Telagen Investment Limited v Ecobank Kenya Limited; Lutomia (Proposed Interested Party) (Commercial Case E102 of 2020) [2023] KEHC 2444 (KLR) (Commercial and Tax) (20 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2444 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E102 OF 2020

DAS MAJANJA, J

MARCH 20, 2023

BETWEEN

TELAGEN INVESTMENT LIMITED ..... PLAINTIFF

AND

ECOBANK KENYA LIMITED ..... DEFENDANT

AND

JACKSON WANDERA LUTOMIA ..... PROPOSED INTERESTED PARTY

RULING

1. The Proposed Interested Party ("the Applicant") seeks the court's determination of his undated Notice of Motion made under sections 3A, 63(c) and (e) of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 1 Rule 10, Order 40 Rules 1, 2 and 9 of the *Civil Procedure Rules* ("the Rules") and Articles 40, 47 and 159 of the *Constitution*. It seeks an order to be joined in the suit as an interested party and to set aside the consent order issued by the court on 9th July 2020 ("the Consent Order").

2. The application is supported by Applicant's supporting affidavit and supplementary affidavit sworn on 7th September 2022 and 17th November 2022 respectively. It is opposed by the Defendant ("the Bank") through the Preliminary Objection dated 22nd September 2022 and the replying affidavit sworn on the same date by Edith Wanjiku, the Bank's Remedial Officer. The Plaintiff does not oppose the application as it did not file any grounds of opposition or replying affidavit. In addition to their pleadings, the Applicant and the Bank have filed respective written submissions.

3. The facts leading to the application are not so much is dispute and are a matter of record. Sometime in 2016, the Plaintiff applied for and got a loan facility from the Bank which was secured by a charge

over the property known as Capital View Apartments, South "B" Estates, Off Plain View Road, Nairobi City County on LR No. Nairobi/Block 93/1488 ("the suit property"). The loan of Kshs. 90,800,000.00 was to facilitate the expansion of apartment units on the suit property. Over time, loan account fell into arrears and when the bank demanded repayment, the Plaintiff filed this suit and urged that the Bank had exaggerated and overcharged its account.

4. On 25th June 2020, the Plaintiff and the Bank entered into a consent which was adopted as the Consent Order settling suit on the following terms:

    1) That the undisputed outstanding loan amount owed by the Plaintiff to the Defendant as at 22nd June,2020 is Kshs. 89, 136,772.65/=

    2) That the Defendant shall restructure the outstanding loan of Kshs 89,136,772.64 as at 22nd June, 2020, to be repaid by the Plaintiff by one-off bullet payment not later than twelve (12) months, from the date of filing this consent, together with the accrued interest rate at 14% per annum as from 23rd June, 2020 until full payment.

    3) The parties hereby agree that the Plaintiff shall in the meantime pay Kshs. 300,000 on monthly basis starting from 18th June, 2020 and on same date thereafter pending full payment of the loan amount as provided in (2) above.

    4) That the Defendant bank be and is hereby appointed as a sales agent and attorney of the reminder of the unsold units in the suit property known as LR No. Nairobi /Block 39/ 1488.

    5) It is hereby agreed that the Bank shall discharge four units namely unit A2, A7, B2 & B4 on the following condition; -

        a. Upon confirmation by the Plaintiff that the full purchase price was paid by the purchasers of the said units as per existing agreement for sale into the Escrow account held by the Bank.

    6) In the event of default relating to any of the foregoing clauses and or in the absence of full settlement of the debt on or before the lapse of the twelve (12) months from the date of filing this consent, the charged property being LR No. Nairobi/Block 39/1488, excluding the discharged units, shall be sold by either public Auction or private treaty, without any further issuance of statutory notices pursuant to section 90 and 96 of the *Land Act* or the 45 days Auctioneers' redemption notice save for advertisement in a newspaper of nationwide circulation.

    7) The Plaintiff shall pay agreed legal costs of Kshs 150,000.00 to the Bank's Advocates within thirty (30) days from the date of signing this consent.

    8) The Plaintiff to agree with the Auctioneer's on the cost of the aborted auction, failure to which, the Auctioneer be at liberty to tax his bill of cost against the Plaintiff. [Emphasis mine]

5. The Applicant's claim is that he is the owner and purchaser for value of the 'A2' Unit ("the Unit"). He states that the Plaintiff offered to sell it him on 28th August 2015 for Kshs. 9,500,000.00. The Applicant avers that it made various payments to the Plaintiff between 1st September 2015 and 2nd February 2018. That under the Sale Agreement ("the Sale Agreement") entered into between the Plaintiff and

Applicant, the Unit was sold free from "any encumbrances or adverse claims" and that on 2nd February 2018, the Plaintiff handed over the Unit to the Applicant together with a handover form confirming the full purchase price had been paid. The Applicant depones that on the same date he, at the behest of the Plaintiff's Advocates P.N. Karanja & Company Advocates, paid a further Kshs. 508,500.00 towards processing of the title documents.

6. The Applicant states he only learnt that the Plaintiff had taken out a loan facility from the Bank secured by the suit property when the Plaintiff filed this suit. He always understood that since he had already paid Kshs. 5,000,000.00 to the Plaintiff, he had acquired an overriding interest over the Unit. The Applicant contends that in his understanding when the Plaintiff entered into the Consent, the Bank would discharge the Unit in his favour. He therefore followed up the discharge of the Unit with the Plaintiff and its Advocates and was assured by the Plaintiff that it was imminent. In reality though, the Plaintiff entered into a consent with the Bank to discharge the Unit in favour of the Applicant upon the confirmation of payment of the full Purchase Price into an escrow account held by the Bank and that the Plaintiff was also required to service the loan facility failure to which the Bank was at liberty to institute recovery proceedings.

7. The Applicant avers that he has paid a significant portion of the purchase price before the suit property had been charged to the Bank and that he had completed payment of the purchase price long before any default of the Plaintiff or creation of the escrow account held by the Bank.

8. The Applicant states that in February 2022, the Bank through its Advocates on record, Nyaanga Mugisha & Company Advocates, issued a statutory notice to appoint a receiver pursuant to section 93(3)(B) and 92(1)(2) of the *Land Act*, 2012. In order to protect its interest in the Unit, it filed the suit; Milimani CMCC NO. E1328 OF 2022, Jackson Wandera v Telagen Investments, Ecobank Kenya Limited, Kings Pride Properties Limited where it sought, *inter alia*, orders staying the statutory notice and the discharge of the Unit in its favour. The application seeking interim relief filed together with the suit was heard and dismissed by a ruling dated 6th June 2022.

9. When the Bank instructed auctioneers to advertise the suit property for sale by way of public auction on 8th July 2022, the Applicant filed another suit; NRB ELC 228 OF 2022, Jackson Wandera Lutomia v Telagen Investments, Kings Pride Properties Limited, Ecobank Kenya Limited & Direct "O" Auctioneers. The Applicant filed an application for interim relief. According to the Applicant, the application was scheduled for ruling on 27th September 2022 and that in the course of the proceedings, the court indicated that so long as the Consent Order in this matter remained, the Applicant would not be granted relief.

10. The Applicant urges the court to grant the application as it is a necessary party who is directly affected by any orders that may be issued in relation to the suit property and the Unit. He contends that the Consent Order was recorded without a consideration of material facts being that he had already paid more than half of the purchase price long before the Unit was charged to the Bank or an escrow account created and held in its favour. He submits that if the Consent Order remains in place as crafted, it will result to a miscarriage of justice and that it is in the interest of justice to grant the orders in order to preserve the subject matter of the application and to ensure a conclusive determination of the dispute.

11. The Bank opposes the application. It contends that the application is *res judicata* as the issues raised in this suit between the Applicant and the Bank have been adjudicated in Milimani CMCC No. E1328 of 2022 where a similar application was dismissed. That the present suit is sub-judice as the issues raised before this Court are pending for determination in NRB ELC No. E228 of 2022.

12. The Bank denies that the Applicant is the registered owner of the Unit or that he has any registered proprietary rights over it. The Bank states that the Applicant does not have a suit or counterclaim as against any of the parties so as to seek injunctive or any other equitable relief against any of the parties. Further, that the present suit has been concluded hence there is nothing left to litigate.

13. The Bank avers that the Plaintiff has failed to honour the terms of the Consent Order and that the outstanding amount stands at Kshs. 122,143,595.51 and which amounts continues to accrue interest. The Bank states that it was not privy to the alleged Agreement between the Applicant and the Plaintiff and his claims, if any, should be directed to the Plaintiff. It submits that the Plaintiff voluntarily offered suit property including the Unit to the Bank as security for the loan advanced to the Plaintiff. That the Applicant and the Bank do not have any privity of contract between them and consequently, the Bank is unaware of the allegations made by the Applicant in its application and in particular as relates to the purchase of the Unit.

14. The Bank explains that the suit property was sold by Jei Enterprises Limited to Windsor Homes Limited and a certificate of lease issued to Windsor Homes Limited on 13th December 2012. In September 2013, Windsor Homes Limited requested for and was advanced a loan of Kshs. 60,000,000.00 by the Bank for construction of housing units on the suit property. Windsor Homes Limited charged the suit property in favour of the Bank in 2013. When Windsor Homes Limited defaulted in repaying, it resolved to sell the suit property to the Plaintiff which resolved to take over the loan facility under Windsor Homes.

15. The Bank points out the suit property has been charged to it since 2013 and the Plaintiff only came into possession in the year 2016 hence the Applicant failed to conduct due diligence as required. Further, that the Sale Agreement between the Plaintiff and Applicant shows that the purchase price was being deposited at the Standard Chartered Bank rather than with the Bank as chargee. That whereas the entire suit property was first charged to the Bank on 23rd September 2013 and subsequently on 19th April 2016, the said Sale Agreement is dated 2nd February 2018 which is after the charge in favour of the Bank had been registered.

16. The Bank questions how the Applicant could have made payments towards the purchase of the Unit as early as 2015 yet the Sale Agreement was entered into in 2018 while the Plaintiff only came into possession of the property in 2016 because in accordance with the agreement between the Plaintiff and the Bank, the proceeds of sale of any unit ought to be deposited in the escrow account held by the Bank and only upon confirmation does the Bank proceed to discharge the particular unit. The Bank asserts that it has not received any money in the Escrow account for purchase of the Unit by the Plaintiff and/or the Applicant hence the Bank cannot issue a discharge for the Unit. The Bank further asserts that the Consent Order is clear that discharge of any of units captured in the Order could only occur upon demonstration that the purchase price of the said units was deposited in the Escrow account held by the Bank over the purchase of units in the suit property.

17. The Bank aver that despite requesting the Applicant's advocates through the letter dated 24th February 2022 to provide proof of payment of the purchase price to the Bank or to the Escrow account, they failed to furnish proof but instead proceeded to file Milimani CMCC No. E1328 of 2022.

18. The Bank maintains that the Applicant did not conduct due diligence on the suit property and ended up making payment to the Plaintiff without the Bank's consent and to another third party who is not even a registered owner of the suit property or even a party to the Sale Agreement. The Bank therefore submits that the Applicant should pursue the parties he paid money instead of the Bank.

19. The Bank avers that it is a secured creditor hence the Applicant's interest over the suit property if any, cannot rank pari passu with that of the Bank. That the Applicant does not have the standing to challenge the Bank's right to recover its money from the Plaintiff. It therefore submits that the Applicant's does not raise any issues for trial and/or consideration by the court for purposes of stopping the Bank from recovering its monies.

20. The Bank contends that the Consent Order was entered into by the Plaintiff voluntarily and can only be set aside and/or varied by the court if it is satisfied that there are compelling grounds proved by the Applicant. That the Applicant does not have any proprietary rights over suit property and or any registered rights over the Unit hence it lacks legal capacity to challenge the Consent Order and has not demonstrated any compelling reasons to warrant its setting aside.

21. I have gone through the application and the responses by the parties. Whereas the Bank raises preliminary issues of res judicata and res sub judice, I note that the objections were in reference to the injunctive reliefs being sought by the Applicant. The injunctive reliefs have since been spent as they were sought pending hearing and determination of the application. Since the orders have been exhausted by the hearing of this application, no meaningful purpose will be served in determining whether the application is res judicata or res sub judice CMCC No. E1328 of 2022 and ELC No. E228 of 2022.

22. The substance of the application seeks a joinder of the Applicant as an interested party and setting aside of the Consent Order. In my view, the fundamental issue is whether the court should set aside the Consent Order. It is only if the Consent Order is set aside that the Applicant may be joined to the suit. Any party who is aggrieved by a consent order, which includes a third party who is not party to the consent, may apply to the court to set it aside or vary it (see *Accredo AG and Others v Steffano Uccelli and Another* MLD CA Civil Appeal No. 36 of 2015 [2017] eKLR). This position is based on the rules of natural justice which require, *inter alia*, that a party must be heard before an adverse order is made and if such an order is made affecting a third party without giving it such an opportunity to heard then the party has a right to apply to set the order aside (see *JMK v MWM & another* MSA CA Civil Appeal No. 15 of 2015 [2015] eKLR).

23. It is an established principle that a consent order cannot be varied or discharged unless it is demonstrated that the same was 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 a court set aside an agreement (see *Brooke Bond Liebig v Mallya* [1975] EA 266, *Flora Wasike v Destimo Wamboko* [1982 -88] 1 KAR 625).

24. The Applicant urged that the Consent Order was entered into without considering material facts with the most important being that he holds a proprietary and overriding interest in the Unit having paid more than half of the purchase price before the Plaintiff and Bank entered into an agreement to charge the Suit Property. This averment by the Applicant is inaccurate and incorrect as the true legal and factual position is that the Bank, had a registered interest over the suit property way before the Applicant made payments to the Unit and that the Bank's interest is protected and superior to that of the Applicant as an alleged purchaser as provided by section 25(1) of the *Land Registration Act*, 2012 as follows:

> 25(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.

25. The Applicant's Sale Agreement with the Plaintiff cannot override the charge created by the Plaintiff in favour of the Bank. The Bank ought to have consented to the said sale of the Unit and the Applicant has not shown that he received the Bank's consent to the purchase the Unit or that he paid the Bank any money as per the Consent Order (See *Innercity Properties Limited v Housing Finance & another* ; *Josephine Mukuhi & another (Interested Parties)* [2020] eKLR and *China Wu-Yi Company Limited v Suraya Property Group Limited & 2 others* (Civil Case 76 of 2019) [2021] KEHC 16 (KLR) (Civ) (10 September 2021) (Ruling)].

26. Therefore, this argument by the Applicant that he purchased the Unit from the Plaintiff and therefore has an overriding interest on the Unit over and above that of the Bank falls flat on its face. Since the Applicant does not have a proprietary interest in the suit property, it is not a party aggrieved or directly affected by the Consent Order. Its application to set it aside fails and hence there is no basis to order the Applicant's joinder since it does not have any cause of action in respect of the suit property. Its action if any, is against the Plaintiff which received his money.

27. The net effect of findings I have made is that the Proposed Interested Party/Applicant's Notice of Motion for joinder as an interested party and setting aside of the Consent Order issued by the court on 9th July 2020 is dismissed. The Applicant shall pay costs assessed at Kshs. 40,000.00 to the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Matheka Oketch and Company Advocates for the Proposed Interested Party/Applicant.

**Nyaanga and Mugisha Advocates for the Defendant