



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CIVIL CASE NO. 17 OF 2017

MWATECH ENTERPRISES LTD.....APPLICANT

-VERSUS-

EQUATORIAL COMMERCIAL BANK LTD.....RESPONDENT

RULING

1. The matter is for a notice of motion dated 2nd March, 2021 seeking relief:

a) That pending the hearing and determination of the suit herein, there be a stay of sale of L.R. No. Nyahururu/Municipality/Block 4/132 by way of public auction, private treaty, or any other manner whatsoever.

b) That in the alternative to prayer a) above, this Honorable Court be pleased to issue an order that a fresh valuation of the suit property be conducted by an independent valuer or by valuer appointed by both parties to ascertain the market and forced sale value of the suit property prior to any auction.

c) That this Honorable Court be pleased to compel the Respondent herein to delist the Applicant from the Credit Reference Bureaus in compliance with the terms of the Settlement Agreement of 12th August, 2021 pending the hearing and final determination of the suit herein.

d) That this Honorable Court be pleased to issue an order compelling the Bank to furnish the Applicant herein with a complete, true and accurate account of its loan account including various rates of interest applied to the loan facility and the loan balance being sought to be recovered.

e) That this Honorable Court be pleased to grant leave to the Plaintiff/Applicant to further amend the plaint per the annexed draft further amended plaint attached hereto and the Defendants/Respondents be at liberty to file an amended defence to the further amended plain if they so please.

f) That this Honorable Court be pleased to grant leave to the Plaintiff/Applicant to enjoin DOUGLAS MWANGI MUTERU and GRACE MUKAMI GICHUKI into these proceedings as the 1st and 2nd Interested Parties respectively.

g) That the costs of this application be borne by the Respondents.

2. It is based on the facts on the application and affidavit and further affidavit by Douglas Mwangi Muteru. The grounds in support of application are:

3. That on or about the 12th August, 2020, parties sat down and negotiated a fresh Settlement agreement dated 12th August, 2020 where parties agreed to settle the Applicants liabilities to the Respondent at Kshs.13,000,000/-.

4. That is was a term of the said settlement agreement of 12th August, 2020 that the Applicant would pay an initial First Installment of Kshs.1,000,000/- upon which the Respondent would immediately and forthwith delist the Applicant and its directors from the Credit Reference Bureau.

5. That following the said Settlement Agreement, the Applicant herein deposited a sum of Kshs.1,000,000/- on the 12th August, 2020 in full compliance with the terms thereto.

6. However, the Respondent still breached the terms of the said Settlement Agreement by failing to delist the Applicant herein from CRB as a consequent of which the Applicant was unable to raise Kshs.3,125,716/- for the 2nd Instalment scheduled for 18th November, 2020 as he

was not eligible for any loan from any credit facility.

7. That however, despite the breach on their end, the Respondent is insisting on selling the Applicant's property L.R. No. Nyahururu/Municipality/Block 4/132 and the same has been advertised for sale by public auction on the 4th March, 2021 in the Daily Nation of 22nd February, 2021.

8. That the Respondent is not allowed to proceed and auction the Applicant's said property in view of his own breach as that would amount to an unfair enrichment and benefit accruing from its own breach of a contractual term.

9. That in fact, from the Respondents' conduct during the subsistence of the dispute herein, it is clear that it has been deliberately failing to keep its contractual obligations with the sole intention of ensuring that the Applicant herein defaults in repayment of the loan as that they can proceed to auction the same at a throw away price.

10. Further, only about Kshs.6,000,000/- has fallen due for payment as the final installment was to be paid on 10th August, 2021 and hence it would be totally unjust to sell a property worth over Kshs.47,000,000/- to recover such small amounts.

11. That the Applicant is totally committed to settling its dues with the Respondents and has already signed a sale agreement dated 14th February, 2021 for the disposal of one of their properties L.R. No. Laikipia/ Uaso Narok/1064 which proceeds are intended to settle the current debt with the Respondent.

12. That in any case, the Applicant has not been served with the relevant statutory notices under the Land Act and the Auctioneers Act hence the scheduled public auction is unlawful, improper and hence null and void for purposes and intents.

13. That further, the Respondent has not been supplied with the updated loan account statements as to be aware of the amounts being sought to be recovered by the sale of his property for transparency and accountability purposes.

14. That additionally, the Respondent has undervalued the Applicant's property by over Kshs.12,000,000/- as per the valuation carried out by the Applicant's valuer and hence there is need to establish the real value of the property before any auction is done, in the event the same were to be allowed to proceed.

15. The 1st and 2nd proposed parties are aggrieved by their continued listing with the CRB and are interested in joining issues with the Applicant in claiming for damages for erroneous listing by the Respondent herein.

16. That the Applicants require leave to amend the amended plaint filed herein since the pleadings have already closed. The amendment sought and enjoining the 1st and 2nd proposed Interested Parties who are the directors of the Plaintiff/Applicant herein is necessary to enable the court determine all the issues arising in this suit and for all and to prevent multiplicity of suits in future.

17. The Respondents affidavit is sworn by John Wageche on 17th March, 2021. Essentially Respondent raises the issue that The current application is res judicata based on the fact that several other applications have been brought by the Plaintiff herein seeking stay of sale of the suit property.

18. That the Plaintiff had not stated where the source of the funds to service the instalments would come from and the Plaintiff's claim herein is thus meant to evoke the sympathy of the court.

19. That the Defendant did in fact delist the Plaintiff and its directors from CRB immediately after payment of the 1st Instalment. The Defendant has supplied letter dated 8th December, 2020 marked annexure JW-4b as evidence of the said delisting.

20. The Defendant argues that the delisting talked of was not a complete delisting but rather changing the status of the listing from non-performing to performing.

21. The Defendant argues that the Plaintiff's directors had to remain listed as a regulatory issue since the loan had remained unpaid for several years as per the provisions of the CBK Credit Reference Bureaus Regulations, 2013.

22. That the competence of the valuer who prepared the valuation report has not been questioned and that there is no sufficient evidence that the property is undervalued and the order for a fresh valuation is a delaying tactic.

23. The Plaintiff has come to court with unclean hands and is not keen on settling the loan amount and the Respondent stands to suffer great loss if the court grants the orders sought.

24. Further affidavit sworn by Douglas Mwangi Muteru is to the effect that, the application arises out of new set of facts that did not exist when the other application was being determined.

25. The current application arises from the newly negotiated agreement dated 12th August, 2020 which was blatantly breached by the Defendant by adamantly refusing to remove the Plaintiff from CRB thus causing it to default on its obligations thereon.

26. Further, the Defendant herein even after being in default itself, caused an advertisement to be placed on the Daily Newspaper intending to sell the suit property by public auction.

27. This new threat necessitated the Plaintiff herein to move to court to seek redress through the current application.

The cause of action as regards this application was not before the court in the previous applications as it did not exist and hence the application cannot be res judicata.

28. Further, the instant dispute is said to be escalated by Clause 6 of Settlement Agreement of 12th August, 2020.

29. The parties were directed to canvass the application via written submissions which the Applicant filed but Respondents are yet to file.

APPLICANT'S SUBMISSIONS:

30. The applicant submits that, main issue arising in this matter is ***whether the Defendant breached Clause 6 of the Settlement Agreement of 12th August, 2021 and whether by that breach he is entitled to benefit thereof by auctioning the suit property.***

31. It is submitted that the respondent delisted the Plaintiff and its directors from CRB but have supplied no evidence whatsoever of delisting. The Plaintiff, has annexed documents showing that and its directors particularly one Douglas Mwangi Muteru are still listed to date.

32. Further in change of version of their arguments, in replying Defendant then argues on paragraph 23 of their replying affidavit that the delisting they were talking about only entailed changing the status from non-performing to performing.

33. However, this new allegation by the Defendants is not what parties agreed upon. The term of the agreement stated that the Defendant would delist the Plaintiff and its directors.

34. It follows therefore that the Defendant is in breach of the terms of the contract of 12th August, 2021 which required it to delist the Plaintiff and its director from CRB but which term the Defendant never fulfilled.

35. Thus it contended that, it is a clear principle of law that a party can never be allowed to benefit from its breach. Applicant cites the case of ***Alghussein Establishment v Eton College [1991] 1 All ER pp 26*** the court held as follows:

“The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain under a continuing contract on account of his breach....”

36. Further, Lord Diplock in ***Cheall v Association of Professional Executive Clerical and Computer Staff [1983] 1 All ER*** stated that:

“This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely upon an event brought about by his own breach of contract..... as “A man cannot be permitted to take advantage of his own wrong.”

37. Equally, in the case of ***Abu Chiaba Mohammed v Mohammed Bwana Bakari & 2 Others [2005] eKLR*** it was held that:

“.....no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man.....he cannot be allowed to take advantage of his wrong.....the law will not and cannot permit such a party to rely on his own wrong to defeat an otherwise valid petition.”

38. It is further submitted that the mere fact that the Plaintiff was also seeking for stay of sale by public auction in the other applications does not mean that the application is *res judicata*.

39. As clearly explained in the Applicant's further affidavit of 23rd July, 2021, this application was brought about by the fact that new issues have arisen since the previous applications were determined. In the first instance, parties herein have since entered into a new agreement of 12th August, 2021.

40. Second, the Defendant actions of breaching the said agreement and purporting to sell the suit property brought about a new cause of action for the Plaintiff herein. These issues did not exist at the time the previous applications were being determined and were therefore never litigated upon.

41. The Plaintiff also seeks to enjoin the two directors of the Plaintiff to the suit on grounds that from the failure by the Defendant to delist them, they have also incurred loss and damage which they seek to claim. Their cause of action also arises from the same circumstances as the cause of action enjoyed by the Plaintiff in this suit. Consequently, these two issues should be determined together to avoid multiplicity of suit.

ISSUES, ANALYSIS AND DETERMINATION:

42. The starting point is the holding by Wendoh J in a ruling delivered on 19th May, 2020. The same stated in part;

“What was in dispute was Clause 3 of the consent Order made on 13th November, 2015 whereby the Respondent was supposed to notify the CRB to remove the Applicant from its listing as a debtor upon payment of Kshs. 8,000,000/-.

After considering the application, I found that both the Applicants and Respondents were in breach of the consent Order in that the Respondents did not get the Applicant delisted from CRB after payment of Kshs. 8,000,000/- whereas the Applicant failed to pay the balance of the loan as agreed in the consent. It was not part of that the payment of the balance of the loan by the Applicant was dependent upon being delisted from the CRB. I therefore observed as follows:

“The legal position is that a party should never be allowed to take advantage of his wrongs/omissions at the expense of the other party.”

Having found as above, it means that the Applicants were not entitled to the order sought that the Respondents do comply with Clause 3 of the consent. That is why the court believed that it was doing justice by giving the parties time to renegotiate.

However, since the Applicants claim that the order nullifying the consent is prejudicial to them in that the interest that had been suspended had been loaded back to the loan, then this court will find that the order was made in error not knowing that it would affect the interest to be charged on the loan.

As to whether the Applicant will be entitled to an order of stay.

It is my view that the prayer is not merited. The Applicant still owes the Respondents a substantial amount of money on a loan that was granted to the Applicant way back in 2011. A dispute on the interest on the sums owed is not reason to stop the Respondent from exercising its right of redemption. As to whether the court can suspend an order, the Respondent has intimated its unwillingness to renegotiate and therefore that prayer cannot be granted.

In the end, I make the following orders:

- The order of 09th October, 2018 nullifying the consent of 13th November, 2015 is hereby set aside and the status reverts back to 9th October, 2018 when the court made its order;***
- The court’s order dated 9th October, 2018 is hereby reviewed to the extent that the parties will not be required to negotiate and enter into a fresh consent;***
- The prayer for stay of sale of L.R. Nyahururu/Municipality/Block 4/132 by auction is declined;***
- Costs to abide the hearing of the main suit.”***

43. The application herein turns on the effect of the clause 3 of the of the agreement of 10/10/2015. Under that clause the Respondent was supposed to notify the CRB to remove the Applicant from its listing as a debtor upon payment of Kshs. 8,000,000/-.

44. Judge Wendo in a ruling of 13/5/2020 found that both the Applicants and Respondents were in breach of the consent Order arising said agreement in that the Respondents did not get the Applicant delisted from CRB after payment of Kshs. 8,000,000/- whereas the Applicant failed to pay the balance of the loan as agreed in the consent. The Judge proceeded to affirm that, it was not part of that the payment of the balance of the loan by the Applicant was dependent upon being delisted from the CRB.

45. The aforesaid holding was never challenged in an appeal or review thus it still stands as valid. In short the same is to the effect that it was not an imprimatur for applicant to breach the agreement of the payment of the loan as per the schedule set by consent which reduced it into a consent order.

46. The clause was only obligating the respondent to notify CRB to remove the name of the plaintiff from its data base of the defaulters. It was not the respondent to delist the applicant from CRB as commonly referred in applicant documents.

47. In the agreement there was no stated consequences as against respondent in default of clause 3 of the consent order of 13/11/2015 unlike in clause 6 which listed consequences of default by the applicant. Among the consequences was re-advertisement of the suit property and continuation of the loan recovery process.

48. The agreement of 10/10/2015 was converted into a court order of 13/11/2015 thus apparently compromising /concluding the suit. The orders of 9/10/2018 nullified the consent order of 13/10/2015 and subsequently the same were reviewed by Wendo J in ruling referred to herein above of 19/5/2020 thus reinstating the consent orders of 13/13/2015 which compromised the entire suit.

49. To date none of the parties has challenged Wendo J ruling aforesaid nor sought to impugn the orders of 13/11/2015 thus the suit stands compromised.

50. Thus the sought stay of process of loan recovery under clause 6 (c) of the consent which compromised the suit is misplaced as suit is concluded.

51. The court cannot neither compel the delisting of the applicants and even its directors from CRB pending suit as the suit is no longer

pending. The plaintiff and its directors have wide avenues to pursue their rights and claims outside this finalized suit.

52. Further the reliefs sought of amendment of pleadings and enjoining other persons as parties also are not available at the stage the suit is as compromised thus leaving no room for further litigation within it. Thus the application is dismissed except to the extent court states below;

53. The court is of the view that prayers D and F would advance the interest of justice for all the parties thus the court makes the orders;

i. The parties will each appoint a valuer to conduct valuation of the suit property within a period of 30 days from dates herein and same 2 valuations to exchanged and filed in court on or before 35th day of the orders herein.

ii. The applicant will bear respondent valuers fees.

iii. The respondent shall furnish the applicant statement of account disclosing all charges including interest loaded and total amount recoverable to date of the valuation and a set of the same report be lodged in court 7 days after valuation.

iv. Parties to bear their own costs of the application.

v. There be liberty to apply.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 4TH DAY OF NOVEMBER, 2021.

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CHARLES KARIUKI

JUDGE