



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 4 OF 2017

SIGNATURE TOURS AND TRAVEL LIMITED.....PLAINTIFF

VE RSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. This is an application dated 12th March 2019 by Notice of Motion brought under Order 27 Rule 1 and 9, Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act. The Applicant, Signature Tours and Travel Ltd is the plaintiff in the instant suit.
2. The Applicant is seeking that the defendant be ordered to deposit within 14 days of the order hereto the sum of Kshs 1,317,063,000/- in the joint names of the advocates of the parties hereto in default of which the proposed sale of the Defendant bank shall not proceed until full compliance of this order is achieved by the defendant and that the release of the said amount deposited shall abide the outcome of the instant suit.
3. The brief background to this application is that by plaint filed on 8th February, 2017 the plaintiff sued the defendant to claim *inter alia* a discharge of any debt demanded by the said defendant and to claim Kshs 1,317,063,000/- as financial loss as a result of the activities of the defendant on properties of the plaintiff that were charged in favour of the defendant.
4. The Respondent filed a defense against the applicant and averred that the applicant failed to service its liabilities on a facility that was advanced to them and defaulted in payment as a result of which the plaintiff/applicants vehicles that secured the facilities were repossessed so as to reduce the debt, and further that the same was in exercise of statutory power of sale.
5. The application is supported by the affidavit of the director of the plaintiff company sworn on 12th March, 2019. In his affidavit in support of the application, the applicant averred that the privatization of the defendant bank is imminent and that the plaintiff is apprehensive that if the privatization is concluded, then the plaintiff will be unable to collect the fruits of its judgement if the plaintiff's suit succeeds.
6. The application is opposed vide a replying affidavit deponed by the Head of Commercial Transactions and Litigation of the defendant/respondent sworn on 10th May, 2019. The deponent averred that the proposed takeover does not affect the rights and obligations of the bank and that the application is speculative and an attempt to exert undue pressure on the bank. The deponent has reminded the court of the Machakos Civil Case 21 of 2018 and another case Nairobi Civil Case 101 of 2016 where there is a consent on record that indicated an intention by the plaintiff to settle the outstanding amount. The deponent urged court to dismiss the application.
7. Vide supplementary affidavit by the plaintiff sworn on 17th May, 2019 and filed on 24th May, 2019, the deponent denied the nexus between the instant case and the Machakos Civil Suit 21 of 2018.
8. The application was canvassed by written submissions with some few highlightings.
9. In their submissions filed on 15th May, 2019, learned counsel for the applicant laid out three matters for consideration, to wit; jurisdiction, takeover of the defendant and the company takeover process. On the aspect of jurisdiction, learned counsel submitted that in the purview of Article 22(1) and 23 of the Constitution, the plaintiff has a right to approach the court and the High Court has jurisdiction to hear the application. Further that the instant application is not as a result of the breach of the takeover rules envisaged under Section 601 of the Companies Ac, 2015 and therefore it is properly before the court. On the aspect of takeover of the defendant, learned counsel submitted that the intended takeover shall render it impossible to claim the amounts as particularized in the plaint and cited the finding in the case of **Jimmy**

R. Kavilu & 14 Others v Stanbic Bank Kenya Limited & 6 Others (2008) eKLR. On the aspect of the company takeover process, learned counsel submitted that there is no laid out plan on how the plaintiff will be compensated in the event that its claim succeeds. Therefore the application should be allowed so as to safeguard the interests of the plaintiff.

10. Learned counsel for the respondent vide submissions filed on 15th May, 2019 framed four issues for determination *to wit*; whether the applicant has met the conditions necessary for issuance of orders directing the defendant to furnish security amounting to Kshs 1,317,063,000/- to be held in joint interest earning account; whether the plaintiff/applicant has met the prerequisite conditions necessary for grant of injunctive orders, being *prima facie case, irreparable injury* based on *balance of probability*; whether the plaintiff is entitled to the prayers sought in the application and who bears the costs of the application. On the first issue, learned counsel submitted that the nature of the application is hinged on Order 27 Rule 1 and 9 of the Civil Procedure Rules and which orders can only be granted under Order 39 and in this regard the application is defective and ought to be dismissed. Counsel cited the case of **Stephen Gachengo v Solenta Aviation Kenya Limited (2018) eKLR** that enlisted the requirements to be fulfilled in order to be granted an order under Order 39 Rule 2 and 5 of the Civil Procedure Rules as well as the burden of proof requirement as emphasized in the case of **Lui Ching Liang v Webwave Electric Manufacturing (K) Co Ltd & 2 Others (2016) eKLR**. Counsel added that the instant application is speculative and ought to be dismissed. On the 2nd issue, counsel submitted that the plaintiff is a loan defaulter and he cited the holding in the case of **Beta Healthcare International Ltd v Grace Mumbi Gathiaga & 2Others (2016) eKLR** that held that orders for furnishing security are applicable to a creditor who has a right to be paid debt owing to him. Counsel submitted that the court lacks jurisdiction to stop the process of acquisition of the Defendant's shares by KCB pending the compliance with the orders in the application because such jurisdiction rests with the Capital Markets Authority. Counsel cited the case of **Delina General Enterprise (K) Ltd v Kenol Kobil Limited (2019) eKLR**. Learned counsel submitted that they are entitled to the costs of the suit as was the finding in the case of **Jasbir Singh Rai & Others v Tarlochan Singh Rai and 4 Others (2014) eKLR**.

11. Vide supplementary submissions dated 28th May, 2019 and filed in court on 29th May, 2019 learned counsel framed three issues for determination on behalf of the respondent. The issues were, firstly whether the plaintiff's prayers can be granted under Order 27 Rule 1 and 9 of the Civil Procedure Rules, 2010; Secondly, whether the proposed takeover of the bank will displace the rights of the plaintiff in the event that it will be successful in the claim and Thirdly, whether it is competent and appropriate for the plaintiff to combine the prayers in one application as sought in prayer 2 of the instant application. On the 1st issue, counsel submitted that Order 27 Rule 1 relates to a suit for a debt or damages and the instant suit does not fall within that category therefore the cited provision is not applicable to them. Counsel cited the cases of **Dedan Karuga Gichinga v Titus Ndegwa Ajaa Olubayu t/a Ajaa & Another (2013) eKLR** and **Cimbria East Africa Limited v Kenya Power & Lighting Co Ltd (2017) eKLR** that made a distinction between a liquidated and an unliquidated claim. On the 2nd issue, counsel submitted that the bank remains a going concern liable to meet its obligations that arose proper to change in structure. Counsel cited sections 9(3) of the Banking Act in support of this submission. On the issue of combination of two prayers, counsel submitted that it is not competent to do so. Learned counsel cited the cases of **Olympic Escort International CO Ltd & 2 Others v Perminder Singh Sandhu & Another; Nyanza Fish Processors Limited v Barclays Bank of Kenya Ltd (2008) eKLR**. Counsel concluded by submitting that the instant application lacks merit and is fit for dismissal.

12. On perusal of the pleadings, the singular issue for determination is whether the application has merit. The Applicant who was a plaintiff to the main suit has brought an application under Order 27 rule 1 and 9 of the Civil Procedure Rules. A reading of rule 1 limits itself to an application by a defendant. The rule states:-

“In any suit for a debt or damages any defendant may at any time after appearance upon notice to the plaintiff pay into court a sum of money in satisfaction of the claim or (where several causes of action are joined in one suit) in satisfaction of one or more of the causes of action.

(2) Where money is paid into court in satisfaction of one or more of several causes of action the notice shall specify the causes of action in respect of which payment is made and the sum paid in respect of each such cause of action unless the registrar or, in a subordinate court, presiding magistrate, otherwise orders.

(3) The notice shall be in Form No. 19 of Appendix A but may be modified or withdrawn or delivered in an amended form by leave of the registrar or, in a subordinate court, the presiding magistrate, upon such terms as are just except that the defendant may, without leave deliver a notice increasing the amount of any sum paid into court, which shall be in Form No. 20 of Appendix A.. “

13. Order 27 rule 1 of the Civil Procedure Rules clearly limits its application to the defendant to a suit and therefore it is only the defendant who can make an application under the rule. Secondly, the defendant can only make the application under the rule where the suit is brought to recover a debt or damages. This was observed in the cited case of **Cimbria East Africa Limited v Kenya Power & Lighting Co Ltd (2017) eKLR**. In the instant suit the Applicant is the Plaintiff in the instant suit out of which this application arises. The plaintiff in the suit is not seeking to recover a debt or damages but an order directed to the defendant to deposit within 14 days of the order hereto the sum of Kshs 1,317,063,000/- in the joint names of the advocates of the parties hereto in default of which the proposed sale of the Defendant bank shall not proceed until full compliance of this order is achieved by the defendant and that the release of the said amount deposited shall abide the outcome of the instant suit. In the premises I find that the application is wrongly brought under rule 1 and 9 of Order 27.

14. A deposit of security in court for the payment of money as envisaged under Order 27 is not payment of money into court in satisfaction of the claim. The Order 27 does not cover deposit of security for the money claimed in the suit. The relief sought by the plaintiff is outside the scope of Order 27. The Applicant is tactfully inviting this Court to order a substitution of the security deposited by it and it appears that its intention is to redeem its property by deposit of an alternative security in the form of a bank deposit of the sum of Kshs 1,317,063,000/-.

15. Considering all the above, I agree with counsel for the respondent that, the nature of orders sought are not applicable to the provision of the law under which they are brought. There is no possibility that the intended takeover of the defendant by another financial institution will jeopardize the interests of the plaintiff since the process is properly anchored in law and regulated by sound institutions namely Capital Markets Authority, Competition Authority of Kenya and the Central Bank of Kenya. Under section 9(3) of the Banking Act there are systems

to protect parties and claims as assets and liabilities are carried over by the new entity following the takeover or merger and become binding. The relevant law provides as follows:

(3) Upon the coming into effect of a transaction effecting the amalgamation or acquisition of one institution by another institution, or effecting the transfer of the assets and liabilities of one financial institution pursuant to this section-

a) all the assets of the amalgamating institutions or, in the case of a transfer of assets and liabilities, those assets and liabilities of the transferor institution that are transferred in terms of the transaction shall vest in and become binding upon the amalgamated institution, or, as the case may be, the receiving institution;

b) the amalgamated institution or, in the case of a transfer of assets and liabilities, the receiving institution shall have the same rights and be subject to the same obligations as those which the amalgamating institution or, as the case may be, the transferor institution may have had or to which they or it may have been subject immediately before the amalgamation or transfer;

c) all agreements, appointments, transactions and documents entered into, made, drawn up or executed with, by or in favour of any of the amalgamating institutions or, as the case may be, the transferor institution and in force immediately prior to the amalgamation or transfer, but excluding such agreements, appointments, transactions and documents that, by virtue of the terms and conditions of the amalgamation or transfer, are not to be retained in force, shall remain in full force and effect and shall be construed for all purposes as if they had been entered into, made, drawn up, or as the case may be, the receiving institution or person to whom the assets and liabilities in question are transferred; and

d) Any bond, pledge, guarantee, or instrument to secure future advances, facilities or services by any of the amalgamating institutions or, as the case may be, by the transferor institution, which was in force immediately prior to the amalgamation or transfer, shall remain of full force and effect and shall be construed as a bond, pledge, guarantee, or instrument given to or in favour of the amalgamated institution or as the case may be, the receiving institution or person to whom such assets and liabilities are transferred, as security for future advances, facilities or services by that financial institution or person except where, in the case of such transfer, any obligation to provide such advances, facilities or services is not included in the transfer.

Guided by the above provision of the law, I am satisfied that the plaintiff's concerns are well taken care of since the new outfit will definitely be a going concern and liable to meet any obligations prior to the change and subsequent structure. The new outfit will definitely address any claims by the plaintiff should it succeed in the end. The plaintiff's application herein is premature. In any event it has transpired that the parties herein have another case being **Machakos High Court civil case No. 21 of 2018** wherein the parties intend to consolidate with this case as the issues involving them are similar. That being the position I find the plaintiff's application is meant to unduly exert pressure on the defendant with a view to stealing a match against it even before the real issues in controversy have been canvassed. No evidence has been availed by the plaintiff that the defendant is going to disappear from the jurisdiction of this court so as to warrant it to put in some money as security yet the intended new entity will be on a going concern and will meet any claims in the event the plaintiff's suit succeeds.

16. In the result it is my finding that the plaintiff's application dated 12th March 2019 lacks merit. The same is ordered dismissed with costs to the Defendant/ Respondent.

It is so ordered.

Dated and delivered at Machakos this 18th day of June, 2019.

D.K KEMEI

JUDGE