



Petrocity Energy (K) Limited & another v Imperial Bank Limited (In Receivership) (Civil Suit 54 & 55 of 2019 (Consolidated)) [2023] KEHC 20199 (KLR) (10 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 54 & 55 OF 2019 (CONSOLIDATED)
DKN MAGARE, J
JULY 10, 2023**

BETWEEN

PETROCITY ENERGY (K) LIMITED PLAINTIFF

AND

IMPERIAL BANK LIMITED (IN RECEIVERSHIP) DEFENDANT

AS CONSOLIDATED WITH

CIVIL SUIT 55 OF 2019

BETWEEN

SCARCE COMMODITIES LIMITED PLAINTIFF

AND

IMPERIAL BANK LIMITED (IN RECEIVERSHIP) DEFENDANT

JUDGMENT

1. Through the Amended plaint dated 7/10/2020 state that the facility was secured by the following: -
 - a. A lien over a fixed deposit account {named 02} for USD 1,067,962.20
 - b. A lien over a fixed deposit account {named 03} for USD 1,067,962.20
 - c. A Personal guarantee in the name of Fossil Fuels for USD 2,000,000 by three directors, [named]
 - d. Corporate guarantee by Fossil Fuels Ltd for USD 2,000,000.
 - e. Set off to be executed by the three {named } directors.
 - f. Right of set by Petro city Ltd



2. The plaintiff and fossil fuel wrote requesting that to apply USD 4,688,508.80 in three named accounts, which stood at 4,687,896.78 on 4/3/2016 a similar request was made.
3. The defendant failed to do so. The total guarantee by the parties requesting was for USD 4,135,924.40 {USD 2,000,000, USD 1,067,962.20 in account 02 and USD 1,067,962.20 in account 03}.
4. The parties issued a reminder given on 25/7/2016. There was no response till later when on 31/3/2019 it was stated that they were in arrears.
5. The plaintiff's view is that the plaintiff needed a guarantee cleared to guarantee cleared to escalation for interest. Particulars of Breach were enumerated.
6. The court was consolidated 54 the plaintiff sought the following orders: -
7. The main defence related a moratorium over all the liabilities of the bank.
8. The parties were heard and their comprehensive evidence was in their respective witnesses statement.
9. The defendant's view was that liquidating the security was tantamount to paying the plaintiff and was outside their mandate
10. The issues arose are: -
 - a. is whether the Plaintiff was entitled to have their security offset against indebtedness
 - b. what remedies are available to the parties

Analysis

11. One of the remits of the liquidation is to recover debts held by the customers. This means receiving securities. All customers are supposed to be treated equally whether their security was money or land or some other thing or chattel.
12. Equally. Those who deposited cash or titles, are entitled to redeem their securities. Unfortunately, for cash depositors, the moratorium meant that they cannot withdraw. However, the moratorium did not discharge the Guarantors of their liability to pay.
13. Their indebtedness is by virtue of being guarantors. As at the date of request, the guarantees had crystalized because, the Plaintiff was already in default. By request that their security be realized, they were not asking for more. He was hedging his bet against future interest. by virtues of the guarantors. By the time the letter o 18/1/2016 was written, the back had gained the right to call us the Guarantee since the plaintiff was in arrears since 2015. The offsetting of the accounts, to recover the guarantee does not in any way prefer the parties.
14. The defendant is both unwilling and unable to realized security to enable the Plaintiff cut his losses and reduce indebtedness. This is not a withdrawal of money but debiting anal ready existing security.
15. Such conduct is not only in breach of contract but also unreasonable. This is not a case where a party seeks to gain an unfair advantage over other depositors. It is a fetter to the right of redemption. In *David Limo Bundotich v Housing Finance Company of Kenya Limited* [2022] eKLR, the court, R. Nyakundi held as doth: -

“ 11. The equitable right to redeem on the other hand, is the right of a mortgager to recover his security by discharging his obligations under the mortgage despite the time fixed by the contract for the performance of those obligations passing



and even though under the express terms of the agreement, the security may be stated to be the absolute property of the mortgagee. Similarly, in the case of a charge, it is the right to have the security freed from the charge although default was made at the time fixed by the contract for the performance of the obligations in respect of which the charge was given. See Cousins (Supra) at 360.

12. The right to redeem in equity is therefore a right given in contradiction to the declared terms of the contract between the parties and is thus the right to recover the mortgaged property after the expiry of the legal right to redeem through its non-exercise on the contract date. That is, after the passing of the contract date, equity superimposes on the mortgage agreement a condition giving the mortgagor a continuing right to redeem which he may exercise at any time before the right is destroyed by foreclosure, sale, release or lapse of time.
13. As rightly held by court in *Isaiab Nyabuti Onchonga v Housing Finance Company of Kenya Ltd & another* [2020] eKLR, this equitable right is dependent on the mortgagor giving the mortgagee reasonable notice of his intention to redeem and on his fully performing his obligations under the mortgage.”
16. In this case the plaintiff was and still is willing and able to provide funds for set off provided security is returned. The difficulties with a normal deposit is that it becomes part of assets that are subject to sharing. It does not clear the indebtedness. I am satisfied that the Plaintiff had proved their case.
17. I am therefore unable to agree with the defendant that the plaintiff should be satisfied with their systematic failure an or defendant. A party is entitled to contractually leave execute his part of the contract and be free.
18. In the circumstance I find that Defendant ought have acted within a reasonable period to offset amounts. The Defendant has not in its pleadings denied existence of funds to offset. The persons requesting off setting were related parties which under KYC the Bank has an obligation to have regard to beneficial ownership.
19. In any case, there was no reply to the request. There was also no contractual obligation to offset from other sources. The defendant simply needed to agree or refuge on reasonable grounds. That refusal has not been done to date.
20. What is does, it is an accounting issue. The actual money still remains in the back.
21. There is no withdrawal. The only request the guarantors were asking is to be discharge from the guarantee. If the guarantors had no deposit they could have demanded for the guarantee. However, the submissions do not address the steps the liquidator has done to deal with a request that has been pending over 7 years.
22. The court finds that the plaintiff is not seeking to take over the Role of the liquidator. The plaintiff simply asked that the accounts between the guarantor and the plaintiff be balanced without withdrawing any money.
23. The guarantor has no right to withdraw cash from the bank.
24. However, the guarantors are not entitled to continue being saddled with a guarantees, which they can clear and then be free as the bank concludes liquidation.



25. From the plaint, the bank had a two accounts as security and person guarantees of 2,000,000 all totaling to USD 4,135,9244.40.
26. Though the plaintiff indicated that a sum exceeding 4,688,503 was to be off set, there is no authority to do so. The guarantee is limited to the authority guarantee by: -
 - a. Account No. 002DUS311019003
 - b. Account No. for USD 1,067,962.20/ 002DUS3110190002. USD 1,067,962.20
 - c. Corporal guarantee of fossil fuel of USD 2,000,0000
Total 4,135,924.4
27. I decline to allow offsetting more than the foregoing amount of USD 4,135,924.40.
28. Further, though the request was made on 18/1/2016 and 25/7/2016. The plaintiff's letter of offer allows for offsetting pursuant to clause 13 thereof. The letter that seeks to have been received is dated 4/3/2016.
29. I note that from the evidence, there was nothing barring the set off. I hold that the set off will be to have occurred on 27/3/2016, being 14 days after 14/3/2016.
30. The defendant in their submission relied on the decision of *Kwanza Estates v Dubai Bank of Kenya Ltd & another* (2016) eKLR, *Re Karuturi Ltd.* (2017) eKLR.
31. The plaintiff refers to the case of Eunice Wiruimu Muteru
32. However, I do not find nothing illegal about the set off. It is within the duties of parties to breach their agreement, if they do so, they are liable for breach. Breach of contract of failure to act on client's instructions in not all illegality. The relationship between parties is contractual. Their remedies are contractual and relate to breach.
33. On the other hand the defendant has not justified its failure to offset within time. I hold that the moratorium related to creditors. It only stopped withdrawal of funds. However, the plaintiff's guarantors are entitled to have their losses mitigated upon. I find no that the plaintiff has proved his case, and I therefore allow the two suits. I therefore allow the suits in terms I propose below.

Determination

34. I make the following orders: -
 - a. The plaintiff was entitled have the guarantees given by Fossil Fuels Ltd Account No. 002DUS 31019003 and 002DUS311010002 and a corporates guarantee by fossil fuels for USD 2,000,000/= all totaling of 4,135,924.40 off set against the plaintiff's Account Nos. 7200009028, 7200008935, 002HPX13072001, 002HPX131190001, 002HPX131750001, 002HPX132000001, 002HPX133090001, 002HPX133090002, 002HPX140930001 and 002TLF151050001 and offset the indebtedness
 - b. The guarantee be and is hereby applied to offset the indebtedness to the extent of USD 4,135,924.40 to the following bank accounts Nos. 7200009028, 7200008935, 002HPX13072001, 002HPX131190001, 002HPX131750001, 002HPX132000001, 002HPX133090001, 002HPX133090002, 002HPX140930001 and 002TLF151050001
 - c. The effective date for the application of the guarantee is 27/3/2016.



- d. Therefore, any interest earned on the fixed deposit after 27/3/2016 form USD 4,135,924.40 shall not be applied to the guarantors.
- e. Further to the foregoing all interest applied after 27/4/2016 for an amount of USD 4,135,924.40 in irregular and in breach of contract.
- f. Consequently, the defendant is to apply the sum of 4,135,924.46 to the plaintiff's hire purchase accounts Nos. 7200009028,7200008935, 002HPX13072001, 002HPX131190001, 002HPX131750001, 002HPX132000001, 002HPX133090001, 002HPX133090002, 002HPX140930001and 002TLF151050001 and delete all interest accruing from the said 4,135,924.40
 - a. Any money in excess of 4,135,924.46 continues to attract interest.
 - b. Given the circumstances of the case, each party shall bear their own costs.
 - c. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF JULY 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Miss Gitari for the Defendant

Mr. Oluga for the Plaintiff

Court Assistant- Brian

