NCBA Bank Kenya PLC v TRV Developers Limited & another (Commercial Miscellaneous Application E1012 of 2023) [2024] KEHC 5935 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5935 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL MISCELLANEOUS APPLICATION E1012 OF 2023

MN MWANGI, J

MAY 15, 2024

BETWEEN

NCBA BANK KENYA PLC .... APPLICANT

AND

TRV DEVELOPERS LIMITED .... 1ST RESPONDENT

TRV TOWERS LIMITED .... 2ND RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 29th November, 2023 brought pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Section 97(2) of the *Land Act*, Order 40 Rules 2 & 4 and Order 51 of the *Civil Procedure Rules*, 2010. The applicant seeks the following orders -

    i. Spent;

    ii. Claytown Valuers Ltd be and are hereby granted immediate access to the properties known as Land Reference Number 209/21933 (original number 209/1/18), Land Reference Number 209/21596 and Land Reference Number 209/21582 under the provisions of Clause 6.5 of the Charge dated 13 September, 2018, the Replacement Charge dated 25 January, 2016 and the Replacement Charge dated 25 May, 2016 respectively, in order to ascertain the market, insurance and forced sale values of the said properties;

    iii. The OCS Parklands Police Station to provide assistance and security to Claytown Valuers Ltd to maintain peace and to protect and preserve human life and property in the execution of this Order; and

    iv. That costs of this application be awarded to the applicant.

2. The application is premised on the grounds on the face of the Motion and is supported by affidavits by Kenneth Mawira and Christine Wahome, Senior Legal Counsel at the applicant bank, sworn on 29th

November, 2023 and 19th February, 2024, respectively. In opposition thereto, the respondents filed a replying affidavit sworn on 12th January, 2024 by Virji Meghji Patel, a Director of the respondents herein.

3. The application was canvassed by way of written submissions. The applicant's submissions were filed on 19th February, 2024 by the law firm of Walker Kontos Advocates, whereas the respondents' submissions were filed by the law firm of Tito & Associates Advocates on 5th March, 2024.

4. Ms Mutisya, learned Counsel for the applicant relied on the case of *Jopa Villas LLC v Private Investment Corp & 2 others* [2009] eKLR and stated that the application herein is not opposed by the 1st respondent, since Mr. Tribhovan Lalji Chavda, who is the 1st respondent's majority director/shareholder and also a director/shareholder of the 2nd respondent, has written through his Advocates to confirm that he has no objection to the valuation. Further, that at paragraphs *9* & 19 of the respondents' replying affidavit, the deponent avers that the respondents do not object to the valuation being carried out, but believe that the costs of the said valuation should solely be borne by the applicant bank. Counsel referred to Clause 6.5 of the Charge dated 13th September, 2018, the Replacement Charge dated 25th January, 2016 and the Replacement Charge dated 25th May, 2016 and submitted that the provisions thereunder provide that valuation on the charged properties shall be at the respondents' expense.

5. Counsel referred to the Court of Appeal decisions in *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA. 503, [2011] eKLR and *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR and contended that if this Court were to find that the applicant should bear the costs of the said valuation, it will amount to rewriting of the contract(s) between the parties herein. She cited the provisions of Section 97(2) of the *Land Act* and argued that the applicant is statutorily required to ensure that a forced sale valuation is undertaken by a Valuer prior to exercising its right of sale. It was stated by Mrs. Mutisya that on 24th January, 2024, the Court in HCCOMM No. E541 of 2023 - *TRV Towers Limited v NCBA Bank Kenya Limited* made an order for valuation of the charged properties but the respondents have denied the applicant's Valuers access to the charged properties. She stated that unless the orders herein are granted, the applicant will not be able to exercise its statutory power of sale over the suit properties, yet the respondents are in huge arrears.

6. Ms Bakari, learned Counsel for the respondents submitted that the respondents are not opposed to the applicants conducting valuation on the charged properties, but the only dispute is in regard to the costs of the said valuation, which they contend should be catered for by the applicant. Counsel relied on Clause 16.2.9 of the offer letter which provides that the applicant should at the first instance request the respondents to conduct a valuation, and it is only if the respondents refuse to conduct such a valuation that the applicant may now come in and conduct a valuation on its own. She submitted that this Court should consider the fact that the respondents have not been given an opportunity to conduct a valuation of their own, thus if the applicant insists on skipping this important stage, it should cater for the cost of the said valuation.

7. Counsel referred to the provisions of Clause 6.5 of the Charge dated 13th September, 2018, the Replacement Charge dated 25th January, 2016 and the Replacement Charge dated 25th May, 2016 and stated that it does not confer an obligation, but it gives the respondents a choice since it starts with the word "Will" which is permissive and is used to express willingness or choice to do something in future, and it does not impose an obligation or duty. To buttress this argument Ms Bakari relied on the case of *Republic v Commissioner of Domestic Taxes Ex-parte Sony Holdings Limited* [2019] eKLR, and contended that the respondents are under no obligation to cater for the expense of the valuation called for by the applicant on its own volition.

Analysis and Determination.

8. I have considered the application herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the respondents' replying affidavit and the written submissions by Counsel for the parties. The issue that arises for determination is whether the instant application is merited.

9. The applicant in its supporting affidavit deposed that the 1st respondent applied for a loan facility from it, which was secured by a legal Charge dated 13th September, 2018 over Land Reference Number 209/21933 (Original Number 209/1/18), whereas the 2nd respondent applied for a loan facility with the applicant which was secured by a Replacement Charge dated 25th January, 2016 over Land Reference Number 209/21596 and a Replacement Charge dated 25th May, 2016 over Land Reference Number 209/21582. Further, that the 2nd respondent guaranteed the loan facility issued to the 1st respondent vide a guarantee and indemnity dated 12th July, 2018.

10. The applicant averred that the respondents defaulted in the repayment of their loan facilities thus triggering its exercise of its statutory power of sale. Through its Advocates on record, the applicant issued the respondents with a statutory demand notice dated 31st May, 2023 pursuant to the provisions of Section 90(1) of the *Land Act* and Section 56(1) of the *Land Registration Act* demanding payment of Kshs.511,489,287.08 from the 1st respondent, and Kshs.409,581 559.38 from the 2nd respondent.

11. The applicant further averred that after the lapse of the three-month period as stipulated in the statutory demand, it issued the respondents with a forty-days' notice to sell dated 20th September, 2023 pursuant to the provisions of Section 96(2) of the *Land Act*, demanding payment of Kshs.549,391,827.98 from the 1st respondent, and Kshs.414,958,827.58 from the 2nd respondent.

12. The applicant deposed that despite issuance of the aforesaid notices, it has not been able to exercise its statutory power of sale over the charged properties since its efforts have been repeatedly frustrated by the respondents who have been filing multiple applications. It was stated by the applicant that there is no order enjoining it from proceeding to enforce its statutory power of sale over the charged properties.

13. It further stated that in anticipation of the sale of the charged properties and in a bid to follow the legal provisions in regard to the statutory sale of charged properties by a Chargee, it duly instructed its appointed Valuers, Claytown Valuers Ltd to conduct a valuation of the charged properties to ascertain their market and forced sale values, but the respondents have continually denied them access to the charged properties to enable the said valuation.

14. The applicant deposed that it is reasonably apprehensive that the continued lack of access to the charged properties threatens to scuttle the impending sale by auction as planned. It stated that the respondents stand to suffer no prejudice if the orders sought herein are granted.

15. The respondents in their replying affidavit averred that they have not denied the applicant access to the charged properties as alleged. They further averred that prior to being contacted by the applicant's Advocates, they were in contact with one of the applicant's employees in the position of a Senior Manager- Credit Risk by the name Grace Kiragu, who informed them that the valuation was being requested in accordance with Clause 16.2.9 of the Offer Letter.

16. The respondents stated that the applicant has not complied with the provisions of Clause 16.2.9, hence it will be unfair to deduct the costs of any such valuation conducted by the applicant from the respondents' bank accounts held by the applicant. They contended that they have indicated their

willingness and readiness to allow access to the applicant's Valuer, subject to the applicant catering for the cost of the said valuation.

17. The respondents stated that there is a Court order in freshly filed cases barring the applicant from undertaking any dealings in the property of the 1st respondent herein, thus allowing the instant application will not only be going against the said Court order but also aiding an illegality. They contended that should the instant application be allowed and the costs of the valuation to be conducted by the applicant deducted from their account, they shall be greatly prejudiced.

18. The respondents asserted that the applicant on the other hand stands to suffer no prejudice in the event the application herein is dismissed.

19. The applicant in a rejoinder stated that the respondents are in breach of their obligations under Clause 16.2.9 of the offer letter because ever since the properties were charged, they have never submitted a Valuation Report once every four years as required by the said provisions, and in any event, there is nothing stopping the respondents from conducting their own valuation concurrently with the applicants.

20. The applicant averred that after the Charges over the properties in question were registered, the terms of the offer letter were superseded by the Charges which became the primary documents governing the relationship between the parties herein. It stated that for the said reason, the terms under Clause 6.5 of the Charges supersedes the terms of the offer letter.

21. It further averred that the fact that it would like to value the charged properties does not mean that auction is imminent. In addition, there is no threat of auction since the applicant is yet to appoint an Auctioneer who would then issue the respondents with the statutory 45 days' redemption notice. The applicant asserted that by signing the Charge documents, the respondents covenanted to bear the costs of the valuation.

Whether the instant application is merited.

22. It is not disputed that the applicant advanced loan facilities to the respondents which were secured by various Charges over the suit properties. The applicant contended that the respondents defaulted in their loan repayment obligations, thus they initiated the process for realizing the securities it holds. The applicant alleges that its appointed Auctioneers have made several attempts to access the charged properties in order to carry out a valuation and thereafter generate reports of their market and forced sale values, but they have been unable to do so, since the respondents have denied them access. The respondents on the other hand averred that they have no qualms with the applicant conducting the aforesaid valuations, but the costs of the same should be borne by the applicant. The respondents argued that pursuant to Clause 16.2.9 of the offer letters dated 25th November, 2020, the applicant can only conduct a valuation of the charged properties and deduct the cost of the said valuation from the respondents' account, after requesting the respondents to do so and the respondents fails to comply with the said request. The respondents contended that since no such request has been made by the applicant, the latter should bear the costs of any valuations conducted on the charged properties. The applicant on the other hand relied on Clause 6.5 of the Charge dated 13th September, 2018, the Replacement Charge dated 25th January, 2016 and the Replacement Charge dated 25th May, 2016 and asserted that the provisions thereunder provide that valuation on the charged properties shall be at the respondents' expense.

23. Further, since the Charges over the properties in question were registered, they became the primary documents governing the relationship between the parties herein, thus superseding the terms of the offer letter. For this reason, the terms under Clause 6.5 of the Charges supersedes the terms of the

Offer Letter. I note that in as much as the respondents averred that there is an injunction restraining the applicant from any dealings with the charged properties, however, on 24th January 2024, in HCCOMM No. E541 of 2023 - *TRV Towers Limited v NCBA Bank Kenya Limited*, the Court made an order for valuation of the charged properties but the respondents still deny the applicant's Valuers access to the said properties.

24. This Court has taken it upon itself to check the Case Tracking System (CTS) in order to confirm whether the injunctive orders exist. The record reveals that in HCCOMM No. E548 of 2023, on 23rd November, 2023 the Court granted the 1st respondent herein an interim injunction in terms of prayer 2. On 28th February, 2024, the said interim orders were vacated and the application was later withdrawn and costs were awarded to the applicant herein. In regard to HCCOMM No. E541 of 2023, the CTS shows that this Court on 24th January, 2024 issued status quo orders as of the said date, and stated that valuation on the suit properties therein could be done. In light of the foregoing, this Court finds that there are no orders barring the applicant, its employees, servants and/or agents from conducting valuation of the properties herein.

25. The applicant in this application is seeking an order that its appointed Auctioneers be granted immediate access to the charged properties in order to ascertain the market, insurance and forced sale values of the said properties pursuant to Clause 6.5 of the Charge dated 13th September, 2018, the Replacement Charge dated 25th January, 2016 and the Replacement Charge dated 25th May, 2016, and for the OCS Parklands Police Station to ensure enforcement of the said order. Clause 6.5 of the said charge document reads as follows –

> " In addition to the agreements by the Chargor implied by Section 88 of the Lands Act, the Chargor hereby further covenants and agrees with the bank that during the continuance of this charge the Chargor will:
>
> Permit the bank at any time, should the bank so require, to instruct a surveyor or valuer to inspect and report on the charged property at the expense of the Chargor and all charges paid by the bank for that purpose shall be deemed to be expenses properly incurred by the bank in relation to this charge."

26. The instant application seeks orders for this Court to compel the respondents to comply with the above provisions of the Charge documents. When it comes to a borrower being advanced financial facilities that are secured by charges over immovable property, it is the rule of the thumb that money will only be disbursed to the Chargor after a Charge has been executed by both the Chargor and the Chargee, and after the said Charge has been duly registered in the relevant Registry, and not upon execution of the Offer Letter. For this reason, I agree with Counsel for the applicant that the terms of the charge document will always supersede the terms of an Offer Letter unless otherwise agreed and specified by the parties.

27. It is worth noting that the respondents have neither disowned the terms of Clause 6.5 of the Charge dated 13th September, 2018, the Replacement Charge dated 25th January, 2016 and the Replacement Charge dated 25th May, 2016, nor have they challenged the said charge document on grounds of fraud, coercion, misrepresentation and/or at all.

28. Parties to a contract are bound by the terms and conditions thereof, and it is not the business of the Courts to rewrite such contracts. In *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR at 507, the Court stated as follows in that regard-

> " A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved."

29. Having willingly executed the Charge dated 13th September, 2018, the Replacement Charge dated 25th January, 2016 and the Replacement Charge dated 25th May, 2016, which documents equate to contracts between the parties herein, the respondents are bound by the terms therein. The above notwithstanding, even if the Court were to consider the terms of Clause 16.2.9 of the Offer Letter dated 25th November, 2020 and find that the applicant was first required to request the respondents to carry out a valuation on the charged properties before the applicant appointed a Valuer to do so, failure to follow the aforesaid procedure would not necessarily mean and/or lead to the applicant bearing the cost of the valuation, since the respondents would still have to use a Valuer approved by the bank and cater for the costs of the said valuation.

30. Further, Clause 16.2.9 of the said Offer Letter neither provides for nor implies that in the event the applicant fails to request the respondents to carry out a valuation on the charged properties before appointing a Valuer to do so, the applicant would bear the costs of the valuation. In *Jiwaji v Jiwaji* [1986] EA 547 cited with authority by the Court of Appeal in *Centurion Engineers & Builders Limited v Kenya Bureau of Standards* (Civil Appeal E398 of 2021) [2023] KECA 1289 (KLR) it was held that -

> " where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties." (emphasis added).

31. In the premise, I find that the instant application is merited. It is allowed as prayed with costs to the applicant.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Mutisya for the applicant

Mr. Wanyonyi h/b for Mr. Ogendo for the respondents

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.