Gitau v HFC Limited & 3 others; Gitau (Interested Party); Kanyiri & another (Applicant); Housing Finance Limited (Respondent) (Commercial Case 469 of 2016) [2024] KEHC 3508 (KLR) (Commercial and Tax) (8 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3508 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE 469 OF 2016

MN MWANGI, J

MARCH 8, 2024

BETWEEN

MINNIE WAHU GITAU ..... PLAINTIFF

AND

HFC LIMITED ..... 1ST DEFENDANT

CHRISTOPHER GITHAIGA KANYIRI ..... 2ND DEFENDANT

REUBEN THEURI GATHEMIA ..... 3RD DEFENDANT

EVAJANICE WAMBUI GITHUKU ..... 4TH DEFENDANT

AND

LIVINGSTONE KAMANDE GITAU ..... INTERESTED PARTY

AND

CHRISTOPHER GITHAIGA KANYIRI ..... APPLICANT

REUBEN THEURI GATHEMIA ..... APPLICANT

AND

HOUSING FINANCE LIMITED ..... RESPONDENT

RULING

1. This ruling is in regard to two applications. The first one is a Notice of Motion dated 27th October, 2021 filed pursuant to the provisions of Article 159 of *the Constitution* of Kenya, Sections 1A and 1B

of the *Civil Procedure Act*, Sections 15, 26, 27, 29, 35 & 37 of the *Banking Act* Cap 488, Sections 31 & 34 of the *Microfinance Act*, Order 52 of the Rules of the Supreme Court of England, Section 5 of the *Judicature Act*, Cap 8 laws of Kenya and any other enabling provisions of the law. The applicants seek the following orders -

i. Spent;

ii. That by an order of this Honourable Court the respondent herein Housing Finance Limited, do unconditionally forthwith remove the names of the 1st and 2nd applicants Christopher Githaiga Kanyiri and Reuben Theuri Gathemia from the Credit Reference Bureau negative listing and cease henceforth from placing their names in the said listing in the absence of a Court Order expressly allowing and/or permitting such listing for just reasons expressly approved by this Honourable Court;

iii. That leave be granted to the applicants herein to institute contempt of Court proceedings against the respondent and its Managing Director and such other officers as had personally been served with the Court Orders herein to show cause why committal proceedings should not be instituted against them jointly and/or severally for flagrantly flouting and/or disobeying the orders of this Honourable Court; and

iv. That the respondent be condemned to pay the costs of this application.

2. The application is brought on the grounds on the face of the Motion and is supported by an affidavit sworn on 27th October 2021, by Christopher Githaiga Kanyiri, the 1st applicant herein. In opposition thereto, the respondent filed a replying affidavit sworn on 5th September 2022 by Christine Wahome, the respondent's Senior Legal Manager.

3. The 2nd application is a Notice of Motion dated 27th June, 2022 filed under the provisions of Article 159 of *the Constitution* of Kenya, Sections 1A, 1B, 6 & 8 of the *Civil Procedure Act*, and any other enabling provisions of the law. The applicants are seeking the following orders –

i. Spent;

ii. Spent;

iii. That the respondent/1st defendant HFC Ltd either by itself or through its servants and/or agents be restrained forthwith by an order of this Honourable Court from instituting, lodging, commencing, furthering, pursuing any criminal proceedings against Christopher Githaiga Kanyiri and/ or Reuben Theuri Gathemia on any issue touching upon the proceedings in this case;

iv. That the said respondent/1st defendant HFC Ltd be ordered to lodge a formal application to this Honourable Court to disclose openly and frankly the basis or foundation for any criminal complaint being lodged and/or pursued by it against any party and particularly Christopher Githaiga Kanyiri and/ or Reuben Theuri Gathemia regarding any matters touching upon the proceedings in this case and do justify why such action is being undertaken prejudicially against Christopher Githaiga Kanyiri and Reuben Theuri Gathemia after full settlement of all issues raised before this Court have been settled amicably in favour of the said HFC Ltd;

v. That in the event the said respondent/1st defendant HFC Ltd either by itself or through its servants and/or agents wish for any reason to pursue any such grossly prejudicial proceedings against Christopher Githaiga Kanyiri and/or Reuben Theuri Gathemia this Honourable do forthwith set aside all the Consent Orders recorded in this matter and restore the parties to their

initial status quo ante as existed prior to the numerous Consents Orders negotiated, executed and fully implemented by all the parties in good faith and this Court do subject the parties to strict restoration before allowing any further steps to be undertaken by HFC Ltd; and

vi. That the respondent/1st defendant HFC Ltd be condemned to pay the costs of this application.

4. The application is brought on the grounds on the face of the Motion and is supported by affidavits sworn by Christopher Githaiga Kanyiri, the 1st applicant herein, on 27th June 2022 and 13th March 2023, and Reuben Theuri Gathemia, the 2nd applicant herein on 13th March, 2023. In opposition thereto, the respondent filed a replying affidavit sworn on 5th September, 2022 by Christine Wahome, the respondent's Senior Legal Manager.

5. The applications were canvassed by way of written submissions. The applicants' submissions were filed on 20th June, 2023 by the law firm of Gatheru Gathemia & Company Advocates, whereas the respondent's submissions were filed by the law firm of Laichena Mugambi & Ayieko Advocates LLP on 20th July, 2023.

6. Mr. Ndambiri, learned Counsel for the applicants submitted that on or about 13th November, 2014, the applicants and the 4th defendant jointly applied and were granted a financial facility of Kshs.11,000,000/= by the respondent, but the 4th defendant refused to participate in the servicing of the said financial facility from the time the said amount was disbursed in their joint loan account No. 7190012927.

7. That subsequently, vide a series of Court Orders dated 11th May, 2018, 19th February, 2019 and 1st September, 2020, it was agreed that the principal financial facility be split into three distinct accounts each to be serviced separately by the respective account holders. That this culminated in the opening of three distinct accounts sometime in May 2021. Counsel submitted that the applicants have since then consistently serviced their loan account Nos. 0000005780 and 000000577956.

8. Mr. Ndambiri indicated that the foregoing notwithstanding, the respondent has continued to retain the names of the applicants in the Credit Reference Bureau negative listing. Counsel contended that by not withdrawing the applicants' names from the Credit Reference Bureau negative listing, the respondent has restricted their ability to do business, earn a living and freely obtain the necessary finances to service their mortgages, and has afforded them disrepute despite the fact that they are upstanding and level-headed citizens. Counsel contended that on diverse dates since 30th March 2022, the applicants were summoned to record statements with the Banking Fraud Unit of the Directorate of Criminal Investigations (hereinafter referred to as "DCI"), consequent to criminal investigations lodged against them by the respondent in relation to alleged forgery of the title of the charge documents used to secure the joint loan facility advanced by the respondent to them and the 4th defendant, which title was issued by the 4th defendant. Counsel contended that the said charges if any, ought to be pursued against the 4th defendant, not the applicants.

9. He stated that if the applicants had been involved in the actual perpetration of the fraud in any way, any complaints against them ought to have been made by the plaintiff, being the title holder. This is because the respondent's interest in the impugned title had fully been redeemed by way of separation of the loan and provision of alternative security for their respective shares of the facility by each of the applicants.

10. Mr. Ndambiri asserted that the respondent's endeavour to criminalize this civil suit is constitutive of flagrant contempt of Court since the proceedings herein have been the subject of a comprehensive mediation process where all issues arising in this suit were brought up and thrashed out, after which

multiple Consent Orders were executed by all parties and adopted by this Court. Further, that the settlement and release of the title to the plaintiff led to the withdrawal of the complaint lodged by it against the respondent's Officers.

11. Counsel relied on the decision in Reuben Kioko Mutyaene v Kenya Commercial Bank Limited; Transunion T/A Credit Reference Bureau Africa Limited (Interested Party) [2020] eKLR and submitted that the respondent acted negligently and in breach of the statutory duty of care owed to the applicants by listing them as defaulters with the Credit Reference Bureau, despite the fact that they had diligently serviced their respective loan accounts. Mr. Ndambiri referred to the provisions of Sections 26(1), (3), (6), (7), (8), (9) & (10) of the Credit Reference Bureau Regulations, 2020 and stated that the respondent did not give the applicants any notice of its intention to list negative information against them prior to doing so.

12. He contended that the circumstances surrounding the institution of investigations against the applicants by the respondent when it had neither a cause of action against them nor any interest in the material title amounts to a gross abuse of the Court process. To buttress his argument, he relied on the case of Margaret Ndege & 3 others v Moses Oduor Ademba [2021] eKLR, where the Court in setting out the tort of malicious prosecution echoed the decision in Mbowa v East Mengo District Administration [1972] EA 352, andEphraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others [2022] eKLR where the Court elucidated what amounts to an abuse of the Court process.

13. On his part, Mr. Ayieko, learned Counsel for the respondent submitted that vide a charge instrument registered on 12th November, 2014 over property LR. No. Ngong/Ngong/3853, the respondent advanced to the applicants and the 4th defendant a loan facility of Kshs. 11,000,000/=. That the applicants and the 4th defendant serviced the loan for a while but as at 31st January, 2016, the balance of the loan facility plus accrued interest stood at Kshs. 11,770,313.19, with interest accruing thereon at the rate of 17% and a default interest rate of 19.75% per annum. That as a result of the foregoing, on 29th January, 2016, the respondent served the chargors and the borrowers with a statutory notice for a period of three months, but the applicants, the plaintiff, the 4th defendant and the interested party failed to rectify the default.

14. That the applicants and the 4th defendant continued being in default hence at the expiry of the said three months the respondent served the applicants, 4th defendant, the plaintiff and the interested party with a Notification of sale dated 21st October, 2016 in realization of the security LR. No. Ngong/Ngong/3853. That the plaintiff challenged the said process vide this suit which resulted in long and protracted negotiations between the parties herein, that culminated in a consent dated 1st September, 2020 which compromised this suit. Counsel contended that the respondent has since fully complied with the terms of the said consent.

15. Mr. Ayieko referred to the provisions of Regulation 26 of the Credit Reference Bureau Regulations and stated that the applicants have never notified them of any inaccuracy or error of information that they allegedly submitted or were to submit to a Credit Reference Bureau. In addition, the applicants have not demonstrated that their names were indeed submitted to a Credit Reference Bureau for negative listing and/or notification to the respondent of their issue with being listed by a Credit Reference Bureau. The respondent submitted that it has not breached any duty of care owed to the applicants, or acted negligently.

16. Counsel stated that it is a cardinal principle in any contempt proceedings that the applicant must prove that the alleged contemnor has ignored or willfully disobeyed Court Orders. He relied on the case of Republic v Principal Secretary, Ministry of Defence Exparte George Kariuki Waithaka [2019] eKLR and asserted that the respondent has fully complied with the terms and conditions of the consent dated

1st September, 2020. In addition, that the applicants have not demonstrated how the respondent has breached or failed to comply with the said Consent Order. In submitting that contempt proceedings are in the nature of criminal proceedings and the standard of proof thereof is that of beyond reasonable doubt, Mr. Ayieko cited the case of North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR. He expressed the view that the prayer for leave to institute contempt proceedings is premature.

17. Mr. Ayieko relied on the Court of Appeal decision in Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR and the Supreme Court case of Geoffrey M. Asanyo & Others v The Attorney General [2018] eKLR and submitted that this Court is functus officio in view of the consent dated 1st September, 2020. He contended that this case cannot be reopened unless the legality of the orders closing it is in question, which is not the case herein.

18. It was submitted by Counsel that the issues the applicants are raising in their applications are criminal in nature hence going beyond the jurisdiction of this Court, and in any event, the National Police Service, the Directorate of Criminal Investigations, and the Banking Fraud Unit are public institutions mandated and authorized to investigate criminal conduct in the country. He further submitted that the DCI and the National Police have the authority to investigate crimes and apprehend offenders for purposes of prosecution. He opined that the reliefs being sought by the applicants herein will have the effect of interfering with the constitutional and statutory duties of the aforementioned institutions. To this end, Mr. Ayieko relied on the case of Thuku Kirori & 4 others v County Government of Murang'a [2014] eKLR.

Analysis and Determination.

19. I have considered the applications herein, the grounds on the face of the Motions and the affidavits in support thereof. I have also considered the replying affidavit by the respondent and the written submissions by Counsel for the parties. The issues that arise for determination are –

    i. Whether this Court should issue an order directing the respondent to unconditionally forthwith remove the applicant's names from the Credit Reference Bureau negative listing and cease henceforth from placing their names in the said listing in the absence of a Court Order;

    ii. Whether the applicants should be granted leave to institute contempt of Court proceedings against the respondent and its Managing Director and such other Officers as had personally been served with the Court Orders herein;

    iii. Whether the respondent should be restrained forthwith from instituting and/or pursuing any criminal proceedings against the applicants on any issue touching upon the proceedings in this case;

    iv. Whether the respondent should file a formal application disclosing the basis or foundation for any criminal complaint being lodged and/ or pursued by it against the applicants regarding any matters touching upon the proceedings in this case; and

    v. Whether this Court should set aside all the Consent Orders recorded in this matter in the event that the respondent wishes to pursue any grossly prejudicial proceedings against the applicants.

20. The 1st applicant in the affidavit filed in support of the application dated 27th October, 2021 averred that the respondent and its Officers have acted wrongfully and illegally by retaining his name in the Credit Reference Bureau negative listing even after his loan account got separated from the joint loan account previously held in the names of the applicants and the 4th defendant, pursuant to a series of Court Orders issued by this Court.

21. The 1st applicant asserted that he has suffered great disrepute occasioned by the respondent retaining his name in the Credit Reference Bureau negative listing while fully aware that he was not in default of his loan repayment. He urged this Court to issue firm orders against the respondent to bar the continued perpetration of the illegal actions by the respondent and any of its Officers against him.

22. The 1st applicant in the affidavit filed in support of the application dated 27th June, 2022 averred that on diverse dates since 30th March, 2022 the applicants were summoned to record statements with the Banking Fraud Unit of the DCI as a result of criminal investigations ostensibly lodged and commenced by the respondent in relation to the alleged forgery of the title charge documents against which a joint loan facility of Kshs. 11,000,000/= was secured, by a title issued by the 4th defendant in this matter.

23. He further averred that in light of the above, the applicants are apprehensive and continue to live in fear of imminent injudicious and unwarranted apprehension by the said Banking Fraud Unit of the DCI. In addition, the attempt to irregularly and without justification lodge lopsided parallel criminal proceedings against the applicants on the subject matter of these proceedings during their pendency before this Court is not only subjudice but also a gross abuse of the Court process.

24. It was stated by the applicants that the respondent's endeavour to criminalize a civil matter in order to undermine active Court proceedings amounts to flagrant contempt of Court. He indicated that numerous Court Orders in relation to this matter have been issued vindicating the applicants of any criminal conduct.

25. The respondent in its replying affidavit averred that vide three charge instruments registered on 12th November, 2014 over all that property known as LR No. Ngong/Ngong/3853, the respondent advanced to the applicants and the 4th defendant a loan facility of Kshs. 11,000,000/=. That subsequently, a dispute arose where the plaintiff herein challenged the process leading to the charging of the property used to secure the aforementioned financial facility, which resulted in long and protracted negotiations between the parties herein which culminated in a consent dated 1st September, 2020 whose terms compromised the civil suit.

26. The respondent further averred that it has since fully complied with the terms of the consent dated 1st September, 2020 thus the prayer for leave to institute contempt of Court proceedings against the respondent or any of its Officers is premature and lacks merit.

27. The respondent asserted that the settlement of the civil suit and restructuring of the respective loans does not obviate the right of an aggrieved party to seek redress through the criminal justice process. He contended that the applicants have not adduced any evidence in support of the allegation that they have been harassed and/or are being harassed by the DCI.

28. It stated that most of the allegations contained in the applications herein are against the DCI and the Banking Fraud Unit who are not a party to this suit at all. It was of the view that the applicants ought to await the outcome of the investigation and the decision of the ODPP on whether or not to prosecute, and not attempt to abuse the Court process by subjecting purely criminal issues to the civil Court process in a bid to advance their interest in this settled suit.

29. In a rejoinder, the 1st applicant averred that upon execution of the Consent Order dated 1st September, 2020, the security title number Ngong/Ngong/3853 upon which the foregoing purported investigations are based, was fully discharged and surrendered back to the 4th defendant. He further averred that any criminal complaint recorded against the himself and the 2nd applicant should be pursued by the plaintiff and the interested party, being the holders of the title for all that property

known as LR No. Ngong/Ngong/3853, and not the respondent who has no justifiable interest in these proceedings.

30. He asserted that he has specifically and quite categorically denied that he has ever been privy to any act(s) of forgery, deceit, misrepresentation and/or fraud in any manner whatsoever.

31. The 2nd applicant in his further affidavit averred that neither the 4th defendant nor the interested party herein have been cited and/or summoned for the purported investigation notwithstanding the fact that the material title which is in the name of the interested party and the plaintiff was secured by the 4th defendant under the authority of the interested party.

32. He also averred that the respondent's officials were personally, directly, and unreservedly involved in the entire process of perfection of the security and registration of the charge, and that they even stated in their statement of defence that they had conducted due diligence and established that the security title was registered in the names of the plaintiff and the interested party.

Whether this Court should issue an order directing the respondent to unconditionally forthwith remove the applicants names from the Credit Reference Bureau negative listing and cease henceforth from placing their names in the said listing in the absence of a Court Order.

33. The applicants contended that on or about 13th November, 2014 together with the 4th defendant, they jointly applied and were granted a financial facility of Kshs.11,000,000/= by the respondent, but the 4th defendant refused to participate in the servicing of the said financial facility from the time the said amount was disbursed in their joint loan account No. 7190012927. Subsequently, vide a series of Court Orders dated 11th May, 2018, 19th February, 2019 and 1st September, 2020, it was agreed that the principal financial facility be split into three distinct accounts each to be serviced separately by the respective account holders.

34. They averred that the above culminated in the opening of three distinct accounts sometime in May 2021 and thereafter, they consistently and diligently serviced their loan account Nos. 0000005780 and 000000577956. The applicants stated that despite the foregoing, the respondent illegally and unprocedurally caused their names to be listed negatively by the Credit Reference Bureau thus restricting their ability to do business, earn a living and freely obtain the necessary finances to service their mortgages. They claim that in doing so, the respondent not only acted negligently but also in breach of the statutory duty of care owed to the applicants.

35. The respondent on the other hand submitted that it has not breached any duty of care owed to the applicants or acted negligently. That in any event, the applicants have not demonstrated that their names were indeed submitted to a Credit Reference Bureau for negative listing and/or notification to the respondent of being listed by a Credit Reference Bureau.

36. It is trite law that he who alleges must prove. This maxim is founded on the provisions of Sections 107, 108 & 109 of the *Evidence Act*, Cap 80 of the laws of Kenya, which stipulate as hereunder-

> " 107. Burden of proof.
>
> 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

37. From the averments on record, it is evident that the applicants bore the onus of proving that their names were negatively listed by the Credit Reference Bureau on account of the respondent. In as much as the applicants claim that the respondent illegally and unprocedurally caused their names to be negatively listed by the Credit Reference Bureau, they have not tendered any evidence in support of the said allegation. There is also no evidence that the applicants reached out and/or engaged the respondent on this issue prior to filing the applications herein.

38. This Court therefore finds that the applicants have not discharged their burden of proof to warrant this Court to issue an order directing the respondent to unconditionally and forthwith remove their names from the Credit Reference Bureau negative listing.

39. In addition, ordering the respondent to henceforth cease from placing the applicants' names in the Credit Reference Bureau negative listing will amount to interfering with the respondent's statutory duty and/or obligations provided for in the Credit Reference Bureau Regulations, 2020, without any justification whatsoever.

Whether the applicants should be granted leave to institute contempt of Court proceedings against the respondent and its Managing Director and such other Officers as had personally been served with the Court orders in issue.

40. It is illegal to willfully disobey a Court Order. It is an established principle that the test for what amounts to contempt of Court when it comes to disobedience of an Order arising from civil proceedings is whether the disobedience was committed deliberately and with mala fides. Parties have a duty to obey Court orders issued in their favour or against them until such orders are varied and/or set aside, regardless of whether the person affected by the orders believes them to be irregular or void. Pursuant to the provisions of Section 5 of the *Judicature Act*, the High Court and the Court of Appeal have the power to punish those who indulge in acts that tend to undermine the Court's authority. The Court in the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR addressed itself on the issue of civil contempt of Court as hereunder-

> " It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

b. the defendant had knowledge of or proper notice of the terms of the order;

c. the defendant has acted in breach of the terms of the order; and

d. the defendant's conduct was deliberate."

41. In this case, the applicants averred that the respondent's endeavor to criminalize this civil suit is constitutive of flagrant contempt of the Court since the proceedings herein have been subject of a comprehensive mediation process, wherein all issues arising in this suit were brought up and thrashed out. The respondent on the other hand asserted that it has fully complied with the terms and conditions of the consent dated 1st September, 2020 whose terms compromised the civil suit herein. The respondent also averred that the applicants have not demonstrated how it has breached or failed to comply with the said Consent Order.

42. On perusal of the application dated 27th October, 2021, it is not clear which Order(s) the applicants claim the respondent has not complied with. It is however clear that the suit herein was compromised vide a consent dated 1st September, 2020 entered into by the parties herein, which consent was adopted as an Order of the Court. This means that the terms of the said consent were not only binding upon the parties herein but were also clear and unambiguous which leads to the logical conclusion that all the parties herein had full knowledge of the terms of the said Consent Order.

43. The provisions of Sections 107, 108 & 109 of the *Evidence Act*, Cap 80 of the laws of Kenya are applicable herein. For this reason, since the applicants are the ones alleging that the respondent willfully disobeyed and/or failed to comply with the terms of the Consent Order dated 1st September, 2020, they bear the burden of tendering in evidence in support of that allegation. On perusal of the application dated 27th October, 2021 and the depositions made by the applicants, I agree with the respondent that the applicants have not in the very least demonstrated which terms of the Consent Orders dated 1st September, 2020, 8th May, 2018, and 18th February, 2019 that the respondent has disobeyed and/or failed to comply with.

44. On whether leave is a prerequisite before institution of contempt of Court proceedings, in Christine Wangari Gacheche v Elizabeth Wanjiru Evans & others [2014] eKLR, the Court of Appeal held that leave to institute contempt proceedings is not required where the said proceedings relate to a breach of a judgment, order, or undertaking. It therefore follows that in this instance, it was not necessary to seek leave of the Court in order to institute contempt proceedings.

Whether the respondent should be restrained forthwith from instituting and/or pursuing any criminal proceedings against the applicants on any issue touching upon the proceedings in this case.

45. It was stated by the applicants that on diverse dates since 30th March, 2022, they were summoned to record statements with the Banking Fraud Unit of the DCI consequent to criminal investigations lodged against them by the respondent in relation to alleged forgery of the title of the charge documents used to secure the joint loan facility advanced to them and the 4th defendant by the respondent, which title was issued by the 4th defendant. They further stated that the said charges ought to be pursued

against the 4th defendant by the plaintiff who is the legal and rightful holder of the title of the property used to secure the financial facility advanced to them and the 4th defendant jointly.

46. In response thereto, the respondent contended that this issue is founded on criminal offences thus this Court has no jurisdiction to hear and determine it as the jurisdiction to do so falls with the Court sitting in the Criminal Division. This then brings about the issue of jurisdiction that ought to be determined before the Court delves into the merits and demerits of this issue. The Court of Appeal in the case of the Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR dealt with the issue of jurisdiction of a Court of law and held that:

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

47. This Court sits in the Commercial and Tax Division of the High Court at Nairobi, thus it does not have jurisdiction to hear and determine matters that are criminal in nature. The issue in contention is whether the respondent should be restrained forthwith from instituting and/or pursuing any criminal proceedings against the applicants on any issue touching on the proceedings in this case. I opine that in determining the said issue, the Court will have to consider whether there is any evidence of fraud and forgery against the applicants in relation to the securities used to secure the financial facility advanced to the applicants and the 4th defendant, to warrant the respondent to institute criminal proceedings against them.

48. In light of the forgoing, this Court finds that this issue is criminal in nature and should have been raised and/or brought before the High Court sitting in the criminal Division which is the Court clothed with the requisite jurisdiction to determine it.

Whether the respondent should file a formal application disclosing the basis or foundation for any criminal complaint being lodged and/ or pursued by it against the applicants regarding any matters touching on the proceedings in this case.

49. As explained hereinbefore, this Court sits in the Commercial and Tax Division of the High Court at Nairobi, thus it does not have jurisdiction to hear and determine matters that are criminal in nature. Thus, in the event the respondent is directed to file a formal application disclosing the basis of any criminal complaint being lodged against the applicants before this Court, it will require this Court to dig through evidence of a criminal complaint, in a bid to establish whether there is any basis for charges being leveled against the applicants or not. This will amount to dealing with issues that are beyond this Court's jurisdiction by virtue of the Division it sits in.

50. Such issues ought to be filed before the High Court sitting in the Criminal Division which is the Court clothed with the requisite jurisdiction to determine such issues.

Whether this Court should set aside all the Consent Orders recorded in this matter in the event the respondent wishes to pursue any grossly prejudicial proceedings against the applicants.

51. The parties herein recorded consents dated 1st September, 2020, 8th May, 2018, and 18th February, 2019, which have since been adopted as Orders of this Court. The Court in the case of Brooke Bond Liebig

v Mallya [1975] EA 266 set down the principles to be considered in dealing with an application to set aside Consent Orders as follows-

> "The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed."

52. In this case, the applicants have not alleged that there was fraud or collusion and/or that they were coerced into entering into the aforesaid consents. To the contrary, the applicants concede that there was consensus between the parties herein that informed the decision to enter into the aforementioned consents. The applicants have moved this Court to set aside the consents entered into by the parties in this suit in the event that the respondent wishes to pursue any grossly prejudicial proceedings against them. The ground upon which they would like to have the Consent Orders of the Court set aside is however not one of the conditions applicable in law. I find that the applicants have not made out a case for setting aside of the Consent Orders on record.

53. The upshot is that the applications dated 27th October, 2021 and 27th June, 2022 are not merited. They are dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF MARCH, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Munene h/b for Mr. Ayieko for the 1st defendant/applicant

No appearance for the respondent

Ms B. Wokabi – Court Assistant.