



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 169 OF 2019

KENCOM SACCO SOCIETY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

1. I have before me two applications. One is filed by **KENCOM SACCO LIMITED**, the plaintiff, dated 17th July 2019. The second is filed by **NATIONAL BANK OF KENYA LIMITED**, the defendant (hereinafter the bank) and is dated 17th October 2019.

2. The Bank was approached by the plaintiff and following negotiations the Bank agreed to provide financial facilities to the plaintiff. Those facilities were under the Islamic Banking namely Musharaka and Mudaraba. By the plaintiff's application the plaintiff seeks injunctive orders to restrain the Bank from selling with the plaintiff's property, charged to the Bank as security for the financial facilities. The plaintiff alleges that on the charged property it was intended that the plaintiff would construct houses for sale within 12 to 18 months. However because the Bank failed to make prompt remittance of the facility the project took 6 years. The plaintiff also alleged that contrary to its expectation the Bank began to charge interest, which is contrary to Islamic Law of Banking that although the plaintiff borrowed Ksh 1.95 billion it has paid Ksh 2.4 billion and that what the parties should now do is agree on sharing of profit and loss on the amount of Ksh 1.95 billion. The plaintiff also expected that the Bank would participate, with it, in the implementation of the project. The plaintiff accused the Bank of abandoning the Islamic Law concept and alleged the Bank retracted to the conventional mode where the facility is bearing interest. The plaintiff is of the view the Bank's demand of Ksh 982,785,763.47 is highly exaggerated and baseless.

3. With a replying affidavit that runs into 75 paragraphs the Bank denied the depositions of the plaintiff and referred to the plaintiff's letter dated 20th May 2019 where the plaintiff offered to pay the Bank Ksh 750,000,000 by 30th June 2019 in full and final settlement. The Bank's position is that it is owed more than the amount offered by the plaintiff. That letter by the plaintiff because it is pivotal to my decision today will be reproduced as herein under:

KENCOM CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LTD

SAVE WITH KENCOM SACCO

A voluntary savings by KCB Employ

P.O. Box 48400-00100

Tel: 2241647/2244201/3561480

Nairobi, Kenya

Date: 20/05/2019

THE MANAGING DIRECTOR & C.E.O

NATIONAL BANK OF KENYA

HARAMBEE AVENUE

NAIROBI

Dear Sir,

RE: KENCOM SACCO FACILITY –DEBT SETTLEMENT PROPOSAL

This has reference to our meeting today with the NBK team on the Kencom Sacco facility.

We propose to pay Ksh 750 million as full and final settlement to distinguish the debt grounded on the following pil

1. There was a period of 18 months between 2014 and 2015 when the sacco continued to service the debt yet I project had stalled for lack of funding.

2. The market dynamics changed drastically hence there were no sales contrary to projections made on the project

3. That you immediately stop accruing any further interest charge as has been previously sought by the Sacco. Our proposal is hinged on the following understanding.

1. That NBK will not discharge the mother title to Kencom Sacco but will undertake to discharge all partial discharges for all sales as shall be directed by the Sacco Board.

2. That the collections in the pipeline will be released to Kencom Sacco Society Limited account domiciled at KCB.

3. That the mother title shall be discharged to Kencom Sacco upon discharging all partial discharges.

We believe this proposal will be considered favourably to bring to a close this long outstanding matter.

With co-operative regards

Robley Ngoje

Josephat Mutuku Roselyne Oddah

Chairman

Hon. Secretary

C.E.O

CC: Director – Islamic Banking

4. The Bank by its application seeks the entry of judgment on admission, to its favour for the amount of Ksh 750,000,000, which the Bank says is admitted by the plaintiff.

5. The issues presented by the parties hereof, if they were all to be considered at this interlocutory stage the court will be led to make final determinations without the benefit of hearing oral evidence. This would be contrary to the court of appeal decision in the case **Mbuthia vs Jimba Credit Corporation and another (1988) eKLR viz:**

“The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits.”

6. The order that commends itself and which I believe will do justice to this case is for an interlocutory injunction, as sought by the plaintiff, to be granted on condition. The condition I will impose is that the plaintiff does within 60 days pay to the Bank ksh 750 million. In default of that payment the injunction will automatically be vacated.

CONCLUSION

7. The orders of the court in respect to the Notice of motion dated 17th July 2019 are:

a) An interlocutory injunction pending the hearing and determination of this suit is hereby issued restraining the defendant from selling/transferring or otherwise dealing with property L.R. No. 12825/195 on condition that the plaintiff do pay to the defendant Ksh 750 million within 60 days from today. In default of that payment the injunction shall be vacated, without any further reference to the court.

b) The defendant’s application dated 17th October, 2019 is held in abeyance.

c) The costs of the Notice of Motion dated 17th July 2019 shall be in the cause.

d) At the reading of this Ruling parties will be given a dated for case management conference and for full hearing.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of MAY, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **4th** day of **May, 2020**.

MARY KASANGO

JUDGE