



REPUBLIC OF KENYA



**Business Partners International Kenya (II) Ltd v Pasaiba Tourmaline
Limited & 2 others (Miscellaneous Application E420 of 2024)
[2024] KEHC 15675 (KLR) (Commercial and Tax) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E420 OF 2024
FG MUGAMBI, J
DECEMBER 6, 2024**

BETWEEN

BUSINESS PARTNERS INTERNATIONAL KENYA (II) LTD APPLICANT

AND

PASAIBA TOURMALINE LIMITED 1ST RESPONDENT

AMOS KIPKOECH MONGONY 2ND RESPONDENT

IRENE CHEMUTAI ROP 3RD RESPONDENT

RULING

Background

1. By an application dated 20th May, 2024, the applicant sought an order for police assistance to access the property known as Apartment No. 7 erected on LR. No. 330/1057/ (Originally No. 330/301/2), which is hereinafter referred to as the subject property.
2. The application is premised on a loan facility of Kshs. 28,500,000/= extended by the applicant to the 1st respondent, on or about September 2019. The facility was secured by a third-party charge dated 4th March, 2020 as well as personal guarantees of the 2nd and 3rd respondents.
3. The applicant contends that there has been default by the applicants and that the amount outstanding as at 22nd September 2021 was Kshs. 38,133,541.01. The applicant confirms having issued a statutory notice, a 40-day notice and a redemption notice. An aborted auction led to the negotiation of a settlement agreement between the parties and a further default, thereby precipitating the present application.



4. The application is supported by the affidavits of Michael Muthengi Makau, the applicant's Country Manager, sworn on 20th May 2024 and 5th July 2024. It is opposed by a replying affidavit sworn by Amos Kipkoech, the 2nd respondent, on 6th June 2024.
5. The 2nd respondent confirms the existence of the facility as well as the securities over the said facilities. He also acknowledges the default but then contends that the same was cured by the payment of Kshs. 3,200,000/= on diverse dates as evidenced by the payment receipts. He further contends that the loan balances are disputed. The respondents argue that since there has been no auction, the applicant cannot seek vacant possession.

Analysis and determination

6. Upon carefully considering the application, response, submissions and the evidence presented before me, the only issue for determination is whether the applicant is entitled to the orders sought. In responding to this question, I start on the footing that the parties herein acknowledge the existence of a contract by way of a facility agreement. This agreement contains the terms that they negotiated and agreed to and which are binding on them.
7. The binding nature of contracts was reiterated in the locus classicus case of *National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd*, [2002] 2 EA 503 the Court held as follows:

“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 and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. ...”
8. The sanctity of agreements between contracting parties was also reiterated in the following words in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Ltd*, [2017] eKLR:

“Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract.”
9. The contractual documents before me also include the third-party charge which all the parties have alluded to. Under clause 8 of the said Charge, the parties agreed that:

“At any time after the occurrence of any of the events specified in Clause 7, the Lender may serve notice on the Charger and/or the Borrower in accordance with Section 90 of the Land Act demanding payment of the money secured by this Charge or demanding performance or observance of a covenant, express or implied in the Charge, and if the Charger and/or the Borrower does not comply with the notice served under Section 90 of the Land Act the Lender may exercise the following remedies in accordance with the Land Act:

 - i. Sue the Chargor and/ or the Borrower for any money due and owing under this Charge;
 - ii. Appoint a receiver of the income of the Premises;
 - iii. Lease or sub—lease the Premises;
 - iv. Enter into possession of the Premises;



v. Sell the Premises.”

10. The question is whether there has been such a default as envisaged under clause 7 of the Charge. The applicant has provided a statement of accounts running up to June 2024, showing the amounts due.
11. In any case, and in further demonstration, the respondents have not denied entering into an Acknowledgment of Debt and Payment Agreement dated 2nd April 2024. From the said agreement the respondents acknowledge that they are indebted to the applicant to the tune of KShs. 33,064,218.58 and a further amount of KShs. 17,499,273.84 on account of future royalties. It is clear from the said agreement that the amounts paid by the respondents were in respect of clause 3 of the acknowledgement of debt agreement and in part payment of the amounts due.
12. As such the argument that the debt is disputed is untenable and an after thought by the respondents, having executed the acknowledgement of debt in April 2024. In any case, the respondents have not filed any proceedings against the applicant if at all there are any tangible grounds to challenge the amounts.
13. The amount as reflected in the statement aligns with the demands by the applicant and the amount acknowledged by the respondents as due and owing. I therefore find no difficulty allowing the application.

Disposition

14. Accordingly, the application dated 20th May 2024 is allowed. The OCS Muthangari Police Station is hereby directed to assist and ensure that the applicant takes peaceful possession of the property known as Apartment No. 7 erected on L.R. No. 330/1057 (Original No. 330/301/2), should the respondents fail to hand over such possession within 30 days of this ruling.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 6TH DAY OF DECEMBER 2024.

F. MUGAMBI

JUDGE

