



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 436 OF 2017**

**BETWEEN**

**JOHN MUGAMBI T/A MUGAMBI & COMPANY ADVOCATES.....1<sup>ST</sup> PLAINTIFF**

**BEATRICE KARIUKI T/A BEATRICE KARIUKI & ASSOCIATES.....2<sup>ND</sup> PLAINTIFF**

**AND**

**SHOWCASE PROPERTIES LIMITED.....DEFENDANT**

**RULING NO. 7**

**Introduction and background**

1. This is the 7<sup>th</sup> ruling in this matter. The Plaintiffs have moved the court by the Notice of Motion dated 15<sup>th</sup> April 2021 made, inter alia, under **sections 63 (e), 1A, 1B and 3A** of the *Civil Procedure Act* and **Order 1 Rule 10(2), Order 51 Rule 1** of the *Civil Procedure Rules* seeking an order that the Interested Party (“the Bank”) be ordered to pay to the Plaintiffs the guaranteed amount being the sum of KES 5,000,000.00 within five (5) working days of service with this order. Further, that the Bank pays interest at the prevailing commercial rate from the date of demand being 17<sup>th</sup> February 2021 until payment in full.

2. The application is supported by the affidavit of John Mugambi, the 1<sup>st</sup> Plaintiff, sworn on 14<sup>th</sup> April 2021 and the grounds set out in the face of the application. The application is opposed by the Defendant through the replying affidavit of its director, Francis Muhoro Gachanja, sworn on 21<sup>st</sup> April 2021. The Bank also opposes the application through the replying affidavit of its Legal Manager, Kariuki King’ori, sworn on 27<sup>th</sup> April 2021. The application was canvassed by way of written submissions with the parties advancing their respective positions.

3. The facts leading to the present application are largely common cause. On 24<sup>th</sup> August 2020, I delivered a ruling allowing the Defendant’s application to set aside judgment on terms that it procures a bank guarantee for KES. 5,000,000.00 within 30 days. The Defendant applied for and the Bank issued the guarantee as evidenced by the agreement dated 13<sup>th</sup> October 2020 and referenced as EBKL/039/0BG00003620 (“the Guarantee”). Before the lapse of the period for compliance, the Defendant filed an application seeking extension of time to comply with the said order directing it furnish the Guarantee, which I allowed on 3<sup>rd</sup> November 2020 by extending time for compliance and deemed the Guarantee issued by the Bank to have been furnished within the time so limited.

4. The Defendant then filed a Notice of Motion dated 10<sup>th</sup> September 2020 seeking to review the court’s ruling of 24<sup>th</sup> August 2020 which I dismissed by the ruling dated 2<sup>nd</sup> October 2020. In the meantime, and by a letter dated 12<sup>th</sup> October 2020, the Plaintiffs’ advocates addressed the Deputy Registrar requesting the court to issue a decree which was done on 13<sup>th</sup> November 2020. The Defendant opposed the issuance of this Decree through the Chamber Summons dated 17<sup>th</sup> February 2021 by stating that the said Decree was irregular and ought to be set aside. By the ruling dated 17<sup>th</sup> March 2021, I held that the Defendant had failed to comply with one of the conditions of the court in its ruling dated 24<sup>th</sup> August 2020 by not filing and serving its Defence within 14 days from the date of the ruling. The effect of the ruling was to dismiss the application and uphold the Decree issued in favour of the Plaintiff.

5. The Defendant, being dissatisfied with the ruling affirming the Decree and dismissing its application, evinced its intention to appeal the same and filed an application seeking leave to appeal. I dismissed the application on 26<sup>th</sup> March 2021 on the ground that the Defendant did not lay out a factual basis upon which the court could exercise discretion in its favour.

## **The Application**

6. The Plaintiffs state that on 17<sup>th</sup> February 2021, their Advocates wrote a letter to the Bank, demanding for the release of the funds under the Guarantee but the said letter has not elicited a response. The Plaintiffs contend that the stay of execution issued by the court on 17<sup>th</sup> March 2021 lapsed on or about 7<sup>th</sup> April 2021 after which their advocates wrote to the Bank demanding for release of the amount under the Guarantee but by the letters dated 9<sup>th</sup> April 2021 and 14<sup>th</sup> April 2021, the Bank has refused to honor the Guarantee, citing that as condition for payment, the Plaintiffs ought to surrender the original Guarantee, which to its knowledge is in the possession of the Defendant.

7. The Plaintiffs contend that the posturing by the Bank is only a ploy meant to delay or defeat the cause of justice as failure to surrender the original Guarantee, does not absolve the Bank from the obligation to honour the Guarantee. The Plaintiffs depone that the Bank is now placing stumbling blocks in liquidation of the Guarantee even when the court held in its ruling of 3<sup>rd</sup> November 2020 that *"It must be borne in mind that a guarantee is an independent undertaking by a bank, issued at the request of its customers to pay a sum of money to a third party upon demand,"*

8. The Plaintiffs thus urge the court to compel the Defendant to release the original Guarantee in its possession or in the alternative, order the Bank to release the total guaranteed amount in the sum of KES. 5,000,000.00 plus interest with effect from 17<sup>th</sup> February 2021 in order that they may now enjoy the fruits of the Judgement entered in their favor.

## **The Defendant's Reply**

9. The Defendant confirms that its Advocates declined to release the original Guarantee to the Plaintiff's Advocates. It states that as at 23<sup>rd</sup> November 2020, the Plaintiffs' Advocates had not informed its Advocates they had applied to the court and obtained reinstatement of the default judgment therefore it is clear that the Plaintiffs were deliberately concealing the fact they had obtained the Decree from the court so as to cash the Guarantee while armed with an irregularly obtained default judgment against the Defendant.

10. The Defendant states that the Decree was extracted on the basis of fraud upon the court as it was issued based on a misrepresentation to the Deputy Registrar that the Defendant had failed to provide the Guarantee when in fact an application for extension of time had been made and was granted by the court, but the Plaintiffs did not disclose this material fact when they extracted the decree. Further, that it is fraud for the Plaintiff to claim the Decree was issued due to the Defendant having failed to file its Defence as directed.

11. The Defendant further depones that the issue of filing defence was raised by the Plaintiff by a letter to the Deputy Registrar dated 26<sup>th</sup> February 2021 where the Plaintiffs clearly acknowledged *"NB: At paragraph 14 of the Ruling dated 24<sup>th</sup> August 2020, the Learned Judge took note of the existence of the Statement of Defence stamped as received on 1<sup>st</sup> February 2018, but made no specific directions regarding the same"*. Thus, the Plaintiffs clearly agree that the learned Judge noted there was a defence on record, but twisted the narrative that it did not amount to a defence.

12. The Defendant accuse the Plaintiffs of developing a habit of going to the Deputy Registrar to extract decrees in the absence of the Defendant's counsel and walking away irregularly issued decrees in contravention of good faith litigation where parties secure orders on merit in open court.

13. The Defendant states that the fact that the Plaintiffs having already obtained a default judgment on 15<sup>th</sup> October 2020 against the Defendant on the basis of failure to supply the Guarantee cannot at this point in time attempt to enforce the Guarantee. The Defendant contends that the Plaintiffs have to choose between either the Guarantee or the default judgement but cannot have both at the same time. It adds that the Guarantee was only applicable if the default judgment was set aside and the Defendant allowed to defend the suit filed herein and in this case the original default judgment which had been entered against the Defendant on 15<sup>th</sup> October 2020 was simply reinstated.

14. The Defendant reiterates that it does not have any legal obligation to furnish the Guarantee as the Plaintiffs cannot enjoy both a reinstatement of the default judgement of KES. 55 million and enjoy the Guarantee of KES. 5 million which they extinguished. The Defendant states that the Plaintiffs are in a hurry to execute both the Guarantee and default judgement quoting the maxim of *"litigation must come to an end"* as they have secured default judgement through sharp practice and want to void a hearing on merit that will expose them.

## **The Bank's Reply**

15. The Bank opposes the application. It confirms the Guarantee and the demand sent by the Plaintiffs' advocates dated 17<sup>th</sup> February 2021. The Bank further confirms that it did not release the money as the terms of the Guarantee thereof provide that payment will be, *"made upon presentation of the original guarantee to the aforesaid address of the bank on or before the expiry date"*. The Bank contends that it has not received an original of the Guarantee and hence not in a position to release the money as to do so will be in breach of the Guarantee. It however states that if the court orders for the release of the money the Bank will be ready and willing to release the amount in full.

16. The Bank denies that it is liable to pay the interest as it is bound by the terms of the Guarantee and that the Plaintiffs did not come to court with clean hands since they were aware they were expected to present the original guarantee for the Bank to release the funds yet they failed to. The Bank thus urges the court to dismiss the application with costs.

## **Analysis and Determination**

17. Since the validity of the Guarantee is not in contest, the only issue for determination is whether the Bank should honour the Guarantee. Apart from insisting on delivery of the original Guarantee, the Bank agrees that it is obliged to honour it on demand. It also states that it will comply with a court order directing it to honour the Guarantee. Contrary to what has been depone by the Defendant, I do not find any

other condition-precedent other than a demand that will trigger the Bank to honour the Guarantee.

18. Turning to the issues raised by the Defendant, following the its application to set aside default judgment, I delivered Ruling No. 1 on 24<sup>th</sup> August 2020 setting aside judgment on the following terms:

*(a) The default judgment entered against the Defendant be and hereby set aside.*

*(b) The Defendant shall file and serve its defence within 14 days from the date hereof.*

*(c) As condition for (a) above the Defendant shall deposit Kshs. 5,000,000.00 in a joint account in the names of the parties advocates or in court or provide a bank guarantee in favour of the Plaintiffs for the said amount from a reputable bank within 30 days from the date hereof.*

*(d) In the event of default of any of the conditions aforesaid, the default judgment shall be deemed reinstated.*

*(e) The Defendant shall bear the costs of the application. [Emphasis mine]*

19. In Ruling No. 4, I held that the Defendant had not complied with the condition imposed in Ruling No. 1 and that therefore the Decree issued by the Deputy Registrar was regular. All the issues raised by the Defendant in opposition to the application have been determined and all that remains is for the Plaintiffs to execute the Decree in their favour. Once the court made a declaration of non-compliance in Ruling No. 4, the Plaintiffs' right to the Guarantee crystallized and the Plaintiffs were entitled to demand payment from the Bank. The Guarantee was intended to secure part of the decretal sum in the event of default and once the sum is paid, the Defendant will be given credit for it. I therefore reject the Defendant's argument that the Plaintiffs have to elect whether to pursue the Guarantee or execute the Decree.

20. I hold that the Defendant has no right to hold the original Guarantee and any attempt to continue holding on to the Guarantee is an attempt to undermine the decisions which the court has already made in relation to the matter. This court cannot countenance the position taken by the Defendant. Despite the condition imposed for the return of the original Guarantee, the Bank is ready and willing to pay the sum due as ordered by the Court. Since the original Guarantee remains with the Defendant's advocates, I direct the Plaintiffs to execute an Indemnity, in the form approved by the Bank, indemnifying the Bank from any liability howsoever arising from payment of the KES. 5,000,000.00 whereupon the Bank shall release the money to them forthwith.

21. I reject the Plaintiffs' claim for interest from the Bank as this is not provided for in the Guarantee which has specific terms and which are in line with the orders made in Ruling No. 1.

#### **Disposition**

22. For the reasons I have set out above, I allow the Notice of Motion dated 15<sup>th</sup> April 2021 and orders as follows:

*(a) The Bank shall release the sum of KES. 5,000,000.00 to the Plaintiffs forthwith upon presentation of an indemnity in its favour executed by the Plaintiffs in the form approved by it.*

*(b) The Defendant shall bear the costs of the application.*

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY 2021.**

**JOHN M. MATIVO**

**JUDGE**

Court Assistant: Mr M. Onyango

Mr Mbobu with him Mr Otenyo instructed by Makhandia and Makhandia Advocates for the Plaintiffs.

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Defendant.