



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. CIVIL APPLICATION NO. 68 OF 2019

BANK OF AFRICA LIMITED.....APPLICANT

VERSUS

ERICK MUGAMBI KINYUA.....1stRESPONDENT

JUSTUS KINYUA NKANATA.....2ndRESPONDENT

LUCY KAGENIO MURUNGI.....3RD RESPONDENT

GEM CM CONSTRUCTION LIMITED THRO THE OFFICE

OF THE OFFICIAL RECEIVER.....4THRESPONDENT

MARTIN KINOTI.....5TH RESPONDENT

VIEW LINE AUCTIONEERS.....6TH RESPONDENT

RULING

Application dated 23rd July 2019 was filed under certificate of urgency, seeking for orders to call for the files and the records of the proceedings in

- a) Meru ELC No. 53 of 2015 – Gem CM construction Ltd, Eric Mugambi Kinyua and Justus Kinyua Nkanata Vs Bank of Africa Ltd filed in July 2015.
- b) Meru CMCC No. 102 of 2015- Erick Mugambi Kinyua, Justus Kinyua Nkanata vs Bank of Africa Ltd filed on 12th June 2018.
- c) Meru CMCC No. 75 of 2019 Lucy Kageni Murungi vs Bank of Africa Ltd and Viewline Auctioneers filed on 15th July 2019.
- d) Nairobi – CMCC No. 5156 of 2019 Martin Kinoti Kinyua, Erick Mugambi Kinyua, Justus Kinyua Nkanata and Gem CM Construction Ltd vs Bank of Africa Limited Viewline Auctioneers filed on 16th July 2019.

It was also sought that proceedings in Meru CMCC No. 75 of 2019- Lucy Kageni Murungi Vs Bank of Africa and viewline Auctioneers be stayed as well as Nairobi CMCC No. 5156 of 2019 pending hearing and determination of the application herein.

It was also sought that the court makes orders for the transfer to this court. Meru CMCC NO 75 of 2019 and Nairobi CMCC No. 5156 of 2019. Martin Kinoti Kinyua, Erick Mugambi Kinyua, Justus Kinyua Nkanata and Gem CM Construction Ltd vs Bank of Africa Limited and viewline Auctioneers filed on 16th July 2019.

It was also sought that the court gives an early hearing for the trial and disposal by this court of Meru CMCC No. 75 of 2019 and Nairobi CMCC No 5156 of 2019. Costs of this suit was also prayed for. The application is supported by the affidavit of Charles Waiyaki sworn on 23rd day of July 2019 and grounds in the face of the application which in summary are that the 1st, 2nd, 4th and 5th Respondents failed to pay loans advanced to them as per paragraph 2 of the grounds and that 1st, 2nd and 3rd Respondents have filed multiple suits seeking to restrain the applicant from recovering the moneys owed to it by exercising its statutory power of sale. It was argued that the four suits filed by the 1st and 5th Respondent were a blatant abuse of the court process considering that they raise similar issues which could be determined before a single forum.

The 1st Respondent Eric Mugambi Kinyua filed a replying affidavit opposing the application and averred that he has sought review of the ruling in Meru CMCC no. 102 of 2018 delivered by Hon L. Ambasi CM on 27th May 2019.

He argued further that unbeknown to Hon Ambasi ELC C M 53 of 2015 had been withdrawn prior to filing the suit in Meru CMCC No. 102 of 2018 by another dated 28.9.2018 1st Respondent said the subject matter is valued at Kshs 17,000,000 and does not surpass the jurisdiction of the magistrates court.

He said that the application had been made to defeat respective matters proceeding in several other courts. He said other parties included in the application had not been served and that there is no claim against them.

He argued that the matters were filed before courts with competent Judicial officers to handle the same and that this application should be dismissed. He said the different suit address several distinct aspects as relates the relationship with the applicant hence combining all these issues will further delay the matter to the detriment of the 1st Respondent.

The 5th Respondent also filed a Replying Affidavit sworn on 26th September 2019 averring that all the suits were justified and the lower courts deemed it necessary to grant orders sought;

He argued that applicants prayer to stay proceedings in CMCC No. 5156 of 2019 is in bad faith and meant to curtail the pertinent issues raised in the suit. He said that suit no. 5156 of 2019 sought to have loan audited because interest and changes levelled against 1st and 5th Respondents didn't make sense in law and the loan agreement/Contract as signed.

He argued that the loan agreement was signed in Nairobi where both the applicant and 4th Respondent are based. That counsels are also based in Nairobi and it is easy to litigate the matter without unnecessary delays.

I have considered that the application was served on the 1st Respondent and 5th Respondents are the only ones who seemed to have been served with application herein although from the copies of pleadings filed herein they appear to be members of one family running the company indicated as Gem CM Construction Limited. The 4th Respondent herein and from the Replying Affidavit of the 1st Respondent he seems to speak on behalf of all the other Respondents and says that all the suits filed have distinct issues which are to be adjudicated upon in the different courts.

In Nairobi CMC CC NO. 5156 of 2019 the parties are the 1st, 2nd, 4th and 5th Respondents herein against the applicant and viewline auctioneers (6th Respondents)

In Meru ELC NO. 53 of 2015, 1st Respondent – Erick Mugambi and 2nd Respondent Justus Kinyua and Applicant herein are parties. In Meru CMCCC No. 102 of 2018 Erick Mugambi and Justus Kinyua Nkanata sued the applicant like in the ELC Matter and Hon Ambasi struck the suit which was sub-judice the suit filed by the same parties seeking similar remedies in ELC No. 53 of 2015.

1st Respondent says ELC No. 53 of 2015 was withdrawn and he therefore seeks review of Hon Ambasi's orders striking out his suit but he has not attached anything to show ELC No. 53 of 2015 was withdrawn rather, by a ruling dated 21st day of February 2018, Hon Lady Justice L. N. Mbuguah dismissed application dated 27th March 2017 and discharged orders of injunction that had been issued earlier for reasons among others that the applicants were indolent in prosecuting the application for injunction.

In Meru CMC CC No. 75 of 2019 Lucy Kageni Muriungi the wife of 1st Respondent sued the applicant. On 15th July 2019, her claim in this suit are similar to those in ELC 53 of 2015 and 102 of 2018.

Having considered the arguments of the parties in their respective affidavits the finding of this court is that Meru CMCC no. 102 of 2018 having been struck out cant be stayed or transferred as it is spent and/or a concluded matter that is now closed.

For ELC C No. 53 of 2015 the applicant should file an application before trial judge to transfer cause if so satisfied.

For Meru CMCC C No. 75 of 2019 and Nairobi CMCC No. 5156 of 2019 this court has established that the subject matter is similar i.e LR Ngusishi Settlement Scheme/442 and LR Ngusishi/Settlement/468 which the 6th Respondent had advertised for sale to recover credit facilities advanced to the 1st to 5th Respondent herein if the 5th Respondent is swearing in his affidavit that the loan contract was signed in Nairobi and that counsel in the matter are based in Nairobi hence it is easy to litigate the matter without unnecessary delays so be it. This court hereby orders that Meru CMC C E&L case No. 75 of 2019 between Lucy Kageni Muriungi and Bank of Africa (Kenya) Ltd and View line Auctioneers be and is hereby transferred to Nairobi Milimani Commercial Chief Magistrates court to be consolidated with Nairobi Milimani Commercial CMC C No. 5156 of 2019 for hearing and determination.

The costs of application shall be paid by the 1st and 5th Respondent to the applicant.

HON A.ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 7TH NOVEMBER 2019.

In the presence of:

CA:- Kinoti

Mr Kithinji Advocate holding brief for M/S Coulson Harney LLP Advocates for Applicants.

Mr Otieno C. Advocate for:-

1st Respondent –N/A

2nd Respondent – N/A

3rd Respondent –N/A

4th Respondent –N/A

5th Respondent – N/A

6th Respondent – N/A

Applicants counsel to notify the Respondents Counsel of Ruling.

Mention before Nairobi Milimani commercial Chief Magistrate court onb 21.11.2019

The Executive officer Meru Law Court to transmit file CMCC No. 75 of 2019 forthwith.

HON. A.ONG'INJO

JUDGE