



**REPUBLIC OF KENYA**

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

**COMMERCIAL & TAX DIVISION, MILIMANI**

**HCCC NO. E026 OF 2018**

CECILIA NAMSI MUNYIRI.....1<sup>ST</sup> PLAINTIFF/APPLICANT

PAUL MUNYIRI KAGUAMBO.....2<sup>ND</sup> PLAINTIFF/APPLICANT

NAMSI LIMITED.....3<sup>RD</sup> PLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE COMPANY

OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT

KEYSIAN TRADERS AUCTIONEERS..2<sup>ND</sup> DEFENDANT/RESPONDENT

**RULING**

1. The Notice of Motion of 28<sup>th</sup> January 2019 seeks the following prayers:-

1. Clause 6 of the Consent Order issued on 30<sup>th</sup> May 2018, by this Honourable Court, be enforced.

2. The costs of this Application be borne by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants.

2. The entire consent of 30<sup>th</sup> May 2018 reads as follows:-

By consent of Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants and Counsel for the 1<sup>st</sup> Defendant/Respondent it is hereby agreed that:-

1. That the amount of Kshs.1.5 Million held in Namsi Interiors Limited Account Number 1000067039 with HFC be transferred immediately to Namsi Ltd Loan account to reduce the outstanding loan arrears of Kshs.2.6 Million.

2. That the applicant pay a monthly amount of Kshs.246,000/= to clear the outstanding arrears together with the monthly payments of Kshs.247,057/= as per the charge.

3. That HFC upon verification of any amounts owed to Namsi Interiors Ltd shall consider a set off of the outstanding loan arrears.

4. That the Plaintiff shall bear the costs of the application and the Auctioneers fees as per scale provided under the law.

5. That the Respondents shall immediately call of the Auction due today by Keysian Auctioneers.

6. That in default of the above, execution to issue in 45 days and joint valuation be conducted by Llyod Masika within 30 days of the default, costs to be borne by the Applicants.

7. That the Applicants be allowed to extract and serve the hand written notes/consent as orders of the Honourable Court.

3. It is common ground that enforcement of clause 6 would be contingent to clause 3 of the Consent.

4. In the affidavit of Eunice Kamau sworn on 28<sup>th</sup> January 2019, the Bank takes the position that it verified the accounts of Namsi Interiors Ltd and communicated the same to the Plaintiffs' lawyers in a letter of 11<sup>th</sup> July 2018 which is reproduced below:

**Wednesday, July 11, 2018**

**Okatch & Partners Advocates,**

**NAIROBI**

**Dears Sirs,**

**RE: HCCC NO. E026 OF 2018**

**CECILIA NAMSI MUNYIRI & OTHERS –VS-**

**HFC LIMITED & ANOTHER**

**YOUR REF: 0 & P/479/2017**

**We refer to the above matter and your letter dated 9<sup>th</sup> July 2018.**

**Pursuant to the Consent Order issued on 30<sup>th</sup> May 2018, our client has since complied with the same. We refer you to our client's letter dated 10<sup>th</sup> July 2018 (copy enclosed). Further to the above and in compliance with Clause 3 of the Court's Order, our client has since interrogated your client's account. Our client does not owe any sums to yours. What is outstanding, as mine flags, is settlement of yours of professional fees. The invoice will be generated pretty soon.**

**Yours faithfully**

**EDWIN ABUYA**

**Cc: Legal Officer – Litigation**

**HFC Limited**

**NAIROBI.**

5. On the other hand, the 1<sup>st</sup> Plaintiff asserts that the Bank has frustrated the conduct of joint verification of the amount owed to the 3<sup>rd</sup> Defendant and has taken a position that contradicts an earlier one that the Bank owed them some money.

6. I have looked at the consent and reproduced the clause around which the dispute revolves. The consent empowered the Bank to verify if any amounts were owed by it to Namsi Interiors Ltd. There was no obligation for a joint verification. A consent is a contract and that is what the Plaintiffs signed up to. The case of the Bank is that it has verified the account and nothing is owing from it to the Namsi. Having made this communication to the Plaintiffs, then they had carried out their duty under the terms of the consent and since default persists then the default clause kicks in.

7. For that reason, I allow the Notice of Motion dated 28<sup>th</sup> January 2019 with costs.

**Dated, Signed and Delivered in Court at Nairobi this 7<sup>th</sup> Day of February 2020**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Kamwami for 1<sup>st</sup> Respondent

No appearance for Plaintiffs

Court Assistant: Nixon