



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 176 OF 2016**

**WILLIAM KURIA JOSIAH.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**TECHSPA GENERAL SUPPLIERS LIMITED.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**BANK OF AFRICA (KENYA) LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. This Ruling relates to the Notice of Motion Application dated 5<sup>th</sup> October 2017, brought under the provisions of Article 159 of the Constitution of Kenya, Sections 1A, 1B, and Section 3A of the Civil Procedure Act, (Cap 21), of the Laws of Kenya, Order 51 Rule 1, of the Civil Procedure rules, 2010 and all other enabling provisions of the laws of Kenya.

2. The Applicant is seeking for orders that;\_

i. That this Honourable Court do extend/enlarge the time within which the 2<sup>nd</sup> Applicant should comply with the Ruling delivered on 21<sup>st</sup> September 2017 i.e. to pay Kshs 10,000,000 (Ten Million shillings) to the Respondent for a period of further three (3) months with effect from 5<sup>th</sup> October 2017;

ii. The costs of this Application be provided for.

3. The Application is premised on the grounds on the face of it and the supporting affidavit, dated 5<sup>th</sup> October 2017, sworn by William Kuria Josiah, the Managing Director of the 2<sup>nd</sup> Plaintiff/Applicant's Company.

4. He deposed that on 21<sup>st</sup> September 2017, the Honourable Court delivered a ruling herein, in which the Applicants were ordered to deposit Kshs 10,000,000 (Ten Million shillings only), within a period of fifteen (15) days. That the Applicants have made all practical efforts to raise the money but cannot be able to raise it within the short timeline given and have only managed to raise Kshs 200,000 (Two Hundred Thousand shillings only) and drawn have also drawn two posted dated cheques numbers 000001 and 000002, totaling Kshs. 800,000 (Eight Hundred Thousand) in favour of the Defendant/Respondent,

5. Further the 2<sup>nd</sup> Plaintiff/Applicant has obtained a business contract, worth Kshs 31,568,120 (Thirty one million, Five Hundred Sixty Eight Thousand, One Hundred and Twenty shillings only) for supply of 300,000 (Three hundred thousand), LPG Gas Grills, for 6kg LPG Gas cylinders. As such it will be in a position to make further payments upon delivery of the first batch of 100,000 (One hundred thousand) pieces of the Gas cylinders, which payment is expected at the end of November 2017.

6. Therefore in view of the foregoing, the 2<sup>nd</sup> Plaintiff/Applicant, will be in a position to comply with the Court's ruling as from 30<sup>th</sup> November 2017. Hence the plea to the Court, to extend/enlarge the time within which to comply with the ruling, by a further period of three (3) months, in order to pay the whole balance of Kshs 9,000,000 (Nine million shillings only).

7. It was argued that the Defendant/Respondent will not suffer great loss and prejudice if the orders sought herein are granted. It is therefore in the interest of justice, fair play, natural justice that the orders sought be granted.

8. However, the Application was opposed vide a replying affidavit dated 16<sup>th</sup> October 2017, sworn by Felix Muhati, the Recoveries officer of

the Respondent's Company. He deposed that from the outset, the Applicants are not entitled to the discretionary orders sought, for the reasons that, for the last one and a half years, they have been enjoying the protection of an interim injunction and have not bothered to pay a single cent of the undisputed portion of the debt owed to the Respondent.

9. That the 2<sup>nd</sup> Applicant's loan account has been restructured numerous times to enable it regularize its arrears and pay off the loan but it has continued to persistently default in making payments. That on 2<sup>nd</sup> November 2015, the parties held a meeting in which the Respondent agreed to restructure the 2<sup>nd</sup> Applicant's loan and hold off on any recovery action on the basis of the it's assurance that it had secured contracts with the Machakos County Government and the Rural Electrification project.

10. However, despite assurances that the then outstanding arrears of Kshs 23,000,000 would be settled upon the performance of the purported contracts with the Machakos County Government and the Rural Electrification project, no payment has been received to date from the Applicants.

11. In particular, the 2<sup>nd</sup> Applicant vide a letter dated 14<sup>th</sup> December 2016, written during the pendency of this suit, undertook to pay a lump sum of Kshs 5,000,000 (Five Million Shillings only) within three (3) months of that date but despite this undertaking, no monies have been paid, save for the sum of Kshs 457,487.80 deposited by the Kenya Power on the 5<sup>th</sup> April 2017.

12. Therefore in view of the previous unfulfilled promises it is not in the interest of justice that the orders sought be granted. Further the Applicants have not attempted to set out the specific steps they have made in attempting to raise the Kshs 10,000,000 directed to be paid by them within 15 days of the ruling of the Court. The fact that they have only been able to raise Kshs. 200,000, is a clear indication that the Applicants are impecunious and are unable to pay their debts as and when they fall due. As such giving an extension as sought will amount to the Court granting an order in vain.

13. It was submitted that the issuance of post-dated cheques is no guarantee that the cheques will clear on the date of presentation and cannot be a basis upon which the Court is called upon to make an order such as the one sought. Further the purported contract to be entered into by the 2<sup>nd</sup> Applicant and a third party does not constitute valid grounds for the Court to grant the orders sought for the reasons that:-

i. it is highly doubtful, on a balance of probability, that the Applicants would be able to deliver on a contract of the magnitude of Kshs 31,568,120 while they have been unable to raise even Kshs 1,000,000 of the Kshs 10,000,000 ordered to be paid to the Respondent by this Honourable Court and no evidence has been tendered of the Applicant's financial capabilities;

ii. without prejudice to the above, if indeed the Applicants have the financial capability to deliver on a contract of such magnitude as purported, then they would have acted in blatant contempt of Court orders as, instead of complying with the Court order to pay Kshs 10,000,000 within 15 days, they went out to solicit business and commit elsewhere monies rightly due and meant to be paid to the Respondent;

iii. Further, if indeed the Applicants have the financial capability to deliver on a contract of such magnitude as purported, then William Kuria Josia, the 1<sup>st</sup> Applicant, has committed perjury at paragraph 4 of his Supporting Affidavit by claiming that the Applicants have been unable to raise the money to comply with the Order of the Court and has therefore come to the Court of equity with unclean hands.

14. The Respondent further argued that there is no evidence that the Applicants will be able to comply with the Honourable Court's orders even if an extension is granted as prayed. That the Applicants will not suffer loss as it is now well settled that once property is charged, it becomes a commodity for sale and the Applicants understands that, one of the consequences of default in repaying the loan is that the suit property will be sold

15. That contrary to the assertions at paragraph 11 of the supporting affidavit, the Respondent will suffer great prejudice if the Application is allowed for the following reasons:-

i. The outstanding loan amount continues to balloon and has currently outstripped the value of the suit property thereby immensely prejudicing the ability of the Respondent to recover its money from the Applicants;

ii. In view of the numerous previous unfulfilled promises made by the Applicants as enumerated above, the Respondent is genuinely apprehensive that this is merely a delaying tactic aimed at denying the Respondent its rightful dues;

iii. The power of sale is a contractual right of the Respondent to be exercised upon default and granting the orders sought herein would amount to the Honourable Court fettering that right and re-writing the agreement between the parties to the substantial detriment of the Respondent

16. The Respondent argued that from the foregoing, the notice of motion Application under consideration dated 5<sup>th</sup> October 2017 be dismissed with costs.

17. The Parties agreed to dispose of the application by filing submissions thereto. The Applicants reiterated the averments in the affidavit in support of the application to the effect that, it was given a short period within which to pay the Kshs 10,000,000 and failure to comply will lead to the sale of the suit property.

18. It was submitted that in deciding whether to grant the prayers sought, the Court should take note that, when the Applicants offered to make a lump sum payment in the month of December 2015, its situation was different from the current situation where its property is at the

risk of being sold. The other issues to consider is: the time it will take to sell the property from the time the suit property will be valued, the issuance of the relevant notices, to the conduct of the auction, the need to give the successful bidder thirty (30) days to pay the amount payable. It will take at least six (6) months and more costs will be incurred in terms of auction, legal advertisement and will be "borne by the Plaintiff thereby punishing them further."

19. It will therefore be more convenient to both parties to grant the orders sought herein for an extension of three (3) months against the six (6) months it would take to commence and conclude the Auction process. More so, not all public Auctions are successful as there have been instances where bidders are not able to offer bids that are close or above the reserve price.

20. The Applicants submitted that the Respondent has at paragraph 14 of the replying affidavit referred to herein stated that:-

**"the initial auction went on as advertised but none of the bids met the reserved price and as such the property was not sold hence the re-advertisement of the property for auction."**

21. It falls that a lot of water has gone under the bridge from the time the Respondent conducted the first auction to date and the hostile political atmosphere has negatively affected most businesses and Kenyans. It is not guaranteed that if the public auction was to be conducted by end of the year 2017, then the bidders will be able to meet the reserve price, which the Applicants believe will be higher than in December 2015, owing to the appreciation in value of the subject suit property.

22. It was submitted that the Applicants have established a prima facie case and met the threshold set out in the celebrated case of; *Giella vs Cassman Brown*. It is explained by the fact that the court in its Ruling delivered on 21<sup>st</sup> September 2017, gave favourable orders and held that the balance of convenience tilts in its favour. It will be tantamount to a travesty of justice if the prayers sought for extension/enlargement of time are not granted for a further three (3) months.

23. However, the Respondent submitted that granting the orders sought would amount to re-writing the contract between the Parties. That the 1<sup>st</sup> Applicant herein, William Kuria Josia, voluntarily created a charge over the suit property herein, being, L.R. No. Limuru/Bibirioni/T.99, and in the said Charge expressly agreed that in the event of default in payment of the loan as agreed in default of any of the other covenants there-under, then the Respondent would be at liberty to immediately proceed with the exercise of its power of sale in accordance with the law.

24. The court herein vide its ruling delivered on the 21<sup>st</sup> September 2017, found as a matter of fact, even at this interlocutory stage, that the Applicants undoubtedly owe the Respondent at least Kshs 10,000,000. The Applicants have not challenged that finding and the Honourable Court having arrived at that conclusion that the Applicants are in arrears, the Respondent's right to **immediately** exercise its power of sale as agreed under the Charge instrument kicks in. By requesting the Court to suspend this contractual right even for a day, let alone the three months sought by the Applicants is in effect asking the Honourable Court to re-write the contract between the Parties.

25. That the Court of Appeal in the case of; *National Bank of Kenya Ltd vs Peipeplastic Samkolit (K) Ltd and Another (2002) EA 503*, quoted with approval at paragraph 15 of the Ruling in *Hassan Zubeid vs Patrick Mwangangi Kibaiya & Another (2014) EKLK*, had this to say regarding Courts re-writing contracts between parties;

**"This, in our view, it is a serious misdirection on the part of the Learned Judge. A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause."**

26. The Respondents reiterated the averments that the Applicants have dishonoured numerous other promises to pay as demonstrated at paragraph 4 of the Replying Affidavit sworn by Felix Muhati, and that the 2<sup>nd</sup> Applicant's loan account has previously been restructured on more than one occasion based on promises by the Applicants that they have secured business contracts whose payoff is guaranteed and imminent

27. Despite these promises, of imminent payoffs, none of the purported payments ever materialized and it is evident that this is the Applicant's tactic for buying time and denying the Respondent its rightful dues. If indeed the Applicants are ready and willing to pay the undisputed portion of the outstanding loan arrears, they would have done so in the one and a half years during which they enjoyed an injunction issued by the Court.

28. The Applicants have thus approached the Honourable Court with unclean hands and are therefore undeserving of any equitable relief. This is so for the reasons that the Applicants' claim, on the one hand, claim to be unable to pay the Kshs 10,000,000 ordered to be paid by the Court in fifteen (15) days and yet, on the other hand, claim to have the financial capability to deliver on a supply contract purported to be worth Kshs 31,568,120; and therefore granting the orders sought will be in vain. That it is now well settled that a Court of Equity should not grant an order in vain as stated by the Court of Appeal in the case of; *Eric V. J. Makokha vs Lawrence Sagini & 2 Others (1994) EKLK* where the Court stated as follows:-

**"...one of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain." On the basis of this maim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes."**

29. In view of the above authority, the Applicants have admitted that they do not have the financial capability to deliver on the purported contract of Kshs 31,568,120, and the Court will be giving an order which would be ineffective.

30. It was further submitted that, in line with the provisions of order 40 Rule 6 of the Civil Procedure Rules, 2010, and as rightly stated by the Honourable Court at paragraph 24 of the Court's ruling delivered herein on 21<sup>st</sup> September 2017, there are no interim orders currently in place in view of the fact that the interim orders previously in place, expired after the 12 months period. Therefore the Application herein dated 5<sup>th</sup> is incompetent and is for dismissal.

31. At the conclusion of the arguments by the respective parties, I have considered the Application, the grounds and Affidavit in support, the Respondent's Replying Affidavit alongside the submissions filed by the respective parties. I find that from the record herein, the 2<sup>nd</sup> Plaintiffs/Applicants was granted by the Defendant/Respondent, the credit facility of Kshs 68,000,000, the subject matter herein, around June, 2010 (as per the averments in paragraph 4 of the Affidavit in support of the Plaintiffs/Applicants notice of motion application dated 13<sup>th</sup> May 2016).

32. Apparently, the Plaintiffs/Applicants started experiencing challenges in repaying the loan around June 2015, (again as per their own averments under paragraph 9 of the aforesaid Affidavit). What followed was the realization of the suit property being the security offered for the loan facility.

33. It is evident that, on at least two occasions, the suit property was not successfully sold in the scheduled auction. It is also evident that, the Plaintiffs/Applicants have sought for re-scheduling of the loan facility, (as deposed in the Replying Affidavit in opposition to the notice of motion application dated 13<sup>th</sup> May 2016). The Applicants have also conceded to be in arrears of the loan amount, therefore the Respondent's right to exercise its statutory right of sale has arisen.

34. The Court delivered a ruling on that Application on 21<sup>st</sup> September 2017 where the Applicants were ordered to pay Kshs 10,000,000 within fifteen (15) days and should have deposited that the sum by 5<sup>th</sup> October 2017. The Applicants have deposed that, it has only managed to raise Kshs 200,000 only and have two other "posted" cheques for Kshs 800,000.

35. Although the Applicant avers that, it has business worth Kshs 31,568,120 and that it will be able to make further payment upon delivery of the first batch of 100,000 gas cylinders, it is not clear when that will be done. It is therefore not in vain when the Respondent submits that, the grant of the orders sought will be in vain.

36. The Applicants have admitted that, it has been experiencing financial constraints since June 2015, which means they have not been servicing the loan. That supports the factual background as set by the Respondent's submissions that, the default period herein is prolonged.

37. The grant of more time to repay the loan without clear evidence and proof that, the Applicant has the means to repay the loan will serve no purpose. Therefore I find no merit in the Application. I concur with the Respondent submissions that Court orders should not be issued in vain.

38. Even then, the granting of the orders sought will prejudice the Respondent as no payments are being made and its note worth that, banks have no money of their own. They trade with investor's money and owe them the legal duty to repay it as and when it is demanded. Therefore, any indulgence to the Applicants must be considered against the facts.

39. Be that as it were, due to unforeseeable circumstances the ruling herein could not be delivered as scheduled due to the fact that the Court was hearing of the Election Petition No. 2 of 21017, as such the three months extension sought has expired by effluxion of time and the prayers overtaken by events and/or are spent and therefore not available to be granted.

40. However, I find that based on materials placed before the Court, there is no merit in the Application and/or it has been overtaken by events. It is thus dismissed it with costs to the Respondent.

41. Those then are the orders of the Court.

**Dated, delivered and signed in an open Court at Nairobi this 5<sup>th</sup> day of February 2018.**

G.L. NZIOKA

JUDGE

**In the presence of:**

Mr. Kimani holding brief for Mr. Mburu for the Plaintiffs/Applicants

Mr. Wafula holding brief for Mr. Omino for the Defendant/Respondent

Teresia .....Court Assistant