



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

MISCELLANEOUS CIVIL CASE 301 OF 2018

DINESH CONSTRUCTION CO LTD.....APPLICANT

VERSUS

MOI UNIVERSITY COOPERATIVE SAVINGS &

CREDIT SOCIETY (MUSCO).....RESPONDENT

RULING

By Notice of Motion application, filed on 26th September 2019, the Applicant sought prohibitory order to be granted by the Court over Eldoret Municipality Block 4/321 in Eldoret Town to satisfy the decree issued on 31st May 2018.

APPLICANT'S CASE

The Applicant's case is as follows;

The Respondent contracted the Applicant to construct an office block on Eldoret Municipality Block 4/321 which commenced from 2008 to 2013 amid various challenges. The office block was handed over and the Respondent made payments but disputed/contested the amount remaining due and owing.

The parties opted to have the dispute arbitrated upon as per their Arbitration agreement. The Final award was granted on 13th March 2017. A valid Judgment of Ksh 141,153,863.17/- with simple interest at 14% per annum from 17th June, 2015 was granted. The Respondent contested recognition and enforcement of the Final Award by the Applicant and sought the Final Award to be set aside. By Ruling delivered on 30th April 2018 by L.J.Ngetich, the Respondent's application to set aside the Arbitral award was dismissed and the Applicant's application to enforce the award was upheld.

The decree holder was unable to locate any moveable property of the judgment debtor and could not execute the decree since May 2018.

The Applicant conducted official search at Eldoret Registry and confirmed that the Judgment debtor was/is registered proprietor of the suit property Eldoret Municipality Block 4/321.

After costly and painstaking investigations, the Decree holder discovered that the Judgment debtor was placed under liquidation having been dissolved under **Section 61 of the Cooperative Societies Act Cap 490**. The gazette notice of 20th July 2018 was annexed to the application.

The Applicant sought orders from Court, to preserve the suit property for sale in satisfaction of the decree emanating from a valid decision of the Court.

RESPONDENT'S CASE;

The Respondent's case is as follows;

The Respondent was represented by one of the Liquidators who filed Replying Affidavit on 6th February 2019 and admitted that the judgment against the Respondent was at a time the Respondent was a going concern.

The Respondent in liquidation deponed that they have various categories of creditors, a Secured Creditor, Cooperative Bank which attached the assets of the Respondent.

The Applicant submitted its claim and it was to be considered alongside other claims in accordance with **Insolvency Act 2015**.

The Applicant rushed to Court in both matters, the instant matter now in Court and the other matter related to the subject matter in Eldoret instead of waiting for the 1 year period of liquidation.

The Respondent contended that it would not be feasible for the Court to issue a Prohibitory order as the suit property is subject to Proceedings in **HCCC 40 of 2018 in Eldoret High Court**.

The Liquidators of the Respondent were yet to sit down with other Creditors and analyse all claims and arrive at possible means of satisfying the claims against the Respondent, prepare statement of affairs and present for approval to and from Commissioner for Cooperative Development within 1 year from date of liquidation of the Respondent.

The Respondent annexed to its Affidavit the Liquidation Order, the Gazette notice of liquidation order of 29th June 2018, interim/temporary orders by Eldoret High Court Civil Case Number 40 of 2018 *injunction/restraining Cooperative Bank of Kenya Ltd from any interference with suit property Eldoret Municipality/Block 4/321 in the name of Moi University Savings & Credit Cooperative Society Limited (Musco) (Under Liquidation) pending interpartes hearing on 21st September 2018*; and pleadings filed by the Applicant as 1st interested party to the proceedings in Eldoret High Court.

The Respondent sought the instant application dismissed with costs

DETERMINATION

ISSUE

After consideration of pleadings and submissions by parties and the issue(s) that commends itself for determination is whether in light of liquidation of the Respondent, execution of the decree may be effected and/or prohibition orders shall issue.

ANALYSIS

It is not in dispute or contested that the Applicant and Respondent entered into a contract for construction of an office block and thereafter, the Applicant was to be paid agreed/contracted amounts of funds.

It is also not in dispute that performance of the contract took place; the Applicant constructed the Office Block from 2008-2013 and handed over the building to the Respondent. The Respondent made payments but did not complete required payments.

It is further not in contention that parties moved to resolve their dispute through Arbitration that culminated to a Final Award of 13th March 2017 and the Arbitrator found the Respondent owed the Applicant Ksh 141,153,863.17/- interest at 14% & Costs of the reference and Arbitration.

It is also not contested that the Final Award after *interpartes* proceedings was upheld by the court vide order of 30th April 2018. The Claimant/Applicant obtained a decree and was unsuccessful in execution of the decree. A Notice to show cause was issued to the Respondent with no response. Therefore there remains in force a valid, regular and legal order of the Court on record whose execution to enable the Applicant enjoy fruits of his judgment is hampered by various challenges.

Of interest and this Court noted with concern is that this Court delivered Ruling on 30th April 2018. Immediately thereafter, the Respondent initiated proceedings before Commissioner of Cooperatives to liquidate the Respondent Cooperative Society under **Section 61 of the Cooperatives Act**; without disclosing the material fact that Ruling and order of the court upholding the Final Award was obtained before Court against the Respondent. The Cooperative Tribunal granted orders to liquidate the Moi University Co-operative Savings & Credit Society Limited which was gazetted on 29th June 2018 almost 2 months after the Ruling of the Court.

The Respondent contended that the Arbitral Award would be considered alongside other creditors especially the secured Creditor Cooperative bank and the Applicant ought to wait for the Liquidator to call the Creditors' Meeting. By the time of hearing of the instant application in July 2019, the 1 year period which the joint liquidators were to undertake the liquidation exercise had elapsed from the date of the gazette notice 29th June 2018; yet no evidence of any action was presented in Court or before the Cooperative Tribunal to demonstrate other than the gazette notice any efforts were taken towards the liquidation process.

With respect, the Respondent has not come to equity with clean hands. The Respondent entered into contract to have a 12 storey building erected by the Applicant named the project and the building later named **MUSCO PLAZA**. The Applicant mobilised funds, labour and equipment and moved on site in 2008. Despite challenges of delay to taking over the site, abandonment of the project, suspension of works, extension and variation of the project, delayed payments etc the building was handed over to the Respondent albeit disputed completion works alleged by the Respondent and default in instalment payment on the final agreed funds as alleged by Applicant.

The truth of the matter is the Respondent ended up with a constructed Office Block which is at their disposal and they are deriving financial and occupation benefit from the building. At the same time, there are funds due and owing to the Applicant. To withhold payment of the decretal amount due and owing to the Applicant from Arbitration and Court proceedings and the resulting decree while owning, running and

benefiting from the constructed building, amounts to and promotes unjust enrichment by the Respondent. See *Kenyatta International Convention Centre –vs- Greenstar Systems Ltd [2018]eKLR*;

“...it would lead to unjust enrichment if the Respondent were allowed to keep the benefit and user of the refurbished without having them pay for their value...the Claimant has performed its obligations under an invalid contract. The counter-performance expected of the Respondent, being payment for those works has not materialized. The Respondent has thereby been unjustly enriched. It should be noted that it is immaterial whether the counter-performance is based on a valid contract or not...it is therefore my conclusion on this issue that there ought to be restitution and the parties be taken back to where they were as if the Contract had not been entered into...”

Unjust enrichment is a doctrine of equity that ensures that a party cannot wilfully subvert the law and hold up its own illegality as a defence to deprive a litigant of its legitimate claim. The Respondent is the proprietor of the completed construction in terms of the performance of the contract between the Applicant and Respondent. The disputed payments were subjected to the dispute resolution process chosen by parties in their contract. The same resulted in the Final Award of 13th March 2017. The Court upheld the award, yet, upon the issue of the decree execution it could not be effected. The Respondent used the legal process to deflect a justifiable claim, by applying to be liquidated without full disclosure of material facts to the Tribunal. By grant of the liquidation order all assets of the Respondent are vested in the Liquidators, thereby depriving the Applicant of the fruits of its judgment. The court will not countenance gross abuse of the legal process to facilitate unjust enrichment by the Respondent.

The Applicant submitted that by virtue of **Section 38 of CPA** and **Order 22 Rule 48 (1) CPR 2010** the suit property Eldoret Municipality Block 4/321 registered in the Respondent’s name would be preserved by not being alienated, disposed off, wasted, encumbered, subdivided, transferred or in any other way interfered with. The Applicant also sought orders of sale of the suit property to realise the fruits of the Final Award of 13th March 2017 and Ruling of the Court of 30th April 2018.

Section 38 of Civil Procedure Act reads;

Powers of court to enforce execution

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

- a. by delivery of any property specifically decreed*
- b. by attachment and sale, or by sale without attachment, of any property;*
- c. by attachment of debts;*
- d. by arrest and detention in prison of any person;*
- e. by appointing a receiver; or*
- f. in such other manner as the nature of the relief granted may require:*

Order 22 Rule 48(1) Civil Procedure Rules 2010 reads;

Attachment of immovable property

1. Where the property to be attached is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such purported transfer or charge, and the attachment shall be complete and effective upon registration of a copy of the prohibitory order or inhibition against the title to the property.

2. A copy of the order shall be affixed on a conspicuous part of the property.

The Respondent submitted that by virtue of **Section 61 of Cooperatives Act**, the Commissioner of Cooperatives granted cancellation of registration/Liquidation of the Respondent Cooperative Society. It provides;

Procedure for dissolution

1. If the Commissioner, after holding an inquiry under section 58 or making an inspection under section 59 of this Act, or receiving an application made by at least three fourths of the members of a co-operative society, is of the opinion that the society ought to be dissolved, he may, in writing, order the dissolution of the society and subsequent cancellation of registration.

2. Any member of a co-operative society who feels aggrieved by an order under subsection (1) may, within two months after the making of such order, appeal against the order to the Minister with a final appeal to the High Court.

3. Where no appeal is filed within the prescribed time, the order shall take effect on the expiry of that period, but where an appeal is filed within the prescribed time the order shall not take effect unless it is confirmed by the Minister or by the High Court, as the case may be.

4. Where the Commissioner makes an order under subsection (1) he shall make such further order as he thinks fit for the custody of the books and documents and the protection of the assets of the society.

5. No co-operative society shall be dissolved or wound up save by an order of the Commissioner.

As provided by Section 65 of Cooperative Act, upon liquidation the properties of the Respondent shall be vested in the Liquidators.

Section 65 of Cooperatives Act provides;

Appointment of liquidator

“Where the registration of a co-operative society is cancelled under section 61 or 62, the Commissioner may appoint one or more persons to be liquidator or liquidators of that society (hereinafter referred to as the liquidator) and all the property of such society shall vest in the liquidator from the date upon which the order of cancellation takes effect”

If any person is aggrieved by an order or decision of the Commissioner of Cooperatives under Section 66 & 68 of the Act, then under Section 69 of the Cooperative Act the party may appeal within 30 days and if not satisfied may appeal to the High Court within 30 days.

Section 69 of the Act provides;

Appeal against order of liquidator or Commissioner

(1) A person aggrieved by any order or decision of the Commissioner or the liquidator under section 66 or section 68, as the case may be, may appeal against the order or decision to the Tribunal within thirty days of the order or decision.

(2) A person aggrieved by a decision of the Tribunal under subsection (1) may appeal to the High Court within thirty days of the decision

This Court confirms that the Commissioner of Cooperatives is mandated under the Cooperatives Act to cancel registration of the Society, grant Liquidation order and appoint liquidators. The issue is that the Respondent invoked the legal process under the Cooperatives Act without full disclosure of material facts; a Ruling from court upholding the Final Award against the Respondent had just been issued. In the absence of stay of execution, review, variation of the order or appeal, it is a valid order of the Court to be executed against the Respondent.

On the other hand, since appointment, no evidence was tendered by the joint Liquidators to show a meeting(s) called of all Creditors or any other action taken in furtherance of the liquidation process.

The joint liquidators invoked the **Insolvency Act 2015** yet the process they alleged involved presenting the proposal to the Commissioner of Co-operatives.

It is in these circumstances; that this Court finds in the interest of justice, if there is no legal intervention, the Applicant's right to legitimate expectation of fruits of the judgment will not be realized.

DISPOSITION

1. Therefore, from totality of the facts presented before this Court, I find the matter commends itself to grant of prohibition under Order 22 Rule 48 (1) CPR 2010 on suit property Eldoret Municipality Block 4/321 to be preserved by not being alienated, disposed off, wasted, encumbered, subdivided, transferred or in any other way interfered with.

2. The Court orders by virtue of Section 38 CPA 2010 the sale of the suit property Eldoret Municipality Block 4/321 or any portion valued to realise the fruits of the Final Award of 13th March 2017 and Ruling of the Court of 30th April 2018.

3. The application by the Applicant of 26th September 2018 is granted with costs.

4. Any execution of Court Orders over the suit property Eldoret Municipality Block 4/321 shall be effected once normalcy resumes from the ongoing Corona Virus pandemic upon official communication by the Government.

DELIVERED SIGNED & DATED IN OPEN COURT ON 15TH APRIL 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

NYAANGA & MUGISHA ADVOCATES-APPLICANT

J.C.K.CHEPTARUS & COMPANY ADVOCATES-RESPONDENT