



REPUBLIC OF KENYA



Africa Banking Corporation v Zeituns Holdings & 5 others (Commercial Case 312 of 2018) [2024] KEHC 9886 (KLR) (Commercial and Tax) (19 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 312 OF 2018**

MN MWANGI, J

JULY 19, 2024

BETWEEN

AFRICA BANKING CORPORATION PLAINTIFF

AND

ZEITUNS HOLDINGS 1ST DEFENDANT

ABDIRIZAK MAALIM AHMED 2ND DEFENDANT

JABRI ABDULNASSIR SEIF 3RD DEFENDANT

SONIA WANJIRU 4TH DEFENDANT

ANITA NYAMBURA 5TH DEFENDANT

CHIEF LAND REGISTRAR 6TH DEFENDANT

RULING

1. This Court had on 7th March, 2024 indicted that this ruling is in relation to two applications dated 9th July, 2021 and 28th September, 2023. However, upon perusal of the Court record, I note that the application dated 9th July, 2021 which was filed by the 4th defendant seeking to set aside the judgment that had been entered against her, was allowed vide a ruling that was delivered on 31st January, 2021. Further, the plaintiff, the 2nd, 3rd & 5th defendants have also only submitted on the application dated 28th September, 2023 despite the fact that this Court issued directions for filing of submissions on both applications on 19th December, 2023. The only application that is left for determination is the Notice of Motion dated 28th September, 2023, which will be addressed by this ruling.
2. The 2nd, 3rd & 5th defendants filed a Notice of Motion application dated 28th September, 2023 pursuant to the provisions of Articles 21, 22, 23, 25, 27, 28, 29, 31, 40, 46, 47, 50 & 60 of the Constitution of



- Kenya 2010, Sections 107, 108, 109 & 119 of the *Evidence Act* Cap 80 Laws of Kenya, Orders 22, 23, 40 Rules (2) & (4), & 50 Rule (1) of the *Civil Procedure Rules, 2010*, and all other enabling laws seeking orders that the Court adjourns the Notice to Show Cause (NTSC) application against the 2nd, 3rd & 5th defendants pending the hearing and determination of Malindi ELC PET No. 04 of 2023.
3. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on 29th September, 2023 by Paul Mucai Gitau, an Advocate of the High Court of Kenya and learned Counsel for the 2nd, 3rd & 5th defendants. He stated that the offer letter dated 27th June, 2012 and the indemnity and guarantee dated 9th July, 2012 are key documents for this case, but the 4th defendant filed an application dated 9th July, 2021 claiming that the signatures on these documents were forged, and if these forgery allegations are proved, they may have been committed by the plaintiff's officers, which would invalidate any claims against the 2nd, 3rd & 5th defendants in equity.
 4. Counsel confirmed that the 2nd & 3rd defendants executed valid charges related to land title Nos. Kilifi/Jimba/337 & Kilifi/Jimba/338, which could be available for execution by the plaintiff in view of the pending constitutional petition filed by the 2nd, 3rd & 5th defendants in Malindi ELC PET No. 04 of 2023 against the plaintiff and seven (7) others. He contended that the plaintiff's NTSC against the 2nd, 3rd & 5th defendants before the determination of the aforesaid petition would be discriminatory and highly prejudicial to the 2nd, 3rd & 5th defendants' Constitutional rights.
 5. In opposition thereto, the plaintiff filed a replying affidavit sworn on 19th December, 2023 by Louis Omukhulu, the plaintiff's Assistant Legal Manager. Mr. Omukhulu stated that the affidavit supporting the application was sworn by an Advocate who has addressed contested facts, a practice disapproved by the Courts. He noted that on 9th April, 2021, this Court entered judgment in favor of the plaintiff against the 1st to 5th defendants for Kshs.227,626,588.49, limiting the judgment to Kshs.84,000,000.00 for each of the 2nd to 5th defendants. That on 12th April, 2021, the defendants' Advocate filed a Notice of Appeal and an application for stay of execution in CA No. E116 of 2021 at the Court of Appeal, but the said application was dismissed with costs. That thereafter, no appeal was filed against judgment of 9th April, 2021. Mr. Omukhulu stated that the outstanding amount of Kshs.227,626,588.49 continues to accrue interest and penalties.
 6. He argued that the Constitutional Petition filed in Malindi ELC PET No. 04 of 2023, in which declaratory orders are being sought on property ownership, is an abuse of the Court process since it involves properties subject to an unvaried and unchallenged judgment delivered on 8th May, 2015. He submitted that the said petition does not equate to a stay of the judgment delivered on 9th April, 2021 hence it cannot prevent the plaintiff from enforcing the said judgment. Further, that the 2nd, 3rd & 5th defendants executed Deeds of Guarantee, agreeing to redeem the outstanding credit facilities if the borrower defaulted. Thus, Malindi ELC PET No. 04 of 2023 does not affect the said guarantees, and the defendants cannot claim that redemption was only against secured properties. The plaintiff argued that adjourning the NTSC hearing would effectively grant the defendants an injunction of the judgment by Judge Majanja, despite the Court of Appeal having dismissed their application for stay of execution.
 7. In a rejoinder, the plaintiff filed a further affidavit sworn on 12th January, 2024 by Abdirizak Maalim Ahmed, the 2nd defendant herein who claimed that paragraphs 3, 4 and 18 of the plaintiff's replying affidavit are vague, ambiguous, and lack clarity on what contentious issues were discussed by their Advocate without disclosing the source of such claims. He argued that the 2nd and 3rd defendants were guarantors to the contract between the plaintiff and the 1st defendant, allegedly represented by the 2nd



- and 4th defendants, and as such any finding of illegality that contravened a statute would render the entire judgment dated 9th April, 2021 unenforceable against the 2nd and 3rd defendants.
8. The instant application was canvassed by way of written submissions which were highlighted on 7th March, 2024. The 2nd, 3rd & 5th defendants' submissions were filed on 4th March, 2024 by the law firm of G. P. Mucai & Company Advocates, whereas the plaintiff's submissions were filed by the law firm of Kimani & Michuki Advocates on 7th March, 2024.
 9. Mr. Gitau, learned Counsel for the 2nd, 3rd & 5th defendants submitted that the NTSC dated 10th May, 2023 should be stayed pending the hearing and determination of Malindi ELC ET No. 04 of 2023, since the 2nd, 3rd & 5th defendants have demonstrated that the said NTSC is not properly before the Court, the aforesaid petition has high chances of success, and land title Nos. Kilifi/Jimba/337 & Kilifi/Jimba/338 will be sufficient to settle the entire decretal sum plus interest thereon. He cited the case of *D. Njogu & Company Advocates v National Bank of Kenya Limited* [2016] eKLR, and stated that it will be embarrassing for this Court to determine the NTSC against the 2nd, 3rd & 5th defendants without first determining on the legality of the subject contract, as it will amount to aiding the plaintiff enforce an illegal contract, contrary to the rich jurisprudence available.
 10. On his part, Mr. Gakuya, learned Counsel for the plaintiff submitted that Constitutional Petition Malindi ELC Pet No. 4 of 2023 involves properties Kilifi/Jimba/337 and Kilifi/Jimba/338, which were charged to the plaintiff as security for a credit facility, but the said properties were found to have been unlawfully registered in the names of the 2nd and 3rd defendants through a judgment delivered on 8th May, 2015 in Malindi ELC Petition No. 11 of 2012. He stated that the Court declared that the properties belonged to Denman Properties Limited, the petitioners in that case. He argued that the said issue was addressed and considered by Judge Majanja in his judgment delivered on 9th April, 2021. Counsel relied on the Court of Appeal case of *John Nduati Kariuki t/a Jobester Merchants v National Bank of Kenya Ltd* [2006] eKLR, in asserting that a bank trades using public funds, not its own money, therefore since the 2nd, 3rd and 5th defendants greatly benefited from these public funds, they cannot claim that they are unable to repay what utilized.
 11. Counsel claimed that the issues raised in the instant application are issues of facts, thus it is materially incorrect for the 2nd, 3rd and 5th defendants' Advocate to swear the affidavit in support of the application herein on their behalf. He relied on the case of *Magnolia Pvt Limited v Synermed Pharmaceuticals (K) Ltd* [2018] eKLR and asserted that Courts have frequently warned Advocates against swearing affidavits to prevent them from becoming involved in disputes between their clients and opposing parties. He stated that Advocates should generally avoid swearing affidavits on contentious matters to prevent potential difficulties during cross-examination. Counsel argued that the 2nd, 3rd and 5th defendants are using their Advocate to evade accountability for the judgment delivered on 9th April, 2021 and the contentious issues related to their attempts to hinder execution.
 12. In a rejoinder Mr. Gitau submitted that the affidavit in support of the instant application sworn by him deposes to factual issues that have taken place in these proceedings. Further, that the 2nd, 3rd and 5th defendants were not parties to the suit before Judge Angote.

Analysis And Determination.

13. On consideration of the application herein, the grounds on the face of it and the affidavits filed in support thereof, the replying affidavit by the plaintiff and the written submissions by Counsel for the parties, that the issues that arise for determination are –



- i. Whether the affidavit in support of the instant application is defective for being sworn by an Advocate; and
- ii. Whether the NTSC application against the 2nd, 3rd & 5th defendants should be adjourned.

Whether the affidavit in support of the instant application is defective for being sworn by an Advocate.

14. It is not disputed that the affidavit filed in support of the instant application was sworn by the 2nd, 3rd & 5th defendants' Advocate on their behalf. The plaintiff contended that the said affidavit addressed contested facts, a practice disapproved by the Courts. The 2nd, 3rd & 5th defendants on the other hand stated that the plaintiff is vague as to what contentious issues were addressed by their Advocate on record without disclosure of the source of such averments. Further, Counsel for the 2nd, 3rd & 5th defendants submitted that the said affidavit deposes to factual issues that have taken place in these proceedings, and that the 2nd, 3rd and 5th defendants were not parties to the suit before Judge Angote.
15. Order 19 Rule 3(1) of the [Civil Procedure Rules, 2010](#) provides for the best evidence rule. It states that -

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”
16. Rule 8 of the [Advocates \(Practice\) Rules, 1966](#) on the other hand provides that -

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear.

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”
17. It is an established legal principle that Advocates should refrain from entering into disputes by swearing affidavits on contentious matters of fact, which is an irregular practice since by doing so they risk becoming witnesses subject to cross-examination in cases they handle merely as agents. In the case of [Kamlesh Mansukhlal Damji Pattni v Nasir Ibrahim Ali & 2 others](#) [2005] eKLR, the Court of Appeal in dealing with a serious objection on the admissibility of an affidavit sworn by Senior Counsel Paul Muite, held the following -

“... There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information...”
18. Bound by the aforementioned decision, it is clear that affidavits should be confined to such facts as the deponent is able of his own knowledge to prove, therefore there is nothing barring an Advocate from deposing to matters confined to such facts as the Advocate is able of his own knowledge to prove. On perusal of the affidavit in support of the application herein, I am of the considered view that it contains averments which are within the knowledge of the 2nd, 3rd & 5th defendants' Advocate, from information



received from the 2nd, 3rd & 5th defendants, and/or from his interpretation of the *Constitution*, as stated in paragraph 13 of the said affidavit.

19. Further, a reading of the plaintiff's relying affidavit reveals that the averments in the affidavit in support of the instant application are not disputed, other than by the plaintiff averring that the 2nd, 3rd & 5th defendants are making false allegations to adjourn the NTSC, it has not specified which of the averments in the said affidavit are false. I therefore find that the averments contained in the affidavit sworn on 10th May, 2022 do not raise contentious matters. In the case of *Magnolia PVT Limited v Synermed Pharmaceuticals (K) Ltd (supra)*, the Court held that –

“Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted.”

20. From the above decision, it is clear that not all affidavits sworn by Advocates are inherently flawed. An affidavit sworn by an Advocate that confines itself to facts within his personal knowledge and avoids contentious issues, such as the affidavit in support of the instant application are not defective.

Whether the NTSC application against the 2nd, 3rd & 5th defendants should be adjourned.

21. The plaintiff took out a NTSC against the 2nd, 3rd & 5th defendants dated 10th May, 2023 which is currently pending. The 2nd, 3rd & 5th defendants are seeking this Court to adjourn the hearing of the said NTSC, pending the hearing and determination of Constitutional Petition Malindi ELC Petition No. 4 of 2023, which they believe has high chances of success. They claim that upon determination of the aforesaid Constitutional Petition, land Title Nos. Kilifi/Jimba/337 and Kilifi/Jimba/338 will revert to the 2nd & 3rd defendants, and the plaintiff will be able to exercise its statutory power of sale over the said properties, and the proceeds of the said sale will be sufficient to cater for the decretal sum due to the plaintiff from the 2nd, 3rd & 5th defendants.
22. The 2nd, 3rd & 5th defendants claim if the NTSC dated 10th May, 2023 is heard before the hearing and determination of Malindi ELC Petition No. 4 of 2023, it will be prejudicial to their constitutional rights. On perusal of the judgment delivered by Majanja J., (as then was) on 9th April 2021, the Court at paragraph 12 held as follows –

“... the titles to the suit properties in the names of the 2nd & 3rd defendants were cancelled by the Court in ELC Petition No. 11 of 2012 which found that the said suit properties belonged to a third party...”

Since there is a valid decision of a court of competent and equal jurisdiction, this court cannot set it aside. The effect of the decision which declared that the suit properties belong to a third party, is that the Bank's proprietary interest therein were extinguished with the consequence that the bank could not exercise its statutory power of sale even if it issued statutory notices.”



23. The Court then noted that the financial facility advanced to the 1st defendant by the plaintiff was also secured by deeds of guarantee and indemnity which were duly executed by the guarantors, and attested by the guarantor's Advocate and properly filed. For this reason, it entered judgment for the plaintiff against the 2nd to 5th defendants limited under their respective guarantees to Kshs.84,000,000.00. The debt herein is not disputed. The instant application was instigated by the that the Court in Malindi ELC Petition No. 4 of 2023 shall revert the titles of the suit properties to the names of the 2nd & the 3rd defendants, and thereafter the plaintiff can exercise its statutory power of sale over the said properties.
24. In my considered view, adjourning the hearing of the NTSC dated 10th May, 2023 pending the hearing of Malindi ELC Petition No. 4 of 2023, means keeping the plaintiff away from the fruits of its judgment indefinitely, because I cannot determine how long it will take for before the said petition is finalized. In addition, I am not persuaded that the 2nd, 3rd & 5th defendants stand to suffer any loss and/or to be prejudiced in the event the instant application is not allowed and the NTSC dated 10th May, 2023 is heard and determined, since in the event that Malindi ELC Petition No. 4 of 2023 is successful, the 2nd and 3rd defendants will have the properties in issue back.
25. Determining the instant application calls for the exercise of this Court's discretion. The *Black's Law Dictionary* (Tenth Edition) defines "judicial discretion" as -
- "The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."
26. In the case of *Coast Water Services Board v Rehema Charo Kabindi & Kache Chare Mramba (Legal Representatives of the Estate of Fredrick Charo Kadenge (Deceased) & another* [2020] eKLR the Court relied on SA Desmith and J M Evans *Judicial Review of Administrative Action* 4th Edition [1980] 278 definition of judicial discretion that -
- "is the legal concept of discretion which implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem."
27. A successful party to a suit is entitled to the fruits of his judgment. In this case, the plaintiff has not only been kept away from the fruits of its judgment delivered on 9th April, 2021, but it has also been unable to recover the financial facility advanced to the 1st defendant. I agree with Counsel for the plaintiff that the plaintiff is a bank that trades using public funds, not its own money hence it is only fair that it be allowed to pursue every legal avenue available to it, to enable it recover the funds advanced to the 1st defendant. In the premise, this Court finds that none of the 2nd, 3rd & 5th defendant's constitutional rights stand to be prejudiced and/or infringed in the event that the NTSC dated 10th May, 2023 is heard and determined to its logical conclusion.
28. In the premise, I am not persuaded that I should exercise my discretion in favour of the 2nd, 3rd & 5th defendants by granting them the orders sought herein.
29. The upshot is that the application dated 28th September, 2023 is bereft of merits. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY 2024.



RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kimathi h/b for Dr. Gitau for the 2nd, 3rd & 5th defendants/applicants

Mr. Ndichu h/b for Mr. Gakunga for the decree holder/respondent

Ms B. Wokabi - Court Assistant.

