REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL CASE NO.17 OF 2017

(FORMALLY HCC.62/2014)

MWATECH ENTERPRISES LTD....................................APPLICANT

- V E R S U S –

EQUATORIAL COMMERCIAL BANK LTD.............RESPONDENT

R U L I N G

The Notice of Motion dated 10/9/2019 was filed by the Plaintiff/applicant who seeks the following orders:

a) ……..spent;

b) ……..spent;

c) That the Hon Court be pleased to recall, review and/or set aside its ruling of 9/10/2018 nullifying the consent of the parties entered into on 13/10/2015 by reinstating the terms of the saidconsent;

d) That in the alternative, the court do suspend its orders of 9/10/2018 nullifying the consent of 13/10/2015 until and unlessthe parties herein have entered into a fresh consent;

e) That this court be pleased to grant any other or further relief as it may deem fit;

f) Costs of the application be borne by the respondent.

The application is brought pursuant to order 45 Rule 1 Order 51 Rule 1 Civil Procedure Rule Sections 1A, 1B & 3A and 80 of the Civil Procedure Act, Articles 40, 43, 47, 48, 50 and 159 of the Constitution.

The application is based on the following grounds: That the applicant filed an application dated 28/11/2016 and after considering it, the court rendered its ruling on 9/10/2018 to the effect that the consent which had been recorded on 13/10/2015 was deemed to be a nullity if the parties did not enter into another consent within 45 days; that the parties were unable to enter into a consent within the 45 days and hence the consent became a nullity; that the said order of 9/10/2018 was made in error because the court gave an order that was not sought for in the application dated 28/11/2016; that there were no grounds for the court to declare it a nullity; that the ruling was not delivered on 5/7/2018 as scheduled and the applicant was not aware of it until 25/7/2019 and that the file was not traceable at the registry and hence the delay in filing this application; that though the respondent was aware of the ruling, they never contacted the applicant for purposes of negotiating so as to enter into a fresh consent; that if the order of 9/10/2018 is not reviewed or set aside, the applicant is prejudiced since he has substantially complied with the terms of the consent but that the respondent has failed to honour its obligation to have the applicant delisted from the Credit Reference Bureau (CRB) and hence the applicant cannot access any credit from any other facility.

Douglas Mwangi Miteri the applicant’s director also deponed that the consent having been entered into by consent of all the parties, there were no grounds of fraud, duress to warrant the setting aside or annulment; that the respondent is not keen on negotiating and continues to accumulate interest on the loan and it is only fair that the court do reinstate the consent judgment of 13/10/2015.

In the further affidavit of the director dated 6/11/2019, Douglas Miteri deponed that since it seems that none of the parties knew of the existence of the order to negotiate afresh, it means the court’s orders could not be acted upon and should be set aside; that since no notice for the ruling was issued, the applicant was prejudiced and that as a result of the court’s order the respondents have escalated the loan from Kshs.9,000,000/= to Kshs.41,000,000/= as at June, 2019.

The application was opposed and **John Wageche**, a Senior Legal Officer at the defendant's Company filed an affidavit dated 7/10/2019 in which he deponed that the respondent was not aware of the ruling of this court dated 9/10/2019 nullifying the consentand allowing parties 45 days to enter into fresh agreement; that the respondent was not aware of the date for ruling until upon perusal of the file, due to poor communication with the former advocate whom they replaced on 14/2/2019; that the court explained in its ruling that both parties failed to comply with the consent orders and held that none was allowed to take advantage of its wrongs at the expense of the other which in their view is unfair; that despite various reminders to the applicant to settle the outstanding amount, there has been no settlement despite various attempts and that the loan continues to accrue interest and now stands at Kshs.41,743,788/= as at June, 2019. The deponent denied that the respondent has issued any notice or taken any steps towards advertising or selling the applicant's property though it is in the respondent's right to exercise its statutory power of sale over the security property as the debt is long overdue. He termed the application an abuse of the court process.

Counsel filed written submissions. The applicant's submissions were filed on 5/11/2018 and were highlighted by Ms. Mwaniki who urged that this court had no jurisdiction to order nullification of the consent order as the parties were denied a chance to address the court on nullification and the order has resulted in injustice to the applicant because interest that had been suspended has been added to the sums illegally owed.

It was urged in the submissions that the court has jurisdiction to review its ownorders as was confirmed in the case of ***Nguruman Ltd v Shompole Group Ranch and another, 2014 eKLR*** and ***Standard Chartered Financial Services Ltd & others v Manchester outfitter Ltd (2016) eKLR***. In the decision of ***Macharia M. Sande v Kenya Co-operative Creameries Ltd***; ***[1992] LLR 314*** and ***Nairobi City Council v Thabiti Enterprises***. The courts have held that a Judge has no power to decide on an issue that was not raised before him through the pleadings of which parties are made aware.

It was further submitted that once the consent of 13/10/2015 was adopted, it became a final order of the court and could only be set aside through Section 80 of the Civil Procedure Act and order 45 Rule 1 Civil Procedure Act.

The respondents' counsel did not attend court on the date set for highlighting of submissions. The respondent only filed written submissions in which counsel submitted that the applicants are not entitled to the prayer of stay because it was also sought in an earlier application; that there has been no intimation that the respondent wants to sell the suit property; that the loan granted to the applicant has been outstanding since 2014 which fact is admitted and hence the orders prayed for are not merited and the respondents should be allowed to exercise its statutory power of sale as this application is an abuse of the court process.

Whether this court's order of 9/10/2018 should be set aside, it was submitted that the court's ruling was based on the fact that both parties were in breach of the terms of the consent order in that the applicant failed to pay the installments as agreed and respondents did not delist the applicant from the CRB; that the ruling was given a year ago and none of the parties has been willing to enter into negotiation and the courts order should not be reviewed unless for concrete grounds. He urged that since both parties are in breach of the consent terms a consequence is that the contract can be set aside for non-performance or frustration by either party. He urged the court to dismiss the application.

I have now considered the application, the submissions and authorities that have been referred to by the counsel.

This application is brought under Section 80 of the Civil Procedure Act, Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

> ***"Any person who considers himself aggrieved:***
>
> ***(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is allowed by this Act***
>
> ***May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."***

The Rule provides as follows:

> ***"[1] Any person considering himself aggrieved:-***
>
> ***(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***
>
> ***[2] A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."***

The grounds upon which a review can be preferred are therefore, on account of mistake or error apparent on the face of the record, or for any other sufficient reason. The said application must be brought without delay.

I will first address the issue of delay. From the court record, the ruling on the application dated 28/11/2016 had been reserved for 5/7/2018 but for reasons which are unrecorded, it was not read. It was read on 9/10/2018 in the presence of Mr. Chege who held brief for Mr. Nyamwange, counsel for the respondent, while Mr. Olonyi for the applicant was absent. It is unfortunate that the court record does not contain the notice to the advocates but it is common practice that counsel are called on phone to come and take their rulings or judgments. What the clerk omitted to do was file the notice. However, the presence of Mr. Chege holding brief for Mr. Nyamwange is evidence enough that counsel had been notified of the date of the ruling otherwise the court would not have read the ruling. The respondent seems to admit in their affidavit that there was poor communication with their counsel and that is why they changed counsel.

The applicants have also changed counsel e and it is very possible that Mr. Olonyi who was then on record, was aware of the date, having been called on phone. However, the court will accept thatthe communication by the court to counsel was not to the expected standards and the delay in filing the application is excusable.

Whether there is an error on the face of the record that needs to be reviewed?

First of all, I wish to agree with the applicant that the order granted by the court was not sought by the parties. As clearly captured, the court made the order in thehope that justice would be done to the parties. Generally, a court will only confine itself to the orders sought in an application as was stated inter alia in ***Macharia M. Sande (Supra)“a Judge has no power to decide on issue not raised before him through the pleadings of which parties are not made aware.”***

I also agree that courts have jurisdiction to review their own orders if they fall within the ambit of Order 45 Civil Procedure Rules. I agree with the decision by J. Musinga in ***Nguruman Ltd (Supra)***where he stated ***‘Relating to the court’s jurisdiction to review certain aspects of its rulingdelivered on 19/4/2013 in Nairobi Civil Appeal No.Nai.18/2012, I had the view that Rule 57(2) grants this court jurisdiction to vary or rescind an order made in an application. I believe there are sufficient grounds for holding that the order for stayof further proceedings was not merited. I summarize these grounds as follows:***

> ***(a) ……………***
>
> ***(b) …………..***
>
> ***(c) The orders granted were not sought by the respondents;***
>
> ***(d) None of the parties were given any opportunity to addressthe court on the issue of stay of further High Court proceedings.”***

What was in issue before me was the application dated 28/11/2018 whereby the applicant sought inter alia, to have the court order the respondents to comply with the terms of the consent order filed in court on 13/10/2015 and stay the sale of ***L.R.Nyahururu/Municipality/Block 4/132*** by way of Auction.

What was in dispute was clause 3 of the consent Order made on 13/11/2015whereby 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 the consent that the payment of the balance of the loan by the applicant was dependant 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 torenegotiate.

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. In ***Mrao Ltd v First American Bank***, where the sums due were disputed, the court cited ***Halbury’s Laws of England Vol.32 [4th Edition] paragraph 725*** which states:

> ***“725 when a mortgage may be restrained from exercising power of sale. The mortgage will not be restrained from exercising his power of sale because the amount due is in dispute because the mortgage has begun a redemption action, or because the mortgage objects to the manner in which the sale is being arranged.”***

Again in ***National Bank of Kenya Ltd v Pipeplastic Samkolit & another [2001] KLR 112*** the court stated:

> ***“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”***

That position of the law has not changed. There is no evidence before the court showing that the defendant has levied interest on the plaintiff's loan account over and above what had been agreed upon by the parties. The IRAC report that has been relied upon by the plaintiff to support his case on the issue of interest was prepared on the basis that the Banking Act is retrospective in its operation. In view of the court's finding on the issue, the report is of no assistance to the plaintiff.

I wish to add that I am in agreement with the defendant that a dispute over the amount payable without more is not a ground for restraining a charge from exercising its statutory power of sale. In the case of, Priscillah Krobought Grant vs Kenya Commercial Finance Co. Ltd. and 2 others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R.) (unreported), the court stated as follows:-

"Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another vs Shah Depar Devji (1965) E.A.91, 32 Halsbury's Laws of England [4th Edition] paragraph 725 and Uhuru Highway Development Ltd. vs Central Bank Kenya and 2 others, Civil Application No.Nai 140 of 1995 (unreported) per Kwach J.A."

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 respondenthas intimated its unwillingness to renegotiate and therefore that prayer cannot be granted.

In the end, I make the following orders:

(1) The order of 9/10/2018 nullifying the consent of 13/11/2015 is hereby set aside and the status reverts back to 9/10/2018 when the court made its order;

(2) The court's order dated 9/10/2018 is hereby reviewed to the extent that the parties will not be required to negotiate and enter into a fresh consent;

(3) The prayer for stay of sale of L.R.Nyahururu/Municipality/Block 4/132 by auction is declined;

(4) Costs to abide the hearing of the main suit.

Dated, Signed and Delivered at *NYAHURURU* this *19th* day of *May,* 2020.

....

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Mwaniki for plaintiff/applicant

Respondent - Absent

Eric – Court Assistant