



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 95 OF 2018

UBA KENYA BANK LIMITED.....PLAINTIFF

VERSUS

ALBRIGHT HOLDINGS LIMITED.....1ST DEFENDANT

RAPID COMMUNICATIONS LIMITED.....2ND DEFENDANT

ANWAR MAJID HUSSEIN.....3RD DEFENDANT

BENSON NDETA.....4TH DEFENDANT

RULING

1. The Plaintiff, UBA Kenya Bank Limited (UBA) is a limited Liability Company duly licensed to carry on the banking business under the Banking Act, Cap 488. Albright Holdings Limited (Albright), the 1st Defendant and Rapid Communications Limited (Rapid), the 2nd Defendant are Limited Liability Companies registered under the Companies Act 486. Anwar Majid Hussein (Anwar), the 3rd Defendant and Benson Ndetta (Benson), the 4th Defendant are both adult male.

2. This present dispute has had a long history which needs to be considered for better understanding of the application, for Ruling before me.

BACK GROUND

3. It is common ground that UBA provided a banking facility to Rapid of USD 4 Million. The terms of that banking facility were set out in a letter dated 3rd November 2013. On the facility subsequently being restructured UBA obtained securities of Legal Mortgage over six different properties and guarantee from Albright, from Anwar and Benson.

4. Rapid defaulted in servicing the facility and UBA began to exercise its statutory power of sale. Albright and Rapid filed HCCC 440 of 2014 to challenge UBA's exercise of statutory power of sale. A consent was entered into in that matter but Albright and Rapid failed to honour the decree passed thereof.

5. UBA did again begin the exercise of its statutory power of sale. Albright filed HCCC 302 of 2015 suing UBA and challenge that exercise of power of sale. A consent was entered into, in that matter. In that consent the party who was the purchaser of the charged properties, namely Sultan Palace Developers Limited, was joined in the suit, but only for the purpose of recording that consent. That consent was adopted by the Court on 19th January 2016 and was in the following terms:

IT IS HEREBY ORDERED BY CONSENT:-

1. *THAT the Purchaser shall issue bank to bank guarantee in the terms agreed between the Purchaser and the Defendant on 11th January 2016, in the sum of Kshs. 638,425,198.95.*

2. *THAT Costs due to the Defendant from the Plaintiff shall be taxed if not agreed. The Plaintiff's advocates shall issue an undertaking to the Defendant's advocates to secure the said costs.*

3. *THAT upon receipt of the guarantee and undertaking the Defendant will release to the advocates of the purchasers, the title documents and the discharges of the suit properties.*

4. THAT the Plaintiff reserves the right to seek a full account of the debt as redeemed and to challenge the amounts thereof.

5. THAT upon registration of the transfers to the purchaser, the parties will agree on the rate of conversion of the amount due to the Defendant in Dollars. In default of an agreement, the purchaser will be at liberty to purchase Dollars in the market and to make payment in Dollars.

6. It is important to state that some of charged properties were sold to a purchaser by private treaty. UBA however, in the suit before Court, contends that the payment made by the purchaser did not fully settle Rapid's indebtedness to UBA. UBA has pleaded in this case that Rapid is still indebted to it at the amount of Kshs. 9,959,634.87 together with interest. This is the amount UBA seeks in this present suit jointly and severally against all the Defendants.

NOTICE OF MOTION

7. Before me for consideration in this Ruling is a Notice of Motion dated 9th May 2018. It is filed by all the Defendants. The application seeks three distinct prayers. The first is for dismissal of this suit. The second is for this suit to be consolidated with HCCC No. 302 of 2015. The third prayers, which is in the alternative to the second prayer, is for the hearing of this suit at the same time as HCCC 302 of 2015.

8. The only ground the Defendants set out as the basis of granting the prayers in the Notice of Motion is that the determination of these suitS may bring conflicting judicial decision on the subject matters.

9. Albright, the Plaintiff in HCCC 302 of 2015, Amended its Plaint, on a date after this present suit was filed by UBA, by which amendment Albright challenged the amount claimed as still outstanding in the account of Rapid with UBA. By that amendment Albright seeks the prayer that the amount claimed as outstanding by UBA be subjected to an independent auditor.

10. The amount which Albright challenges in HCCC 302 of 2015 is the amount UBA seeks judgment for in this present suit. It would therefore follow that the Court is sought, in both suits, to determine the amount Rapid is indebted to UBA and consequently, on making that determination, the Court would determine the indebtedness of the other Defendants as guarantors.

11. There is no doubt that the issues are one and the same in both suits. It is therefore in the interest of justice that both suits be heard together. In the case **BENSON G. MUTAHI –V- RAPHAEL GICHOVI MUNENE KABUTU & 4 OTHERS [2014] eKLR** Justice B. N. Olao considering an application for consolidation had this to say:

“The principles of consolidation of suit was re-stated in STUMBERG AND ANOTHER –V- POTGEITER (1970) E.A. 323 as follows:-

“where there common question of Law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”

12. In this case the issue of Rapid's indebtedness to UBA is the common thread between this suit and HCCC 302 of 2015. It is therefore desirable that these two suits be consolidated to be determined together.

13. Although the Defendants have succeeded in one of the prayers of the Notice of Motion the costs shall be in the cause, in the interest of justice.

14. The orders of the Court are:

(a) HCCC No. 95 of 2018 and HCCC 302 of 2015 are hereby consolidated. The lead file shall be HCCC No. 95 of 2018.

(b) The costs of the Notice of Motion dated 9th May 2018 shall be in the cause.

(c) Since these combined claims fall within the pecuniary jurisdiction of the Chief Magistrate's Court HCCC No. 95 of 2018 and HCCC 302 of 2018 (as consolidated) are hereby transferred to the Chief Magistrate's Court Milimani for trial.

(d) At the reading of this Ruling a mention date before the Chief Magistrate's Court Milimani will be given.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH day of MARCH, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....COUNSEL FOR THE PLAINTIFF

.....COUNSEL FOR THE 1ST DEFENDANT

.....COUNSEL FOR THE 2ND DEFENDANT

.....COUNSEL FOR THE 3RD DEFENDANT

.....COUNSEL FOR THE 4TH DEFENDANT