



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. NO. 301 OF 2018

COOPERATIVE BANK OF KENYA LTD.....OBJECTOR/APPLICANT

VERSUS

DINESH CONSTRUCTION CO. LTD.....1ST RESPONDENT

MOI UNIVERSITY COOPERATIVE

SAVINGS & CREDIT SOCIETY (MUSCO).....2ND RESPONDENT

RULING (2)

1. By a Certificate of Urgency application dated 5th June 2020, filed together with Notice of motion and supporting affidavit, the Applicant urged the court to be heard on priority basis for reasons;

a) That this Court delivered Ruling on 15th April 2020 allowing the 1st Respondent, to sell the suit property known as **ELDORET MUNICIPALITY/BLOCK NO. 4/321**(Musco Towers) (hereinafter, “the suit property”) to realize a debt amount of Ksh 141,153,863.17 plus a simple interest in execution of a Final Award delivered on 13th March 2017 arising from a debt owed by the 2nd Respondent.

b) That the orders issued by this Court were issued in the absence of disclosure of the material fact that Objector/Bank holds a legal Charge over the suit property and the development thereon dated 18th March 2010.

c) That there exists two previous Rulings by the High Court in Eldoret, over the same suit property, rendered on 6th November 2019 and 31st January 2020 respectively, allowing the Objector/Bank herein to exercise its statutory power of sale over the suit property so as to recover the debt owed to it by the 2nd Respondent, and which debt stood to Ksh 553,249,626.60 as at 10th October 2019.

d) That the Ruling delivered on 15th April 2020 by this Court lies in contradiction to the two aforementioned Rulings delivered by a Court of concurrent jurisdiction hence presenting a scenario of imminent conflict which can and should be immediately arrested and cured by setting aside of the orders issued on 15th April 2020.

2. The Objector/Applicant filed Notice of Objection pursuant to **Rule 51 of Order 22 CPR 2010**.

3. In the Notice of Motion pursuant to **sections 1A, 3 & 3B of the Civil Procedure Act, Cap 21, Laws of Kenya, Order 22 Rule 51 and order 51 Rule 1 of the Civil Procedure Rules 2010**; the Applicant/Objector sought orders;

a) That there be a stay of execution of the Ruling and consequential orders issued on 15th April 2020 regarding the registration of

b) Prohibition order against Eldoret Municipality/Block No. 4/321 and the attachment and sale of Eldoret Municipality/Block No. 4/321 by the 1st Respondent herein either by itself, its servants, agents, employees and/or assigns pending the hearing and determination of this application.

c) That the Ruling delivered on 15th April 2020 and consequential orders issued therein be set aside and/or vacated.

4. The Applicant was based on grounds;

- a) That this Court delivered a Ruling on 15th April 2002 allowing the 1st Respondent, to sell the suit property known as **ELDORET MUNICIPALITY/BLOCK NO. 4/321** (hereinafter “the suit property”) to realize a debt amount of Ksh 141,153,863.17 plus a simple interest in execution of a Final Award delivered on 13th March 2017 arising from a debt owed by the 2nd Respondent/Sacco.
- b) That the Objector/Bank holds a Legal Charge dated 18th March 2020 over the suit property and the development thereon as security for the repayment of various loan facilities advanced to the 2nd Respondent/Sacco between 2008 and 2016, which took place prior to the 2nd Respondent being placed under liquidation in June 2018 by the Commissioner for Cooperatives.
- c) That the Objector/Bank has a legal right and interest in the suit property that:
 - i) Is statutorily affirmed and legally existed prior to any interest that the 1st Respondent may purport to gain through the attachment of the suit property;
 - ii) Cannot be alienated by the 1st Respondent by way of attachment;
 - iii) Cannot be capable of being attached in relation to a debt owed to the 1st Respondent.
- d) That further there exists two previous Rulings over the suit property in both Eldoret **HCCC No. 40 of 2018** and **HCCC No. 42 of 2019** – rendered by the High Court of Kenya on 6th November 2019 and 31st January 2020 respectively allowing the Objector/Bank herein to exercise its statutory power of sale over the suit property so as to recover the debt owed to it by the 2nd Respondent and which debt stood at Ksh 553,249,626.60 as at 10th October 2019.
- e) That the 1st Respondent is guilty of material non-disclosure as it unlawfully failed to disclose that;
 - i) The property is charged to the Objector/Bank and a current search of the same would have been demonstrative of this;
 - ii) It was aware of the existing matters in Eldoret as it had tried to be enjoined in **HCCC No. 40/2018**, however the said application for enjoinder was dismissed;
 - iii) It has always been aware of the Objector/Bank’s legal rights over the suit property; and
 - iv) It was aware that the suit property is encumbered and cannot be subject to attachment proceedings.

REPLYING AFFIDAVIT

5. The 1st Respondent through the Project Manager Fredrick Opondo opposed the Application vide an affidavit dated 26th June 2020, and averred that the 1st Respondent herein obtained a decree of this Court on 31st May 2018 against the 2nd Respondent for decretal sum of Ksh 141,153,863.17 together with simple interest at Ksh rate of 14% per annum from 17th June 2015. Marked as “**FO-1**” is a copy of the decree dated 31st May 2018.

6. The 1st Respondent averred that it was unable to locate any movable assets of the 2nd Respondent as a result of which it was unable to execute the said decree. Marked “**FO-2**” is a copy of letter from the Auctioneers dated 3rd September 2018. However, the 1st Respondent learnt through Gazette Notice dated 27th July 2018 that the 2nd Respondent herein was/is under liquidation having been dissolved in accordance with **Section 61(1) of the Cooperative Societies Act**. Marked “**FO-3**” is a copy of the Gazette Notice dated 27th June 2018.

7. The 1st Respondent stated that it carried out an official search at the Eldoret Land Registry which confirmed that the 2nd Respondent was indeed the registered proprietor of the piece of Land known as Eldoret Municipality/Block 4/3212 situated in Eldoret town.

8. The 1st Respondent stated that being reasonably apprehensive that the suit property would be disposed of, alienated, wasted and/or encumbered, the 1st Respondent made an application in good faith on 26th September 2018 for orders of prohibition as well as for court to allow it to sell the said property to satisfy the decree issued on 31st May 2018. A copy of the Notice of Motion application is marked as “**FO-4**”.

9. The 1st Respondent further averred that during the hearing of the application dated 21st September 2018, the matters in Eldoret **HCCC No. 40 of 2018** and the joinder application dated 27th September 2018 were fully disclosed to this Court. Marked “**FO-5**” is a copy of 2nd Respondent’s Replying affidavit dated 8th October 2018.

10. On 15th April 2020, this Court granted orders *inter alia*, that a prohibitory order be issued over the suit property, and the same be sold to satisfy the decree issued herein on 31st May 2018. The 1st Respondent stated that in the said Ruling of 15th April 2020, the Court properly considered the then existing matters in Eldoret, particularly the 2nd Respondent’s arguments that the Objector was a secured creditor.

11. On 27th May 2020, the 1st Respondent applied to the Registrar of Lands in Eldoret Land Registry, to register the said Court Order in order to safeguard the suit property against any dealings, disposal, alienation, wasting and/or encumbrance being registered while pending sale as directed by Court. A copy of application for registration is marked **"FO-8"**.

12. The 1st Respondent states that the motive of the liquidation of the 2nd Respondent is questionable by the fact that almost two (2) years have lapsed since publication of gazette notice yet no action has been undertaken by the 2nd Respondent towards finalizing the said process.

The 1st Respondent deposed that the process of liquidation of the 2nd Respondent was initiated to unjustifiably derail, deny and/or circumvent payment of the decretal sum owing and due as directed by this Court.

13. The 1st Respondent confirms that it had indeed filed an application to be enjoined as interested party in Eldoret **HCCC No. 40 of 2018**, however the Objector herein and the 2nd Respondent colluded and recorded a consent to compromise the suit to the exclusion of the interest of the 1st Respondent.

14. The 1st Respondent averred that the present Objection proceedings are nothing but joint conspiracy between the 2nd Respondent and the Objector to further frustrate realization of decretal sum by the 1st Respondent. That the alleged decision and resultant orders in Eldoret **HCCC No. 40 of 2018** was reached without examination of merits, and had the court in Eldoret reviewed the facts and evidence on record, especially the evidence of the 1st Respondent it could have reached a different outcome.

APPLICANT'S SUBMISSIONS

15. The Applicant submitted that it has a legal interest over the suit property **ELDORET MUNICIPALITY/BLOCK NO. 4/321** as a secured Creditor and the property is security to discharge the 2nd Respondent's outstanding loan facility with the Objector. It is Secured Creditor *vis a vis*

Other Creditors to the 2nd Respondents Assets as held in **RE-HI PLAST LTD [2019] eKLR & KENYA NATIONAL CAPITAL CORPORATION vs ALBERT MARIO CORDEIRO & ANOR [2014] eKLR.**

16. The Objector alleged there was material non- disclosure, that the 1st Respondent failed to inform this Court of the Objector's legal charge in the suit property and failed to attach the Search Document which would have proved that the suit property was encumbered. Material Non-Disclosure was considered in **GOTV KENYA LTD vs ROYAL MEDIA SERVICES LTD & 2 OTHERS [2015]eKLR**

17. The Applicant asserted that it was not objecting to the 1st Respondent's right to realize fruits of its judgment from the Arbitral Award against the 2nd Defendant but it should not rely on the instant suit property as it is charged to the Objector.

The Objector alleged that parties should be guaranteed certainty and the Court should not be used as an instrument of divesting the Bank of its statutory right arising from realization of its security.

18. The Objector therefore moved the Court to set aside the Ruling of 15th April 2020 as by the said orders it was condemned unheard and it is unlawful and unjust for 1st Respondent to deprive it of its Statutory right of sale to recover its debt.

19. The Objector proved its legal interest in suit property by annexure of the Legal Charge **JK-3** as security for payment for loans disbursed to the 2nd Respondent from 2008-2016 by the Objector Bank. The Objector served requisite Statutory Notices **JK-4- JK-6**.

20. The 2nd Respondent members & Liquidators contested the Objector's claims in the suits filed in Eldoret High Court and the Court upheld the Objector's claim and parties filed Consent for sale of the suit property as confirmed by documents annexed **JK-7 & JK-8**.

21. The Objector reiterated that by virtue of production of Legal Charge, the Consent, The Official Search Certificate and Court Rulings of **HCCC No. 40 of 2018 and HCCC No. 42 of 2019** the Objector has proved its claim to the suit property as required and stated in **PRECAST PORTAL STRUCTURES vs KENYA PENCIL CO LTD & OTHERS [1993]eKLR**

1st RESPONDENT'S SUBMISSIONS

22. The 1st Respondent submitted that the impeached proceedings and Ruling of this Court arose from Final Arbitral Award of Ksh 141,153,163.17 against the 2nd Respondent of 17th March 2018 and adopted by this Court on 30th April, 2018.

23. Immediately the 2nd Respondent was served with the decree, the 2nd Respondent moved to the Cooperative Tribunal and applied to be liquidated. Thereafter, up to date no step has been taken by the Liquidators towards calling Creditors meetings and compiling debts and Creditors List. It was/is a sham to avoid settling debt arising from the Arbitral Award.

24. In **HCCC 40 of 2018 Eldoret High Court**, between the Objector and the 2nd Respondent, they entered into a Consent that settled the dispute and compromised the suit before it was heard and determined on its merits and the 1st Defendant was locked out and denied opportunity to be enjoined to the proceedings and to heard on merit.

25. Thereafter, the 1st Respondent moved this Court vide the Application for prohibition and sale of the instant suit property to realize its decree emanating from the Final Arbitral Award. The Court had/has jurisdiction to grant the said orders vide Ruling of 15th April 2020.

26. The cardinal principle of law is that where the Court grants orders conscious decision on controversial matters, the hotly contested issues cannot be reviewed by the same Court but on appeal as was held in **NATIONAL BANK OF KENYA LTD vs NDUNGU NJAU NBI C.A.211 OF 1996.**

27. At the time of hearing of the application, the 1st Respondent disclosed that there were **HCCC 40 of 2018 & HCCC 42 of 2019** where the High Court in Eldoret dealt with the same suit property. Whereas, the Court granted orders to the Objector, this granted orders to the 1st Respondent. The orders of this Court are equally valid. The Objector is asking this Court to enquire into decisions of another Court which is illegal and improper as was held in **BELLEVUE DEVELOPMENT CO LTD vs FRANCIS GIKONYO & OTHERS [2018]eKLR & ATHANAS NZUKI vs UCHUMI SUPERMARKET LTD & ANOR [2013]eKLR**

28. There are 3 competing and contradictory orders of 2 High Courts of Kenya and these matters ought to be ventilated before another forum with inclusion of liquidators of 2nd Respondent.

The Objector has not tendered sufficient evidence to prove that the right to statutory power of sale has crystallized. A close examination of the Charge document Clauses (a) & (b) (i) (ii) & (iii) where the Objector opted to appoint a Receiver Manager to collect rent from the charged property in default by Chargor, the charge though named as Fixed Charge is a Floating Charge hence the Objector's rights have not crystallized. See **SOKHI INTERNATIONAL (K) LTD vs GIRO COMMERCIAL BANK LTD[2006]**

DETERMINATION

The issue is whether the Ruling of 15th April 2020 and consequential orders should be set aside.

29. The 1st Respondent and 2nd Respondent entered into construction contract and thereafter a dispute arose resulting in Arbitration proceedings that culminated to the Final Arbitral Award of 13th March 2017.

30. By the Ruling of L. J Ngetich of 30th April 2018, the Final Arbitral Award was recognized and enforced and decree was issued on 31st May 2018.

The 1st Respondent/Decree-holder despite conducting investigation could not execute the decree as the 2nd Defendant's assets could not be traced.

31. 1st Respondent came to learn that the 2nd Respondent/Judgment Debtor was placed under liquidation by the Commissioner of Cooperative by **Section 61 of Cooperative Act.**

32. 1st Respondent conducted search at the Registry and found that the 2nd Respondent owned suit property **ELDORET MUNICIPALITY/BLOCK NO. 4/321** and therefore applied to this Court that prohibition be registered against the suit property which orders this Court granted vide the now impugned Ruling of 15th April 2020 and decree of 20th May 2020.

The Final Arbitral award was enforced on 30 April 2018, liquidation of the 2nd Respondent was gazetted on 20th July 2018 and Mr. Hesbon M. Kiura and Mr. Joel Kipsanai Barbengi were appointed as Joint Liquidators of Moi University Sacco Society Limited (MUSCO) as per the annexed Liquidation Order of 29th June 2018 by Commissioner of Cooperative Development. Clearly the decree was/is a debt outstanding against the 2nd Respondent before liquidation.

33. The 2nd Respondent and/or the Liquidators have never appeared in this Court despite service by the 1st Defendant and now the Objector. No explanation or reasons are advanced to the Court to consider and from the scant pleadings filed, the liquidators alleged the application made in this Court was premature as the Decree Holders had to wait for Creditors meeting which ought to be held within 1 year.

34. The Objector's instant application is the subject matter of the application. The Objector submitted that the 1st Respondent is responsible for material non-disclosure of material facts; that is the suit property **ELDORET MUNICIPALITY/BLOCK NO. 4/321** although registered in the 2nd Respondent's name, the suit-property was the subject of 2 High Court matters and the Objector was allowed as secured Creditor to exercise its statutory power of sale over the property to settle the 2nd Respondent's outstanding debt.

35. Secondly, it was alleged that due to such non-disclosure, the Court was embarrassed by granting orders that cannot be enforced as the Prohibition could not be registered and sale of the suit property conducted.

This is because from the evidence now produced by the Objector and as shown by annexed documents, the 2nd Respondent obtained loan/overdraft facilities and the Objector drew a Legal Charge over the suit property. The 2nd Respondent defaulted in servicing the loan facility.

The Objector produced the following documents to fortify its claim to the legal interest of the suit property. The following documents were;

- a) Legal Charge of 18th March 2010 charging Title Number **Eldoret Municipality Block 4/321.**

b) Certificate of Official Search confirming Charge to Cooperative Bank for Ksh 200,000,000/- and it read; ‘*All rights under Sections 83 & 84 RLA reserved was registered on 18th March 2010.*’

c) Copies of Ruling **HCCC 42 of 2019** of 31st January 2020 & **HCCC40 of 2018 of 6th November 2019** where the Objector and 2nd Respondent’s consent was adopted as an order of the Court over sale of the suit property by the Objector.

36. From the above outline, it is confirmed by the Objector it legal claim and right to the suit property **Eldoret Municipality Block 4/321** by the Legal Charge and Certificate of Search. The Objector is a Secured Creditor as defined **Section 2 of Insolvency Act 2015**

“(a) a person holding a security on or against the property of the debtor or (any part of it) to secure a debt due or accruing due to the person from the debtor; or

(b) a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable;

37. In the case of **Re Hi Plast supra**, this Court considered rights of secured Creditor *vis a vis* other Creditors. The Court found, based on the law that a Secured Creditor ranked in priority to other Creditors over the secured property released as collateral to the facility provided to the debtor by The Creditor.

The Creditor presented proceedings where members of MUSCO challenged its right over the suit property in **Eldoret HCCC 42 of 2019**. The Court upheld the Objector’s right to exercise statutory power of sale.

38. **Section 109&112 Evidence Act** prescribes;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

39. The Objector claimed the 1st Respondent failed to disclose its interest to the suit property and is liable for non-disclosure of material facts. The Court confirms that the 1st Respondent, the Applicant then disclosed that there were Court proceedings in Eldoret High Court with regard to the suit property in **HCCC40 of 2018** whereby their application for joinder were blocked from joining the proceedings.

40. By virtue of **Section 109 & 112 of Evidence Act**, the maxim is that any person who alleges a fact that the Court should consider shall prove it especially if it is within the knowledge of the party. Therefore, it was not incumbent for the 1st Respondent to produce the Charge, Certificate of Search, Consent and the Court Rulings as it was not privy to these transactions or proceedings.

41. It is interesting that the 2nd Respondent who participated in the proceedings then and was party to the transactions and proceedings referred to was not accused or blamed by the Objector for non-disclosure of material facts. The right party to prove its claim is the Objector as it has done in the instant matter as provided by law. The 1st Respondent is not liable for non-disclosure of material facts.

42. The 1st Respondent on the other hand claimed that any attempt by the Court to consider the Objector’s application is contrary to law and this Court should exercise judicial restraint from enquiring and/or reviewing matters already determined by other Courts of concurrent and coordinate jurisdiction. This Court lacks requisite jurisdiction and is *functus officio*.

43. The Objector moved this Court vide **Order 22 Rule 51 CPR 2010** that reads;

“(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.”

44. The Objector moved this Court to stake its legal claim over the suit property. The Court has jurisdiction to hear the objection raised vide **Order 22 Rules 52,53,54 CPR 2010** which outlines that the Court ought to hear the Notice of Objection after all parties are served and they respond and the Court may consider stay of execution or raising attachment or allowing attachment and sale.

45. With regard to the submission that this Court should not be involved in enquiring and/or reviewing matters already determined by other Courts of concurrent and coordinate jurisdiction, in relation to **HCCC42 of 2019 & HCCC40 of 2018**, this court has not reviewed but legally enquired and perused the Rulings. These decisions are to discharge the burden of proof by the Objector that their claim exhibited by the Charge and Certificate of Search when challenged by 2nd Respondent the High Court Eldoret the Court dismissed the challenge and upheld the Objector’s claim to the suit property.

46. **Belle Vue Development Co Ltd vs Francis Gikonyo J & Charles Kariuki J Paul Mwaniki Gachoka & Vinayak Builders Ltd Supreme Court Petition 42 of 2018**, the Court referred to KiageJJA’s Lead Judgment from C.A as follows;

“The Superior Court Judge had no jurisdiction to enquire or review the propriety of the decisions of Judges who were of concurrent jurisdiction as himself and that therefore, he did not possess supervisory jurisdiction over 1st & 2nd Respondents under Article 165(6) COK2010...”

47. This Court is not reviewing ***HCCC 40 of 2018, HCCC 42 of 2019*** as they are decisions of a Court of equal, concurrent and competent jurisdiction as this Court. However, this Court is persuaded by the Court’s findings that the Objector has a legal right/claim to the suit property. This finding fortifies the Objector’s claim as proved by the Legal Charge and Consent, Certificate of Official Search.

48. The proceedings herein were halted to enable the 2nd Respondent now represented by Joint Liquidators to be served and to attend and/or participate in these proceedings. The parties served the 2nd Respondent who declined to respond, appear, be represented or file any pleadings.

49. It was submitted that this Court granted unenforceable orders and embarrassed itself. With respect, Courts role is, one of an Arbiter, once the Court is moved by parties, it will hear and determine the disputes based on evidence on record and the law. The evidence then on record resulted to the Ruling of 15th April 2020, now the evidence presented in the instant application will lead to a different decision. It is this Court’s view that the 2nd Respondent is the genesis of the present circumstances; the fact that there are conflicting decisions as the subject matter is litigated by Cooperative Commissioner in the High Court, both in Nairobi and Eldoret. The cases arose from the 2nd Respondent who incurred debts and went into liquidation and since 2018 over 2 years now, the Joint Liquidators have not held a Creditors Meeting as to include the 1st Respondent’s legal claim in the list of claims/debts and settle with the assets of the 2nd Defendant/Respondent.

DISPOSITION

50. The Application by Objector of 5th June 2020 is upheld that the Ruling of this Court of 15th April 2020 and Decree of 20th May 2020 are hereby set aside.

51. The 1st Respondent’s Decree shall be presented to Mr. Hesbon M. Kiura and Mr. Joel Kipsanai Barbengi Joint Liquidators of Moi University Sacco Society Limited (MUSCO) and to be a part of the debts due and owing by MUSCO to be settled.

52. Each party to bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH MAY 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. NYANJAGA H/B MS MURAGURI FOR COOPERATIVE BANK/ APPLICANT/INTERSTED PARTY

MR ROTICH FOR THE DECREEHOLDER/PLAINTIFF

COURT ASSISTANT: GRACE