



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & AMIRALY DIVISION
CIVIL SUIT NO. 278 OF 2017

**DINIT VIRCHARND MALDE (suing as Executor of the
will of Lalitaben Kantilal Shah- Deceased).....PLAINTIFF**

-VERSUS-

**SPIRE BANK LIMITED (Successor in title to the Southern
credit Banking Corporation).....DEFENDANT**

RULING

This ruling relates to a Notice of Motion application dated 18th October 2018, brought under **Section 1A and 1B of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 3, 4, (1)(a) and 29 of the Contempt of Court Act No. 46 of 2016**, and all other enabling provisions of the law. The Applicant sought orders;

- a. This Honourable Court determines that the Chief Executive of the Defendant bank is in contempt of court;
- b. This Honourable Court be pleased to order the Chief Executive of the Spire Bank be committed to civil jail for contempt for disobedience of the orders of the Court issued on 9th July, 2018 by Hon. Justice Rachael Ngetich, sitting in the High Court of Kenya at Nairobi in the matter of **HCCC NO. 278 OF 2017**;
- c. The Defendant/Respondent provides the costs for this application.

The Application was based on grounds;

- a. That on 21st May 2018, the Application for the production of statement and accounts on the sale and allocation of proceeds of sale of Land **L.R. No. 209/75/15**, which was sold by the Respondent exercising the Chargor's power of sale;
- b. That the Respondent has not opposed the said application;
- c. That on 9th July 2018 the court ordered the Respondents to retrieve and produce the said Bank statements within twenty one (21) days from the date of that order;
- d. That in utter contempt, the Respondent has refused, failed and/or ignored to follow the court order.

REPLYING AFFIDAVIT

The Application was opposed vide a Replying Affidavit dated 12th February 2019 sworn by John Wageche, advocate for the Respondent. He averred that the Defendant had duly filed a comprehensive and certified statement of account in relation to Kempaper Limited Account **Number 3010000475** for the period between 1st October 2000 and 31st October 2018.

That in light of Respondent's compliance by filing the bundle containing statement of account of Kempaper Limited as stated in paragraph 3 above, the orders sought herein are overtaken by events.

The Respondent stated that the Applicant's cause of action sprung from the sale of **L. R. No. 209/75/2015** transferred on the 26th September 2007 and that was/is a testament that the present suit is caught up by the statute of limitations under the doctrine of laches as pleaded in the statement of defence.

The Respondent stated that the transfer by charge dated 26th September 2007 has been subject of litigation in court with the courts making their findings on the Applications the Applicant filed herein in **Civil Suit No. 543 of 2005**.

The ruling of the court in **Suit 543 of 2005** by H. M. Okwengu, Judge on 18th March 2008, he stated that;

“In my considered view, the wordings of Order XXIII Rule 3(2) is quite clear that where no application is made under sub-rule 1 for the joining of the personal representative/executor, the suit “shall” abate. That provision is mandatory and is incapable of no other interpretation. The contention that the suit did not abate as the temporary order of injunction was still in effect brings to mind the “chicken and egg” paradox, except that the position here is clear that the order of temporary injunction was issued “pending the hearing and determination of the suit”. The order of temporary injunction could not therefore exist in a vacuum. By virtue of the Plaintiff's suit having abated, that order of temporary injunction was spent.”

He stated that the Applicant herein appealed the decision of Justice Okwengu through a **Civil Appeal No.85 of 2008** which was withdrawn by the parties on the 8th June 2015.

That in light of the previous proceedings in relation to the sale of **L. R. No 209/75/2015**, the present suit is *res judicata* and the Honourable Court ought to be hesitant to issue the orders sought herein.

The Respondent stated that the impugned transaction was by its predecessor Southern Credit Banking Corporation. That previously, Southern Credit Banking Corporation Limited through a merger had changed its name to Equatorial Commercial Bank Limited as shown by **Annexure 5**. The said Bank then changed from Equatorial Commercial Bank Limited to presently Sphire Bank as evidenced by **Annexure 4** from 20th May 2016.

That it is in strength of **clause 13** of the letter of offer dated 25th June 2004 that a set off of Ksh 16,657,540/- was from the proceeds of the sale of the suit property applied in favour of Converters E.A Limited on 29th September 2007.

FURTHER REPLYING AFFIDAVIT

The Applicant herein swore Further Affidavit dated 14th March 2019, in response to the Replying Affidavit by John Wageche, stated that he had read the documents filed by the Defendant/Respondent on 4th October 2018, saying that the document filed by the Respondent were Bank statement of Kempaper Limited, the principal debtor of the Respondent. The statement of account did not in any way refer to the proceeds of sale of the subject property of the deceased.

That he expected the bank officer, the deponent therein, to differentiate between a Bank statement and a statement of Accounts for the sale of a guarantor's property charged a security.

That the Deponent is not in a position to depose on the law of statute of Limitation of actions.

That all previous litigation in relation to the subject property (which he had previously disclosed in detail) related to stop sale of the suit property. The deceased considered the said property her matrimonial home, but which the Respondent irregularly sold anyway. No other suit has ever been filed and/or prosecuted in relation to the fate of the proceeds of the sale of the property.

That, if the Defendant/Respondent believed that the suit was caught up by the prescription of time, or is *res judicata*, there are free to make such necessary applications for the court to consider. Nothing stops the court from making the orders sought herein, that is, an order to require the Respondent to give an account on how they allocated the proceeds of sale of **L. R. No. 209/75/15**.

DETERMINATION

The Court considered the submissions filed and made in Court and observed as follows;

- a. The Court record confirms on 9th July 2018 the Court granted the application of 14th May 2018 which sought the Defendants, its servants and/or agents be ordered to produce statements and/or accounts for the sale and allocation of proceeds of sale of suit property **LR209/75/15** transferred by the defendant/ Respondent on 26th September 2007.
- b. On 4th October 2018, the Defendant filed and served certified true copy of statements of account for Kempaper Limited from 1/10/2000-31/10/2018.
- c. In light of the Respondent's compliance the application is overtaken by events.
- d. The Applicant filed 2 Further Affidavits one on 19th March 2019 and the other is of 20th June 2019 the gist being that the statements required are those that reflect the sale proceeds of suit property LR 209/75/1. The statement would entail how much was

realised from the sale and how it was utilized and if there was surplus.

e. It would shed light on how Ksh 16, 657,540 of the proceeds of sale were allocated to Converters Limited a Company unrelated to the guarantee given by Plaintiff/Applicant.

This Court finds the application of 14th May 2018 spent as what request was made was complied with. However, the Applicant is now more specific to the content of the information required subsequent to the statement of accounts filed.

f. Although, the Plaintiff/Applicant is entitled to pursue right to information by virtue of **Article 35 of COK 2010**; the instant application was not specific and detailed on the scope of information required and hence the court cannot hold the Defendant Respondent to an unspecific standard. Suffice is that the Respondent produced statements and/or accounts that they found relevant for the sale and allocation of proceeds of sale of suit property LR 209/75/15 transferred by the defendant/Respondent on 26th September 2007.

g. The Court has taken into consideration, the fact that the Defendant/Respondent is the successor of the original bank that carried out the transaction in 2007, 12 years ago. It is not possible to hold them to produce an account for sale it did not conduct and was not privy to except to produce documents availed to it by its predecessor. They may not have received from predecessor Bank Southern Credit Bank the relevant documents to prove and provide better particulars of the impugned sale and transfer of proceeds of sale .

For these reasons I find no basis to open at this stage the Contempt of Court avenue against the Defendant in the absence of cogent evidence that the Defendant/Respondent was/is in actual possession of any or all relevant documents of the process culminating to the impugned sale of suit property **LR 209/75/15** and utilization of the funds thereof.

To ensure justice is served to all parties; any other documents sought and/or crucial to hearing and determination of the suit shall be channelled, considered, verified and requested for and produced during Case Management process before the hearing of the substantive suit. All Interlocutory applications may be canvassed during these sessions and may include, Notices to produce and /or cross examine any crucial witness, discovery and/or interrogatories.

DISPOSITION

- 1. The instant application is spent and the Court shall not at this stage consider contempt of Court proceedings.**
- 2. The parties shall move the Court appropriately; conduct case management before Deputy Registrar Commercial & Tax Division within 30 days.**
- 3. Matter shall be mentioned on 10th February 2020 for compliance.**
- 4. Costs in the Cause.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 13TH DECEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. MUTUKU FOR THE PLAINTIFF

MR. KARA HOLDING BRIEF KIMANI FOR THE DEFENDANT

COURT ASSISTANT - JASMINE