



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.139 OF 2018

YURUB INVESTMENTS LIMITED.....1ST PLAINTIFF

NEW NYANZA WHOLESALERS LIMITED.....2ND PLAINTIFF

VERSUS

DIAMOND TRUST BANK LIMITED.....1ST DEFENDANT

DALALI TRADERS AUCTIONEERS.....2ND DEFENDANT

Consolidated with

CIVIL CASE NO.451 OF 2017

LABURMAN COURTS LIMITED.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK (K) LTD.....DEFENDANT

R U L I N G

1. This is a ruling on two applications filed by the plaintiffs dated 29/10/2020 and 24/11/2020, respectively. The first application dated 29/10/2020 is brought under **Article 159 of the Constitution of Kenya, sections 1A,1B and 3A of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.**

2. In that Motion, the plaintiffs sought that the order made by Odero J on 23/9/2020 requiring the plaintiffs to deposit a bank guarantee of Kshs.100 million within 90 days be reviewed/varied and/or set aside. They also sought a stay of 90 days to be able to raise that guarantee and consequently that the public auction of the property known as **LR. NO. 209/1063 IR No.84749 (“the suit property”)** set for 13/11/2020 be suspended.

3 The application was supported by the affidavit of **Amina Hersi Moghe**, a director of the plaintiffs sworn on 29/10/2020. She deposed that in the Order of 23/09/2020, the auction of the suit property which was due on 24/09/2020 was suspended subject to the payment of the auctioneers’ fee by 24/09/2020 and provision of a bank guarantee of Kshs. 100 million within 90 days from the date of the Order.

4. That whereas the first condition was complied with by depositing Kshs. 3,500,000/- in court on 6/10/2020, the plaintiffs were unable to raise the bank guarantee of Kshs. 100 million because the 1st defendant was holding the title for the property known as **L.R No.13871 IR.No.1413015/1**. That it was the said title that the plaintiffs wanted to use to raise the subject guarantee.

5. The plaintiffs contended that the said title for **L.R No.13871 IR.No.1413015/1** was deposited with the 1st defendant in order for the property to be jointly sold to offset loan facilities. That they had approached several banks to obtain the required bank guarantee but the 90 days’ period granted needed to be extended in order to successfully secure the same.

6. The application was strenuously opposed by the 1st defendant vide a replying affidavit of **Tarminder Umesh**, the Debt Recovery Officer of the 1st defendant sworn on 11/11/2020 and Grounds of Opposition dated on 10/11/2020.

7. The 1st defendant contended that the plaintiffs had failed to comply with the Order of 23/09/2020 and that the bank was therefore entitled to enforce the said order. That the plaintiffs had previously applied vide an application dated 24/09/2020 for review whereby the court ordered that the plaintiffs deposit in court Kshs. 3,500,000/- as half of the auctioneers' fees.

8. That since that Order had already been reviewed, the same cannot be reviewed again as that will be in violation of **Order 45 rule 6 of the Civil Procedure Rules**. Further, that the plaintiffs had misled the Court by claiming that they were the registered owners of the property known as **L.R No.13871 I.R No.141305/1** yet the same was owned by a company known as **Khadar Developers Limited**. That the said **Khadar Developers Limited** had filed a suit against the 1st defendant seeking the release of the said title but the application was dismissed on 9/11/2020.

9. The 1st defendant further contended that it will be prejudiced if the orders sought are granted as the amounts owed as of 31/01/2018 was Kshs.175,964,762/77 by Yurub Investments Limited and Ksh.371,263,613/- by a New Nyanza Wholesalers Limited who also had an overdrawn account of Kshs.16,231,260/51.

10. The Court has carefully considered the record and the depositions by the parties. This is an application for review. Under **Order 45 of the Civil Procedure Rules**, review can only be ordered when it is shown that there is an error apparent on the face of the order or on discovery of new evidence which could not have been obtained at the time the order was made despite diligent effort or for any sufficient reason.

11. A look at the grounds on the face of the Motion does not reveal that the application was grounded on any of these grounds. Having looked at the entire supporting affidavit and reply to the defendant's further affidavit sworn on 1/12/2020, I find that none of the aforesaid grounds were relied on. That alone makes the application a candidate for dismissal.

12. Further, as contended by the 1st defendant, the application was fatally defective and did not lie. This was an application to review the Order made on 23/09/2020 and extend the 90 days given to secure a guarantee with a further 90 days. The 1st defendant deposed, and it was not denied, that a similar application was made on 24/9/2020. Pursuant thereto, the court reviewed the first limb of that order and allowed the plaintiffs to deposit in court a sum of Kshs. 3,500,000/-, as half of the auctioneers' fees.

13. **Order 45 Rule 6 of the Civil Procedure Rules** provides: -

"No application to review an order made on an application for a review of a decree or order passed or made on a review shall be entertained."

14. My understanding of the above provision is that, one can only apply to review an order or decree once. That once an order has been reviewed or a review declined, there is no jurisdiction to relook at that order again, except on appeal.

15. In **Richard Omari Nyamatura v Daniel Ombachi Mogeni [2015] Eklr**, the Court held: -

"In our view, to allow the second review application would have been, not only contrary to the provisions of section 80 of the Civil Procedure Act and Order 45 Rules 1 and 6 of the Civil Procedure Rules, but would have also violated section 1A and 1B of the Civil Procedure Act."

16. In any event, the facts militate against the granting of the extension sought. Firstly, there was no satisfactory evidence to show the effort made, if any, to secure the aforesaid guarantee within the period given. Secondly, the alleged property that was required to be given as security for the aforesaid guarantee did not belong to the plaintiffs. Neither were any resolutions produced to show that **Khadar Developers Limited**, had agreed to offer the said property for that purpose.

17. Accordingly, I decline to grant any of the prayers sought in the first Motion.

18. The second Motion was dated 24/11/2020. The same was brought under the **Contempt of Court Act 2016, Order 40 and 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**.

19. The Motion sought to have **Mr. Nasim Devji**, the Managing Director of the 1st defendant cited for contempt of court and thereby committed to prison. The grounds for the application were that; on 12/11/2020, the Court stayed the execution of the sale by auction of the suit property on the condition that the 1st plaintiff paid the auctioneers' fees and costs of the auction and deposited with the 1st defendant a sum of Kshs. 30,000,000/- by 10 am the following day, 13/11/2020.

20. The plaintiffs contended that they met the foregoing conditions. That on 13/11/2020 they had a meeting with the auctioneer who categorically refused to raise a fee note for the auction of 13/11/2020 and insisted that the plaintiffs first settle the costs of the suspended auction of 24/9/2020. That they had already paid to the auctioneer Kshs. 3,845,425/- while Kshs. 3.5 million had been deposited in court as ordered by Odero J.

21. That further, they deposited Kshs. 30 million on 13/11/2020 before the auction time of 11 am. That despite as aforesaid, the 1st defendant had proceeded to advertise the suit property once again for sale for 8/12/2020. That the said act of advertising the suit property for sale as aforesaid constituted disobedience of the order of the Court made on 12/11/2020.

22. The 1st defendant opposed the application vide the replying affidavit of **Amaan Kassam**, the 1st defendant's Legal Manager sworn on 2/12/2020. It was contended that on the day the order was made, the defendants' advocates advised the plaintiffs' advocates by email and

letter at 3.52pm that the auctioneers fees was Kshs. 7,340,900/-.

23. That on 13/11/2020, the plaintiffs failed to pay the sum of Kshs. 30 million and the auction proceeded at 10.30 am but there was no acceptable bid. That the 1st defendant only received Kshs. 30 million from Bank of Uganda Kampala on the same day at 12.46 pm and credited the account at 1.46pm. That the plaintiffs having failed to comply with the conditions of the order of 12/11/2020 and with the failed auction of 13/11/2020, the 1st defendant proceeded to re advertise the suit property for auction for 8/12/2020.

24. The 1st defendant further denied that the orders of Odera J had been complied with as contended by the plaintiffs. That the payment of the auctioneers' fees was made on 24/11/2020, 11 days after the deadline set by the Court had passed. It was urged that the application be dismissed.

25. I have considered the depositions by the parties. I have seen the correspondence between the advocates for the parties. By a letter dated 12/11/2020, emailed on the same day at 3.52 pm, the defendants advocates advised the plaintiffs' advocates that the auctioneers' costs for the suspended auction was Kshs. 7,340,900/-. That the same should be paid before 13/11/2020. The hard copy of that letter was received by **Ms. Mutinda & Associates Advocates** for the plaintiffs on the same day at 4.03 pm.

26. On 13/11/2020, the plaintiffs' advocates wrote to the defendants' advocates and advised them that their clients had deposited Kshs. 30 million and had agreed with the auctioneers that, the plaintiffs would only be charged the auctioneers' cost for the suspended auction of 24/9/2020. That the sum of Kshs.3.5 million deposited in court be released to the auctioneers by consent. That any further charges by the auctioneers be agreed on or before 10/12/2020.

27. By a letter dated 16/11/2020, the defendants advocates denied any agreement on the part of the auctioneers as had been alleged by the plaintiffs' advocates. They insisted that the plaintiffs had not complied with the Court Order of 12/11/2020.

28. Examining the aforesaid correspondence, it is clear that while the plaintiffs were advised of the auctioneers' costs on the evening of 12/11/2020 as ordered by the Court, they never paid the said costs. The Court was clear that if the plaintiffs disputed the amount of the costs raised, they should have advised the defendants of that fact and demand the taxation thereof. This not having been done, the first part of the Court Order had not been complied with. There is no evidence to show that Dalali Traders Auctioneers had agreed to only receive the costs of the auction of 24/9/2020 and forego the one of 13/11/2020.

29. The second limb of the Order was that the plaintiffs were to pay Kshs. 30 million to the 1st defendant before 10 am on 13/11/2020. The clear evidence on record, which was not controverted by the plaintiffs was that, the payment was received by the 1st defendant at 12.46 pm. The bank slip dated 13/11/2020 produced as annexure "AHMI" shows that the EFT was applied for on 13/11/2020 at 11:08:14. That was clearly outside the timelines set by the Court.

30. The plaintiffs having failed to comply with the said order, the 1st defendant was entitled to re-advertise the suit property for auction on 8/12/2020. In view of the foregoing, I see no contempt on the part of the 1st defendant.

31. Accordingly, I find both applications to be without merit and hereby dismiss them with costs. The suspension of the sale of the suit property ordered on 3/12/2020 is hereby lifted.

DATED and DELIVERED at Nairobi this 4th day of March, 2021.

A. MABEYA, FCI Arb

JUDGE