



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE No. 69 OF 2019

MOMBASA WATER PRODUCTS LTD.....PLAINTIFF

VERSUS

1. NIC BANK LIMITED

2. OCEAN FREIGHT (E.A) LIMITED.....DFENDANTS

RULING

1. This suit was commenced vide a plaint dated 19th August, 2019 and filed herein on 21/8/2019 seeking for the judgment against the Defendant for:-

- a) Immediate payment of the sum of Kshs.25,819,141.88 as claimed;
- b) Interest on (a) above at commercial rates from the date of filing the suit;
- c) Immediate and unconditional release of the original certificates of title C.R. No.60789 and C.R.No.60790 being held by the 1st Defendant to the Plaintiff;
- d) General damages in respect of the illegal lien exercised by the 1st Defendant over the original certificates of title C.R. No.60789 and C.R.No.60790;
- e) Refund for all monies unlawfully charged as penalty interest payments and default charges/Late fees;
- f) Interest on € above from the date of filing the suit;
- g) A declaration that the Plaintiff was not under any contract or contractual agreement or otherwise to repay the term loan of Kshs.70,000,000 plus interest;
- h) A declaration that the term loan minimum monthly repayment was limited to Kshs.1,610,689.25 and the maximum monthly repayment was to monthly payment of the payment guarantee Kshs.1,765,000/=;
- i) A declaration that the letter of offer dated 3rd August 2010 did not provide for the monthly repayments exceeding the monthly payment under the payment guarantee;
- j) An order that account be taken between the Plaintiff and the 1st Defendant;
- k) Interest in (k) above at court rate;
- l) Costs of the suit;
- m) Any other relief this Honourable Court may deem fit to grant.

2. Simultaneous to filing the suit, the Plaintiff filed a notice of motion application dated 19/8/2019 which is the subject of this ruling. The application is anchored under the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. The Plaintiff/Applicant, by this application seeks for the following orders;

a) That the court be pleased to order the 1st Defendant and/or its employees, servants and/or agents to release the original Certificate of the title for plot No. CR. No.60789 and C.R 60 790 to the Plaintiff;

b) That the costs of the application be provided for.

3. The application is based on grounds 1 to 29 on its face and further supported by the affidavit sworn on 19/8/2019 by **Joseph Mbugua Gichanga**, one of the Plaintiff's directors.

4. The Plaintiff's case therein is that it sold its property known as Plot No. 4811/VI/MN to the 2nd Defendant vide an agreement for sale dated 27/5/2010 and for a consideration of Kshs.165,000,000/=. That the 2nd Defendant made a down payment of Kshs.60,000,000/= and the remaining balance of Kshs.105,500,000/= was to be paid by installments of Kshs.1,765,000/= per month as from the month of September, 2010. The sale agreement further provided that the 2nd Defendant would obtain a guarantee from a reputable bank for repayment of the instalments.

5. The 1st Defendant then guaranteed the repayment of the balance of Kshs.105,500,000/= to be paid on equal monthly instalments of Kshs.1,765,000/= for a period of 59 months and the remainder of Kshs.1,365,000/= to be paid in the 60th month. It is the Plaintiff's case that the guarantee was later formalized by payment guarantee No. GTEO3-101046 dated 24/8/2010.

6. The Plaintiff further avers that on the strength of the said guarantee by the 1st Defendant, the Plaintiff applied for a term loan of Kshs.70,000,000/= to be paid in 60 monthly instalments of Kshs.1,610,689.25/=. The Plaintiff claims that the term loan agreement expressly provided that the purpose of the term loan was to partly re-finance the payment guarantee issued to the Plaintiff by the 1st Defendant on behalf of the 2nd defendant for Kshs.105,500,000/=.

7. The Plaintiff goes on to allege that the letter of offer dated 3/8/2010 for the term loan did not contain the repayment date as it was deemed that the repayment date would be the date when the 1st Defendant will be remitting the sum of Kshs.1,765,000/= as per the guarantee to the Plaintiff, that is, the agreement was that he, 1st Defendant, would credit the Plaintiff's term loan account No.1-000-696877 with repayments of Kshs.1,610,689.25 for the 60 months.

8. On the foregoing, the Plaintiff expressed the view that the 1st Defendant was not entitled to charge the Plaintiff default charges and penalty interest because the repayment was the responsibility of the 1st Defendant in terms of both the letter of offer and the repayment guarantee.

9. The plaintiff then alleges that the Defendants jointly violated the rights of the consumer of credit, breached the terms implied by the law and clogged the rights of the Plaintiff to receive its consideration for the property through the payment guarantee between the Plaintiff and the 1st Defendant for the credit facility of Kshs.70,000,000/=.

10. From the month of September, 2010 to August, 2013 (a total of 36 months) the 1st Defendant deposited the sum of Kshs.1,765,000/= into the Plaintiff's account as per the guarantee. Therefore according to the Plaintiff the 1st Defendant paid a total of Kshs.63,540,000/= and the balance left unpaid as per the guarantee is Kshs.41,960,000/=. Accordingly, the 1st Defendant deducted the sum of Kshs.1,610,689.25 from the Plaintiff's account for the settlement of the term loan as agreed.

11. The Plaintiff avers that the 1st Defendant breached its mandate by failing to inform the Plaintiff whenever it failed to remit monthly payments of Ksh.1,610,689.25 for the term loan or when it remitted less money than the agreed or other than that which was credited from the guarantee account as per the mandate. The Plaintiff pleaded some of the alleged breach and further averred that the 1st Defendant's actions violated Article 10, 46 and 47 of the Constitution by failing to accord the Plaintiff fair administration action.

12. The Plaintiff flaunts the 2nd Defendant for its failure in giving a guarantee from a bank which fraudulently deducted the Plaintiff's monies in its accounts and made false representation. According to the Plaintiff, the 2nd Defendant is obligated to indemnify the Plaintiff in respect of the monies fraudulently deducted from the Plaintiff's account and further that the 1st Defendant by virtue of its guarantee to repay the term loan, it is equally obligated to pay late fees or interests thereof.

13. It is the Plaintiff's case that the 1st Defendant has refused to return to the Plaintiff two original certificates of title being C.R. No.60789 and C.R.No.60790, both valued at over Kshs.65,000,000/= which the Plaintiff had given to the 1st Defendant when the Plaintiff needed facility yet no money was advanced to the Plaintiff and therefore the 1st Defendant cannot hold the titles for any other purpose. The Plaintiff adds that there is no mortgage or charge registered over the titles to entitle the 1st Defendant to hold them and the lien exercised by the 1st Defendant over the titles is not only a nullity but has caused the Plaintiff great loss.

14. The 2nd Defendant/Respondent controverted the instant application vide the grounds of opposition dated 23/8/2019 and the replying affidavit sworn by **Cecilia Ndeti** on 29/8/2019. It is the 2nd Defendant/Respondent's case that the application is seeking mandatory final orders while it does not meet the principles for granting mandatory orders at the interlocutory stage. Therefore according to the 2nd Defendant, the application has been made in bad faith, does not disclose any reasonable cause of action against the 2nd Defendant and amounts to an abuse of the court process.

15. The 2nd Defendant does not dispute that it entered into a sale agreement with the Plaintiff/Applicant for the sale of property known as Mainland North Section VI/4811 at an agreed price of Kshs.165,000,000/=. That, in terms of the agreement, the 2nd Respondent made a down payment of Kshs.60,000,000/= and the remaining balance of Kshs.105,000,000/= was to be paid at monthly instalments of

Kshs.1,765,000/=. It is also not in dispute that the 2nd Defendant/Respondent entered into a separate agreement with the 1st Respondent to be deducting a sum of Kshs.1,765,000/= from the 2nd Respondent's account on monthly basis and credit the same to the Plaintiff's account. However, the 2nd Defendant/Respondent avers that the entire sum of Kshs.105,000,000/= was deducted as agreed and credited to the Plaintiff/Applicant's account and therefore the whole suit against it stands without merit.

16. It is further averred that the Plaintiff/Applicant entered into a separate loan facility agreement with the 1st Defendant/Respondent which the 2nd Defendant is not privy to and thus the same cannot be enforced against it. The 2nd Defendant further avers that it is neither an agent nor principal of the 1st Defendant and that it does not hold any of the titles claimed by the Plaintiff.

17. The application is further opposed by the 1st Defendant vide its replying affidavit sworn on 11/9/2019 by **Stephen Atenya**, its Senior Legal Manager. It is deponed therein that the instant application is incompetent and fatally defective for the reason that the 1st Defendant has never been in possession or custody of the Plaintiff's Original title over the properties known as C.R 60789 and C.R 60790. It is averred that any allegation by the Plaintiff that the 1st Defendant is exercising lien over the titles and has refused to release the same to the Plaintiff is unfounded since no outstanding loan facility has been secured by the said titles. According to the 1st Defendant, no evidence has been led by the Plaintiff demonstrating that it deposited the said titles with the 1st Defendant and the date thereof.

18. The 1st Defendant does not deny guaranteeing the payment of Kshs.105,500,000/= with regard to purchase of property known as Plot No. 4811/VI/MN by the 2nd Defendant. The 1st Defendant however denies having unlawfully deducted funds from the Plaintiff's account as alleged. It is further averred that the Plaintiff does not deserve the refund of the funds claimed because the 1st Defendant has not acted fraudulently, dishonestly or in violation of the Plaintiff's rights in dealing with the Plaintiff's accounts.

19. The 1st Defendant is of the view that the application seeks a mandatory injunction which cannot issue at interlocutory stage without any legal or actual basis.

20. In Response, the Plaintiff filed supplementary affidavits sworn by **Joseph Mbugua Gichana**. He avers that the 1st Defendant's deponent, Stephen Atenya has committed the offence of perjury by falsely indicating the Plaintiff has never taken the Certificates of title for the parcels of land known as Plot No. 14002/II/MN and 14001/I/MN to the 1st Defendant yet by virtue of a letter dated 16/10/2019 addressed to the firm of M/s.Mogaka, Omwega, the 1st Defendant acknowledges that the Plaintiff handed the certificate titles to the 1st Defendant.

21. The parties disposed of the Application by filing submissions herein, which I have considered.

Plaintiff/Applicant's Submissions

22. It is submitted that the application is primarily against the 1st Defendant who has allegedly breached the fiduciary banker- customer relationship by obtaining by false pretenses the Plaintiff's monies and further stole or destroyed the Plaintiff's (2) certificates of title which is in violation of the Plaintiff's rights under Article 40 of the Constitution of Kenya, 2010.

23. It is the Applicant's case that since the application seeks for a mandatory injunction order, the guiding principles are laid out in the case of **Giella-vs-Cassman Brown & Company Ltd [1973]EA 358** as follows;

a) The Applicant must establish a prima facie case with the probability of success at the main trial.

b) The Applicant must show that if the order is denied, he would suffer irreparable harm that cannot be adequately compensated by an award of damages.

c) The Applicant has to show that the balance of convenience tilts in his favour should the court be in doubt as regards the test under the first and second requirements as a condition to grant interlocutory injunction.

24. The Applicant submits that it has established a prima facie case with a probability of success. The Plaintiff submitted extensively on the wrongful deduction of funds from its account by the 1st Defendant and the unjustified charge on late payment fees and interests. However, with regard to certificate titles C.R No. 60790 and C.R No. 60789, which are the subject of the instant application, the Plaintiff submits that at no point has the 1st Defendant adduced any evidence to show that it returned the two titles subject of the proceedings herein. According to the Plaintiff, the 1st Defendant has opted to deny possession of the said titles because it is fully aware that there is no basis as to why the 1st Defendant has been holding the titles. The Plaintiff reiterates that there is no justified reason for the 1st Defendant to keep holding the titles since there is no charge secured by the same. It is submitted that in **Mombasa CMCC No. 292 of 2016**, Mombasa Water Products Ltd and 2 others –vs- NIC Bank others, the 1st Defendant confirmed that it was holding the two titles for the reason that there were outstanding loan arrears owing to it. To that extend, the Plaintiff's case is that there are no loan arrears hence the certificate titles should be released. This line of argument is supported by the decision in the case of **Allan George Njogu Residences Limited-vs-National Bank of Kenya Ltd [2013] eKLR**.

25. Secondly, whether the Plaintiff/Applicant will suffer irreparable losses not capable of adequate compensation by an award of damages, it is submitted that by withholding the two certificates of title, the 1st Defendant has denied the Plaintiff the right to enjoy the use of the titles in violation of Article 40 of the Constitution. The Plaintiff avers that it cannot transact in any manner with the suit property without the original certificates of title and no amount of damages can compensate the violation. In support of the argument, reliance is placed in the case of, **Niaz Mohamed Janmoohammed –vs- Commissioner of Lands & 4others [1996] eKLR**.

26. Lastly, the Plaintiff/Applicant submitted that the balance of convenience tilts in its favour for the reason that the 1st Defendant has not demonstrated why it is holding the Plaintiff's certificate of title. On that basis, the Plaintiff seeks the court to grant the orders sought.

1st Defendant's Submissions

27. The 1st Defendant's submissions reiterate the grounds in its replying affidavit. Nonetheless, the 1st Defendant identifies four issues for determination as follows;

- a) *whether Plaintiff has satisfied the conditions to warrant a mandatory injunction;*
- b) *whether the Plaintiff has a prima facie case;*
- c) *whether the Plaintiff will suffer irreparable harm;*
- d) *where the balance of convenience tilts.*

28. On the first issue, it is submitted that the 1st Defendant has neither been in possession of the certificate titles for properties known as C.R. 60789 and C.R. 60790 nor has it admitted ever being in possession of such titles. The 1st Defendant is of the view that the allegations by the Plaintiff that it wrongfully deducted funds from the Plaintiff's account or are in violation of the Plaintiff's rights, has no nexus with the prayers sought herein. Further, that the Plaintiff has failed to meet the threshold set under Sections 107 and 109 of the Evidence Act, that he/she who alleges must prove the fact. According to the 1st Defendant, it holds more than 46 titles deposited by the Plaintiff but no specific evidence by the said plaintiff to show that it deposited the certificate C.R. 60789 and C.R. 60790 with the 1st Defendant and as such the order sought cannot issue at an interim stage. In support of this line of argument, the 1st Defendant relies on the cases of **Rosaline Mary Kahumbu-vs- National Bank of Kenya Ltd (2014) eKLR** and **Kenya Breweries Limited & Another -vs- Washington O. Okeyo [2002] eKLR**.

29. The 1st Defendant further submitted that the Plaintiff has failed to demonstrate a strong and clear case before a mandatory injunction can issue as was stated in the case of **Alex Wanaina t/a John Commercial Agencies -vs- Janson Mwangi Wanjihia [2015] eKLR** that;

i) A mandatory injunction need not to be given at an interlocutory stage. It could be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it would not normally be granted. However, it would be granted if the case was:-

- (a) Clear and one which the court thought it ought to be decided at once, or**
- (b) If the act done was a simple and summary one which could be easily remedied.**
- (c) Or if the defendant attempted to steal a march on the plaintiff.**

ii) The decision to grant a mandatory injunction at the interlocutory stage was a decision dependent on the discretion of a judge and each case had to be decided on the basis of its own peculiar facts and circumstances."

30. Secondly, on whether the Plaintiff has established a prima facie case, it is submitted that the Plaintiff has to show that it has a right and that right has been infringed by the Defendants as established in the case of **Mrao Limited -vs-First American Bank Limited & 2 others [2003] KLR 125**. In that regard, the 1st Defendant submits that the Plaintiff has failed to show that its rights with regard to the prayers sought have been infringed. The 1st Defendant is of the view that the alleged illegalities by wrongful deductions of Plaintiff's funds have no nexus with the orders sought and can only be adjudicated at the full hearing.

31. Thirdly, on whether the Plaintiff will suffer irreparable damage, it is submitted that there is no dispute as to the ownership of plots C.R. No.60789 and C.R. No.60790 and if the titles to the said plots are lost then the law provides for a procedure on how to replace the same. In essence, the 1st Defendant's submissions are that the Plaintiff will not suffer any irreparable harm and, in the event that the Plaintiff suffers any damage, the same cannot be attributed to the 1st Defendant as it has never been in possession of the two titles.

32. Lastly, it is submitted that the Plaintiff has failed to establish a prima facie case or demonstrated irreparable damages thus the balance of convenience tilts in favour of the 1st Defendant for the reason that if the court was to grant the orders sought therein, it would amount to compelling the 1st Defendant to produce titles it does not have. The court is invited to dismiss the application after concluding that the instant application is without merit, frivolous and amounts to an abuse of the court process.

The 2nd Defendant's submissions

33. The 2nd Defendant submits that for grant of interlocutory mandatory injunctions, the Applicant has to satisfy the conditions set in the case of **Giella-vs-Casman Brown, that is that**; the Applicant must establish a prima facie case with a probability of success; that the Applicant is likely to suffer irreparable loss that cannot be compensated by an award of damages if the orders sought are not granted and lastly if the court is in doubt then the balance of convenience should tilt in its favour. It is submitted that in the instant case, the Applicant has not satisfied any special and exceptional circumstances deserving the granting of the orders sought.

34. It is further submitted that the Plaintiff/Applicant and the 1st Defendant entered into a different contractual agreement and the same cannot be enforced against the 2nd Defendant for lack of privity. Finally, it is the 2nd Defendant's case that the Applicant has failed to demonstrate that it stands to suffer irreparable loss that cannot be compensated by way of damages unless the orders sought are not granted.

35. The Plaintiff filed submissions dated 22/10/2019 in response to the submissions filed by the 1st and 2nd Defendants.

36. I have extensively considered the submissions filed by all the parties herein.

Analysis and Determination

37. At the conclusion of the arguments by the parties herein, I have considered the entire Application in the light of the materials placed before the Court and find that the following issues arise for consideration:-

(a) Whether this application has merit;

(b) Whether the prayers sought can be granted; and

(c) Who should bear the costs?

38. I shall consider all the issues together and in that regard, I find that the application has been brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act. The application only seeks for a single prayer;

“that the court be pleased to order the 1st Defendant to release the original certificate of title for Plot No. C.R. No.60789 and C.R No.60790 to the Plaintiff/Applicant.”

39. The Plaintiff's case is that the titles were submitted to the 1st Defendant for purposes of procuring a loan facility. That the no facility was advanced and no charge has been created over the said certificates of title hence they should be released back to the Plaintiff/Applicant. The 1st Defendant on the other hand, has denied ever being in possession of the titles and further that no evidence has been adduced by the Plaintiff/Applicant on how the titles were deposited with it. In response thereof, the Plaintiff averred that the 1st Defendant merely denied being in possession of titles because it knew that there was no basis for holding the titles.

40. The Plaintiff further submits that vide a letter dated 24/9/2019, the 1st defendant acknowledged that the certificate titles in question were handed over to it but they were returned to the Plaintiff, hence according to the Plaintiff the same amounts perjury.

41. It is disputed as to whether the 1st defendant is in possession of certificates of title for Plot No. C.R. No.60789 and C.R No.60790. This is a triable issue as it requires proof of how the 1st defendant came to be in possession of the titles and whether there were terms and conditions thereof.

42. Our jurisprudence has laid down as a principle that where there is any single triable issue, the matter ought to go to full hearing – see the case of *Provincial Insurance Co. of E.A vs Lenny M. Kivuti*.

43. In this instance, the 1st Defendant denies that it is in possession of certificates of title for Plot No. C.R. No.60789 and C.R No.60790 as alleged by the Plaintiff/Applicant and hence the issue will have to be determined through a full trial. Secondly there are other prayers pending and the order sought will only partially determine the suit. It is important that all the prayers are determined together once and for all. This will give both parties a chance to present their case and exercise their right to be heard.

44. In conclusion, I find that no basis has been made for prayer (a) to be granted. Accordingly, the application fails and is hereby dismissed.

45. The parties are directed to comply with pretrial directions and fix the suit for hearing.

46. The costs of this application to abide the outcome of the suit after full trial.

It is so ordered.

Dated, Delivered and Signed at Nairobi this 19th Day of May, 2020.

D.O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in

open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes