right to proceed with the statutory sale.

12. In a nutshell, therefore the issue as to whether the withdrawal of the suit was legitimate and regular, the response is in affirmative. Indeed, there is no suit by the Plaintiff and the only matter remaining for determination is the ones raised from the filed Defence and Counter – Claim dated 2nd October, 2023 by the Defendant, now the Plaintiff under the provision of Order 7 Rule 11 of the Civil Procedure Rules, 2010.

13. Secondly, the other aspect emerging from the application herein is whether the funds being a sum of Kenya Shillings Two Million (Kshs. 2, 000, 000.00/=) being held by the Honourable Court should be released or not to the Plaintiff/Applicant herein or Court should continue holding on it for it to add up to off set the outstanding debt owed to the Defendant. There seem to be an extremely stiff tussle around this issue. While the Plaintiff/Applicant presses for the release of the monies on grounds That the suit so as to assist the ailing Plaintiff/Applicant meet his medical obligations on one hand, the Defendant/Respondent holds under Paragraphs (m), (n) and (o) above of the Replying Affidavit as follows:-

“ She knew That the funds realized from the aforesaid sales were not adequate to cover the Plaintiff/Applicants outstanding which still stood at the sum of Kenya Shillings Four twenty Two Million Five Fifty Four Thousand Five Ninety two Hundred (Kshs. 422, 548, 592.00/ =). Annexed and marked as “SN - 2” are copies of the Statements evidencing the balance afore - stated after the sale of the securities held by the Defendant/Respondent herein.

She stated That Plaintiff/Applicant's withdrawal of suit and the instant application was in bad faith as the same was being done after the Plaintiff/Applicant had realized That the sales did not settle the outstanding facility.



In light of the aforesaid progress of proceedings, it would amount to defeating the Defendant/Respondent's legitimate and already materialized claim in the event the funds were released to the Plaintiff/Applicant on the pretext That the Defendant/Respondent never had a Defence while taking into account the fact That the failure to file the Defence in time was due to the ongoing negotiations.

14. In order to resolve this vigorous dispute sustained between the parties herein, its critical for the Court to extrapolate on the exact reason, nature and purpose That the Court has been holding onto this monies. From the record, a fact which is not disputed, upon the Plaintiffs/Applicants moving this Court under a Certificate of Urgency and admitting being in default to the debt they owned the Respondent sought to be granted temporary injunctive orders restraining the Respondent from causing any sale of property belonging to the Plaintiffs/Applicants through a public auction scheduled to take place on 29th June, 2021. Upon considering the said application, on 17th June, 2021 this Honorable Court – Justice Munyao granted the following orders:-

“Upon perusal of the Notice of Motion application dated 16th June, 2021 brought by Mohamed Sheraz Adam Ordered:-

- a. That since default is not denied, the Applicant to deposit a sum of Kshs. 2,000,000/= in court or with Defendant within 7 days.
- b. That if the said sum is deposited as directed above time being of essence then there will be a stay of the sale intended for 29th June, 2021.
- c. That the application otherwise be served for inter-parties hearing on 28th July, 2021 before Justice Yano.

15. A very quick reading of the above Court Order, my impression is That it was very specific and conditional. It was to stop the auction from taking place on a particular date. Between That period and now a lot of activities have occurred. For instance, That time has already passed and the purpose intended has passed. The Orders were never extended whatsoever as envisaged under the provision of Order 40 Rules 6 and 7 of the Civil Procedure Rules, 2010 hence it lapsed by effluxion of time and operation of law. That is the primary essence of extending Court orders.

16. Additionally, from the records, the Court has been indormed That the parties have been engaged in intensive out of Court negotiation with a view to attain a settlement. I am informed That on 17th June, 2021 there was a sale of several properties belonging to the Plaintiff/Applicant by way of private treaty – That is the properties known as Land Reference No. Group (V) 1548 where a sum of Kenya Shillings Eleven Million Five Hundred Thousand (Kshs. 11,500,000.00/=) and Land Reference No. Group (V) 1547 where a sum of Kenya Shillings Thirty Two Million Five Hundred Thousand (Kshs. 32,500,000/=) was realized for purposes of off setting the outstanding debt. Simply, from this engagement by the parties, it automatically compromises the Honorable Court from continuous holding of the monies whatsoever. The Court will find itself in an extremely awkward situation from the good governance, integrity, accounting and transparency purposes under the provisions of Article 10 (2) (b) 160 (1) and 173 (2) of the Constitution of Kenya and other provision of the Judicial Service Commission Act, of the Laws of Kenya. Ideally, I dare say, had it not been due for the implied and graphic inactiveness and lethargy by the Plaintiff/Applicant for not having moved this Honourable Court earlier on, for reasons known to them, these monies ought to have been released a while ago. It already overdue. For these reason therefore, these monies should be released to the Plaintiffs/Applicants herein immediately.



Whether the parties are entitled to the orders sought.

17. The issue under this Sub – heading is straight forward after the Honourable Court has already made its legal position on these matters. The argument advanced by the Defendant/Respondent herein That the Court should continues holding the monies on ground That the Defendant/Respondent had incurred costs with respect to instructing its Advocates who had attended Court and negotiated out of Court settlements hence the Defendant/Respondent was entitled to costs prior to withdrawal of the suit by the Plaintiff/Respondent herein is self defeating and far fetched.
18. Furthermore, taking That the funds realized from the auction were not adequate to cover the Plaintiff's outstanding debt which stood at a sum of Kenya Shilling Kenya Shillings Four twenty Two Million Five Fifty Four Thousand Five Ninety two Hundred (Kshs. 422, 548, 592.00/=) the amount being held by Court should be used to off – set the outstanding debt. This is unrealistic and a clear way of transforming Court into a debt collection and management agent which is alien and unknown in law.
19. Besides, taking from records, the Defendant who has now filed a Defence and Counter Claim can still pursue all other means to recover its outstanding debt as stipulated and provided for in law. Although I have taken judicial notice That the Plaintiff/Applicant has not furnished this Court with any empirical medical evidence on the ailment of the Plaintiff as a reason for realizing the monies, the reason is not only superfluous immaterial, but also inconsequential in the given circumstances whatsoever. For these reason therefore, I hold and reiterate That Honorable Court has no good reason to continue holding the money.

Who will bear the costs of the application

20. The law is firm on the issue of costs be at the discretion of the Court. Costs mean the award That a party is granted at the conclusion of the legal action and proceeding in any litigation. The Proviso of Section 27 (1) of the *Civil procedure Act*, Cap. 21 holds That costs follow the events. By event it means the results of the said legal action.
21. Although from the instant case the Plaintiff/Applicant has been successful in prosecuting its application dated 7th August, 2023 and hence entitled to costs, taking That since this matter is still alive and progressing to the next level, I order That costs to be in the cause.

V. Conclusion & findings

22. Having caused an indepth analysis of the issues framed herein, the Honourable Court specifically grant the following orders:-
 - a. That the Notice of Motion application dated 7.8.2023 found to have merit and hence allowed.
 - b. That the Defendant in the Counter Claim granted 14 days to file Defence to the Counter Claim and the Plaintiffs in the Counter Claim granted 7 days leave to file Reply to the Defence to the Counter Claim under Order 7 Rules 11 of the Civil Procedure Rules, 2010.
 - c. That for expediency sake the suit be set down for hearing on 9th May, 2023 and there be mention on 6th February, 2024 for compliance and Pre-Trial Conference under Order 11 of the Civil Procedure Rules, 2010.
 - d. That costs of the application to be in the cause.



It is so ordered accordingly.

RULING IS DELIEVERED THROUGH MICRO SOFT TEAMS VIRTUAL MEAN, SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF OCTOBER 2023.

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HON. JUSTICE L.L. NAIKUNI

JUDGE

