Katsran Limited v SBM Bank (K) Limited (Commercial Case 111 of 2018) [2023] KEHC 2332 (KLR) (20 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2332 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CASE 111 OF 2018

DKN MAGARE, J

MARCH 20, 2023

BETWEEN

KATSRAN LIMITED ..... PLAINTIFF

AND

SBM BANK (K) LIMITED ..... DEFENDANT

RULING

1. The matter is fixed Ruling on the application dated September 19, 2022. The Defendant appeared before me on February 20, 2023 and intimated that they were not filing submissions but were relying on an affidavit of Kelvin Kimani sworn on November 1, 2022.

2. The said application seeks the following prayers -

    a. Spent.

    b. Stay of execution of the Filing of Honourable justice Njoki Mwangi delivered on July 15, 2022 and the resultant decree (sic) pending the hearing and determination of this application.

    c. The honorable Court be pleased to order a fresh and current valuation on Property Title No LR Kwale/Ngomeni/2401 situated at Kiseje Area, Kwale county.

    d. This Honorable Court orders a reconciliation of outstanding loan amounts, to present an offer an accurate loan balance statement.

    e. The consulted dated September 26, 2019 and which was adopted as an order of the court be struck out.

    f. *Status quo* be maintained.

3. The application is supported by the Affidavit of Henry Mutua Katambo, a managing Director of the Plaintiff/Applicant. There are grounds on the face of that application, which are basically the same as in the supporting affidavit. The Application was opposed. Thought the affidavit of Kelvin Kimani.

Background to the Application

4. The Plaintiff complains that the impugned Ruling was delivered without notice. I note also that is not borne from the record. The said Ruling was dismissed on an account of a having arisen from a Consent Order adopted on September 26, 2019. The applicant also blamed the Respondents for relying on an old valuation instead of a current one. The Applicant blames previous counsel for misdeeds both real and imagined and mostly imagined.

5. The consent order dated September 26, 2019 was entered into by the parties to facilitate a proper sale though public auction, in exercise of the Respondent's statutory power of sale. This was because the chargor was complaining about lack of valuation before the chargee exercised the statutory power of sale was to be carried out.

6. The consent removed that last hurdle and gave assurance that the sale will use a mutually agreed valuation. Immediately, the valuation was done, the Applicant made the application to set aside the consent among other orders. The result was a ruling of July 15, 2022. Immediately after that Ruling, this application was filed seeking virtually similar orders.

Analysis

7. In its ruling impugned in this application, the court found as doth: -

> " In right of all the fact and circumstances of the case, and the fact that the valuation report by Maina Chege and Co, Valuers is from a valuer appointed by consent of the parties. It would be unjust, unreasonable to set aside the direction given herein on December 13, 2023. The Court will not exercise its discretion in favour of the Plaintiff.

8. The directions given on September 13, 2019 relate to a very same consent on valuation. The consent was adopted in court by the parties. Valuation was done by a mutually agreed valuer. That completed the work of the consent. There is nothing new in the current application that was not in the former Application.

9. The order sought being to be set aside is a consent order, it is less likely to be overturned by the court unless cogent evidence is led requiring that the same be set aside. See *Fatuma Mohamed Haji & another v African Banking Corporation Limited & 4 others; Hussein Mohamed Yusuf (Interested Party)* [2020] eKLR; *Diamond Trust Bank Ltd vs Ply Pannels Ltd & others* Nairobi C A 243 of 2002

10. The complaint against their former advocates has no basis in the factual matrix of this case and in law. Advocates will always have ostensible authority to compromise a claim. Litigation will be near impossible if the courts have to be furnished with authority to do each and every act. In *John O Ochanda & others (Suing on his Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya) v Telkom Kenya Limited* [2015] eKLR, the court stated: -

> "In the same authority relied on by the Respondent of *KCB Ltd Vs Specialised Engineering Co Ltd*, (*supra*), Harris J at page 493 held that: -
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> "the 7th Edition of Seton was published in the year 1912, that is more than sixty-five years ago. It does not take into account the decision of Mc Cardie J in Welsh Vs Roe (1918) 87

LJkb 520, where the earlier authorities were carefully considered and it was held that after the commencement of an action, the solicitor for a party has an implied general authority to compromise the settlement the action and the party cannot avail himself of any limitation by him of the implied general authority to his solicitor, unless the limitation has been brought to the attention of the other side."

11. Court of Appeal made a decision on January 25, 2018 in *Bank of Africa Limited v Juja Coffee Exporters Limited & 4 others* [2018] eKLR to the effect that: -

> " The respondents' main arguments appear to be based on impropriety of security documents and not whether any loans were disbursed on the basis of those securities; the accuracy of accounts; and assertions that the securities were unique and irreplaceable. We take the view, however, as this Court did in the case of *Ecomil Pasag Co Limited & 2 others v UAP Insurance Co Limited* [2017] eKLR, that the properties were offered as security in a commercial transaction and the consequence of alienation was anticipated if there was default. The value is quantifiable and there is no evidence that the bank is incapable of paying the damages if the main suit ultimately succeed ...
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> 'a bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.' And so it is in this case."

12. The court of Appeal in *John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd* [2006] eKLR, stated as doth: -

> " we have considered the factors which the court must have in mind in considering this aspect of the matter as stated *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1EA 227. A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it. He offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents. He cannot be heard to say, as he does, that the securities are unique and special to him. We think the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capability has not been challenged."

13. When property is offered as security, it is a commodity for sale. It has no uniqueness that can not be recouped. There is also no evidence that the new circumstances have arisen between July 15, 2022 to date warrant a relook of the valuation carried out.

14. In any case, it is not the duty of the court to train auctioneers and bankers on how to do their word. Before the Auction is done, auctioneers know what needs to be done. This court has no role. In any case, the applicant can also do his valuation to show proof of damages during a full hearing. They also have another noble duty, to pay and exercise the equity of redemption.

15. Where there was no fraud, collusion or misrepresentation a consent order remains valid. This was the finding by the court in the impugned Ruling. There is nothing that has been placed on the record to change the circumstances. The consent gave benefit to the applicant by postponing the inevitable as the parties agreed on valuation. The land is now a chattel for sale in the market, that is the essence of our securitized system of loans and mortgages

16. Once the same was done and dusted, the first application to set aside, the consent was made. Once it was refused, it took a few months before again it was brought back as review clothed as a novel matter. I am

cautiously optimistic that this is the last ruling. The first question I need to ask is whether the Plaintiff has satisfied the conditions for setting aside the consent order dated September 26, 2019. Secondly, whether such an issue is a new one or is *res judicata*.

17. In *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR the Court of Appeal, sitting in Kisumu pronounced itself as doth: -

> " It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out:

18. In its decision in *S M N vs Z M S & 3 Others* [2017] eKLR, the Court of Appeal stated as follows:

> " 17. There is no dearth of authorities on the law governing the setting aside of consent judgments or orders, and we are grateful to counsel for citing some of them before us. Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties."

19. It is not easy to read a man's brain. He can promise heaven and proceed to deliver hell without battling an eyelid. It is not tough been a party to such consents. No wonder, as way back as 1885, Bowen LJ, as part of the bench of the English court of Appeal, in *Edgington v. Fitzmaurice* (1885) 29 Ch D 459, stated that: -

> " but the state of a man's mind is as much a fact as the state of his digestion."

20. There may be a need to morphological study of the human mind especially their view of the age old contractual obligation under the principal of Pacta Sunt Servanda. The above truism arises from the common law position set out succinctly in *Purcell vs F C Trigell Ltd* [1970] 2 All ER 671, where Winn LJ posited as doth at page 676;

> " It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons."

21. The issue of setting aside a consent has been dealt with in a long line of cases. This is neither the first nor the last application to be made. For it to be allowed, it must have inherent merit and serve no other purpose. The most important part of such a consent is that it should be endorsed by the parties or their advocates.

22. Once the parties confirm that the consent has been recorded, then it becomes a contract which can only be set aside as a result of it inherent merits or demerits. Justice Harris, J(as then he was) in *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd* [1982] KLR 485, posited as follows: -

> " A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement."

23. If the parties are relying on ignorance of facts and fraud, then they have a higher burden than normal standards. It is not enough to bring documents to court and plead ignorance. The mantra is that ignorantia legis neminem excusat. The burden of proof for is higher than the normal. Mere allegations cannot cut. Hon Mr Justice Mrima put this in a more artistic way in *Ahmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR: -

> " The Court of Appeal in *Kinyanjui Kamau vs George Kamau* (2015) eKLR held as follows: -
>
> ..... It is trite law that any allegations of fraud must be pleaded and strictly proved..... In cases where fraud is alleged, it is not enough to simply infer fraud from the facts....

24. Fraud is not just thrown to the court, with hope that it will stick. The evidence of fraud must be such that anyone, well informing and looking at the evidence will be puzzled on how such a mongrel of a document could be written in this day and age. The right to change one's mind is not useful after recording the consent. Even lack of proper legal advice is not a proper ground. There should be such evidence as for setting aside a contract. In *Kuria Kiarie & 2 Others v Sammy Magera* (2018) eKLR the Court of Appeal in dismissing an allegation of fraud held that: -

> We have examined the appellants' amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered. Even if it was open to tender evidence on fraud and illegality, the mere allegation that a sale agreement and a consent for transfer cannot be obtained on the same day is well below the standard of proof..... We need not belabour this issue as we are satisfied that it was neither properly pleaded nor strictly proved. That ground of appeal fails too.

25. The presence of a consent by itself shows an agreement of the parties. The burden of proof is on the party disputing the consent. Parties must get to learn the pain of writing and entering into a consent order. It is not set aside lightly and on mere pontifications.

26. There must be cogent evidence coupled by innocence on part of the other party. A court cannot set aside a consent where both parties are guilty of fraud. Hon Lady Justice Mumbi Ngugi in *Kericho Guest House Enterprises Limited v Kenya Breweries Limited* [2018] eKLR stated as follows: -

> " In *Setton on Judgments and Orders* (7th Edn), Vol 1 pg 124, the author states that:
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> "*Prima facie*, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... it cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."

27. It is not enough to shout about mistake of counsel. The mistake must be real and not that the parties gain from a consent and turn around when they realize that their goosed is cooked, served and eaten. The Applicant has not placed scintilla of evidence to show that the consent was obtained by fraud or misrepresentation. In any case, that issue was dealt with by Hon Lady Justice Njoki Mwangi who stated in her impugned ruling at paragraph 25 as doth: -

> " In this case the Plaintiff and its Counsel did not place before the Court any evidence to demonstrate that the consent entered into on September 26, 2019, which was adopted as an

order of the court, was obtained illegally or through fraud. The parties are bound by their consent order that appointed a joint valuer, Maina Chege & Co Valuers."

28. The Plaintiff cannot regurgitate, the same issues again and again. The application dated March 17, 2022 was filed soon after the consent and the issue was dismissed. That dismissal was final on the question of fraud. The court considered the same and found no fraud. I thus hold and find that the Applicant is not entitled has not met the threshold for Review. The application for Review is that dismissed.

29. The prayer for Stay of execution is untenable for two reasons. First, there is anything to stay in that Ruling of July 15, 2022. The ruling the court gave was to the effect that, the application dated March 17, 2020 is dismissed with costs to the Defendant. This was a negative order which cannot be stayed. The second aspect of stay is that the same is a slave order dependent on the application for Review. Once no merit is found in review, then what is there to be preserved? Does it mean to stay a dismissal?

30. Does it then revive the application or some other thing? There is absolutely nothing to stay in a dismissal order as the same is a negative order. This was succinctly held in the case of Catherine Njeri Maranga v Serah Chege & another [2017] eKLR, the court, Hon Justice Richard Mwongo stated as doth:-

> The same reasoning was applied in the case of *Raymond M Omboga v Austine Pyan Maranga* (*supra*), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:
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> "The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order.
>
> ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise..."

31. The Court of Appeal in *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 others* [2021] eKLR, the court stated as doth: -

> " With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated July 30, 2020, merely dismissed the applicant's case with costs to the respondents. The parties were not ordered to do anything or to refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay. See *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR where the Learned Judges stated thus:
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> "what is there to be executed under the judgment, the subject of the intended appeal" The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered."

32. The court did not order any party to do or refrain from doing anything. Therefore there is nothing to stay. The court cannot stay nothing. Further, in the more recent case of *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Ors* [2016] eKLR, the Court of Appeal expounded on stay of execution stating:

> "16. In *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:
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> "The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only."

33. This is also in line with *Raymond M Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, Makhandia, J (as he then was) stated thus:

> " The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise..."

34. The substantive law on *Res Judicata* is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"

35. The *Black's law Dictionary* 10th Edition defines "res judicata" as

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

36. In the Court of Appeal case of *Siri Ram Kaura Vs M J E Morgan*, CA 71/1960 (1961) EA 462, alsor refered to in the above case, the East African Court of appeal had occasion to pronounce itself as follows: --

> " The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...
>
> The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open

> that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

37. The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

38. It is therefore not permissible for parties to evade the application of *Res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

39. In *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR the court of appeal gave the raison d'etre for *res Judicata* as follows:

> " The rationale behind *res-judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res-judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unravelling uncontrollably."

40. The court in case of *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR, while dealing with a similar issue, the court stated as doth: -

> " The Respondent, by bringing application after application on the same issue at different times one after another is hell bent to frustrate the Appellant from realizing the judgment as awarded by the lower Court and unless something is done, the Appellant will forever be left babysitting his barren Decree. This state of affairs cannot be allowed to prevail under our current constitutional dispensation in light of the provisions of Article 48 of the *Constitution* which enjoins the state to ensure access to justice for all persons.

41. Therefore, the prayer for stay falls by way side. It is irreparable of being granted. Prayers 3, 4 and 5 are basically by the same thing.

42. These aspects were dealt with comprehensively in the application dated March 17, 2022 which resulted in the Ruling of July 15, 2022 and the application dated November 27, 2018, which culminated in the consent of adopted on September 13, 2019. Consequently, this falls within the meaning of *res judicata*. The doctrine of *Res Judicata*, as envisioned in Section 7 of the *Civil Procedure act* bars a party or re-litigation on the same, cause of action or subject matter.

43. I am of the view that all the issues raised have been fully litigated and Ruling given. There is no basis for orders sought. The matters have been dealt with by the Court of both competent and co-ordinate jurisdiction.

44. It is not my duty to sit on appeal on usual already decided by the court. only one aspect remains, hearing the main suit, or whatever remains of it.

45. The last disturbing element is that it appears that counsel for court can interfere with her discretion. Unless it is shown it was not exercised judicious.

46. The court cannot interfere with exercise of discretion, simply because, the applicant, did not familiarize himself with paragraph 20 of the Ruling of Hon. Lady Justice Njoki Mwangi. In that paragraph it was clear that she was exercising discretion.

47. Exercise of discretion cannot be a ground of review. It can only be a ground of Appeal, for improper exercise of discretion. Indeed, not even the Appellate exercised discretion differently, were they the ones hearing the appeal.

48. On the issue of status quo, the same was handled in paragraph 21 – 25 of the impugned Ruling. Having dealt with the issue of injunction by consent, there is nothing remaining on the status of the auction. It is all systems go.

49. The issue of blaming the former advocates on record does not fly. Nothing was placed before this court or any other court. As justice Njoki succinctly held there was no evidence of any fraud.

50. Even if there was fraud, then it could have been a ground in the application dated March 17, 2020.

51. For now, the horses have bolted and the Plaintiff is in the right place, the place he placed himself, in the hands of the questions who have the right, any the duty to sell the charge parcel of land.

52. The prayer for accounts is a red herring meant to create subterfuge and show that there is a new issue. Even where there is a new issue the same cannot as a matter of course be a ground for starting anything. There are no statements that have been annexed to show any issues between the parties. The court cannot be used for a fishing expeditious.

53. Consequently, the Application lacks merit and is dismissed with costs of 15,000/=.

54. The suit must now be fixed for hearing and be heard within 120 days. If the Plaintiff is unable to fix the suit for hearing and actually proceed for hearing before July 19, 2023, the suit shall stand dismissed with costs to the Defendant, without application from the parties or a need for further order from the court. For avoidance of doubt, by July 20, 2023, the defendant should be in a position to file his party and party bill of costs, if the suit could not have been heard and Plaintiff's case concluded.

55. It is my sincere hope that this matter can come to an end in the most amicable manner.

DATED, ISSUED AND DELIVERED AT MOMBASA, VIRTUALLY 20TH DAY OF MARCH, THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.

HON MR JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

No appearance for the Plaintiff

No appearance for the defendant.