



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. COMM CASE NO. E 1185 OF 2020

KHADAR DEVELOPERS LIMITED.....APPLICANT

-VERSUS-

DIAMOND TRUST BANK LIMITED.....RESPONDENT

RULING

1. A preliminary objection is what used to be a demurrer, which is a pure point of law which when raised it can dispose of the matter before court. It cannot be raised if there are any facts to be ascertained or where facts are in dispute. It is raised on the basis that the facts on record are true and are agreed upon between the parties. (See **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**).
2. The agreed facts in this matter are that; the parties were and are still in a Lender and Borrower relationship. While in such a relationship in 2015, the applicant delivered to the respondent its title **LR. No. 13871 IR No. 141305/1** (hereinafter “*the said title*”) with the understanding that they would jointly seek for a buyer therefor.
3. As it were, a buyer was not found and the applicant sought the return of the said title from the respondent. In particular, the applicant sought the aforesaid return in order to offer the same as security in order to raise a bank guarantee for Kshs 100 million ordered on 23/9/2020 in H.C.C.C No. 139 of 2018. In the said suit, the applicant’s property is due for auction on 13/11/2020 if the aforesaid bank guarantee is not raised.
4. On the aforesaid background, the applicant took out this miscellaneous application seeking an order that the respondent does deliver to court the said title. The application was certified urgent for hearing on 5/11/2020.
5. When the matter came up for hearing, **Mr. Shah** Learned Counsel for the respondent opposed the same vide the preliminary objection dated 3/11/2020. The objection was that, the Motion was an abuse of the court process as there was no suit pending on which the Motion could lodge, contrary to **section 19 of the Civil Procedure Act** and **Orders 3 and 37 of the Civil Procedure Rules**.
6. **Mr. Shah** submitted that there are only 3 modes by which a suit can be commenced, viz, by Complaint, Originating Summons (Motion) or by a Notice of Motion in Judicial Review proceedings. That since the parties’ relationship was that of a lender and borrower, the proper way to have commenced these proceedings would have been by way of an Originating Summons under **Order 37 of the Civil Procedure Rules**. Counsel referred to the decisions in **Edna Cheronno Bore v Spire Bank Ltd & Anor [2018] eKLR**, **Diamond Trust Bank Kenya Ltd v Sanlam General Insurance Ltd & Another [2020] eKLR** and **Cyril J Haroo & Another v Uchumi Services Ltd & 3 Others [2014] eKLR** in support of those submissions.
7. On his part **Mr. Kaveke** Learned Counsel for the applicant submitted that; under **Order 51 Rule 10 (2) of the Civil Procedure Rules**, no application is to be dismissed for want of form. That since the present proceeding is a Miscellaneous Application, there is, no provision in the **Civil Procedure Act and Rules** on how a miscellaneous application is to be commenced. That this was in tandem with **Article 159 of the Constitution of Kenya** which discourages technicalities.
8. **Mr. Kaveke** further submitted that where there is no procedure provided, the court invokes its inherent jurisdiction and permits the procedure taken by a party. Counsel cited **Harlsbury’s Laws of England 4th Edition vol 37 Para 14** in support of that proposition. He further cited the decision of **Kenya Power and Lighting Company vs Benzene Holdings Ltd [2016] eKLR** for the proposition that the court should invoke its inherent power and save a pleading that has been brought under a wrong provision of the law.
9. The court agrees with **Mr. Kaveke’s** submission that the court should not uphold a technicality and sacrifice substance or justice. Further that, where necessary, the court should bend backwards to accommodate a litigant rather than displace him from the seat of justice for want of form. This is what **Article 159 of the Constitution and Sections 1A, 1B and 3B** seek to buttress, the famous **Oxygen principle**.

10. However, the Court of Appeal has delivered itself firmly on the *oxygen principle* (“*00 principle*”) including in the case of **Hunker Trading Company Ltd vs Elf Oil Kenya Limited** wherein it stated:-

“It seems to us that in the exercise of our powers under the “Oxygen Principle”, what we need to guard against is any arbitrariness and uncertainties. For that reason, we must insist on full compliance with past rules and precedents which are Oxygen compliant so as to maintain consistency and certainty. We think the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of power. If improperly invoked, the oxygen principle could easily become the unruly horse...”

11. This court takes cognisance of the fact that, the constitution requires the courts under **Article 159** to render justice without undue regard to procedural technicalities. However, where a party fails to comply with express provisions of the law on how to move the court, the court has no discretion by way of the oxygen principle to breathe life to a proceeding that is contra-statute. That will be illegal. Courts are there to apply and protect the law. They only tamper the application of the law with fairness and justice. Courts cannot encourage parties to act outside the law.

12. The procedure on how to move the court for relief is not a technical procedural issue. It is a substantive issue because, it enables the parties to present their respective cases with certainty and in a convenient and predictable manner. With certainty or procedure, prejudice is avoided. This is what the procedural law and rules are for.

13. **Section 19 of the Civil Procedure Act** provides that every suit shall be instituted in such manner as may be prescribed by rules. In this regard, a court of law will not have jurisdiction to entertain a proceeding that is commenced contrary to the law.

14. It is not in dispute that the parties in this matter are in a Lender-Borrower relationship. Contrary to the submission of the applicant, there is provision regarding matters that arise between borrowers and lenders.

15. **Order 37 Rule 4 of the Civil Procedure Rules** provides:

“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, may take out as of course an originating summons, returnable before the Judge in Chambers, for such relief of the nature or kind following as may be by summons specified, and as the circumstances of the case may require, that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee.”

16. The view that this court takes is that, the subject title was delivered by the applicant to the respondent on the basis of the borrower-lender relationship between them. The issue of the surrender back or delivery by the lender to the borrower of the same is one between a mortgagee and mortgagor under the aforesaid **Rule 2 of Order 37**. In view thereof, the court is unable to agree with the submission of the applicant that it exercises the inherent jurisdiction as enunciated in **Harlsbury’s Laws of England Vol 37 Para 14 and in KPLC v Benzene Holdings Ltd (supra)**.

17. Further the court notes that the only substantive prayer in the Motion is couched as follows:-

“2. THAT pending the hearing of this application interpartes, an order to compel the Defendant to deliver the title LR. No. 13871 IR No. 141305/1 to Court.”

18. The aforesaid prayer is a mandatory injunction that is couched in the interim. It is not clear what would happen to the title once it is delivered to court. The same pre-supposes that there would be further proceedings. It is not clear how and on what, the supposed further proceedings would be predicated or hinged.

19. In **Edna Cheronu Bore v Spire Bank Limited & Another [2018] eKLR**, the court held that a miscellaneous application filed without a substantive pleading, hangs in the air. That without the same being anchored in a pleading, it is invalid. This court associates itself with the said decision and applies the same in this case accordingly.

20. In view of the foregoing, the court finds the Motion before it to be fatally defective. The **Preliminary Objection** is meritorious, the same is upheld and the Motion dated **30th October 2020** is hereby struck out with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 9th day of NOVEMBER, 2020.

A. MABEYA, FCI Arb

JUDGE

Before Justice A. MabeYA

C/A Sophie

For the Applicant

For the Respondent:

ORDER

This decision is hereby virtually delivered this 9th day of **November, 2020**.

A. MABEYA, FCI Arb

JUDGE