



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

MISC. APPL. NO. 194 OF 2018

MABATI ROLLING MILLS LTD RESPONDENT

-VERSUS-

BLUE NILE E. A. LTD PROPOSED 1ST APPELLANT/APPLICANT

LYDIA GODE YUSUF PROPOSED 2ND APPELLANT/APPLICANT

RULING

1. The subject Application herein is a Notice of Motion Application dated 23rd August 2018, brought under Article 159(2) of the Constitution of Kenya 2010, Section 1A, 1B, 3, 3A and 95 of the Civil Procedure Act, The High Court (Organization and Administration (General) Rules 2016, Part III, Rule 16 and 17), Order 45 Rule (1), Order 50 Rule 6 and all other enabling Provisions of the law.

2. The Application is seeking for orders that, the Court enlarges the period within which to comply with the orders given on 8th August 2018. That, the Court be pleased to substitute the deposit of the sum of Kenya Shillings Twelve Million, eight Hundred and Forty-eight thousand, three hundred and thirty-three, twenty-six cents (Kshs 12,848,338.26) with order for the deposit of the title deed for Marsabit/Jirme/1360.

3. In the alternative, the Court substitutes the said security for deposit of the following log books:

- i) Motor vehicle Reg. No. KAW 847U
- ii) Motor vehicle Reg. No. KAZ 424V
- iii) Motor vehicle Reg. No. KBR 712D
- iv) Motor vehicle Reg. No. KBR 714D

That the costs be provided for.

4. The Application is based on the grounds thereto and an Affidavit sworn by Lydia Gode Chute who deposes in a nutshell that, it has been unable to raise the sum ordered deposited due to cash flow challenges caused by a depleted and/or under-performing economy, obligations to creditors and debtors who have failed to pay the 1st Applicant for goods delivered on credit.

5. It is further averred that the Applicant has received a title deed and rights therein assigned to the 2nd Applicant, from the registered and beneficial owner of Land title No. Marsabit/Jirme/1360, which said property shall be transferred and registered in the name of the 2nd Applicant and contemporaneously offered as alternative security for the decree. The property is said to be valued at Kenya Shillings Twenty million (Kshs 20,000,000) which is above the cash sum ordered to be deposited in Court as security. That the six log book for the subject motor vehicles shall be transferred and registered in the name of the 2nd Applicant and deposited in Court.

6. It was argued that the Applicant stands to suffer irreparable loss, since its running stock has been attached at a critical trading moment when the 1st Applicant is trying to meet its obligations to creditors, including the servicing of a debenture held by Kenya Commercial Bank. Finally, the Applicant argues that, there shall be no prejudice occasioned to the Plaintiff if the orders sought are granted.

7. However, the Application was opposed vide a Replying Affidavit dated 7th September 2018, sworn by the William Karoki, the legal officer of the Respondent Company. It is averred that, the Application is a charade and an abuse of the Court process and an attempt to frustrate the Respondent from enjoying the fruits of litigation. That, on the 25th August 2018, an objection proceedings was lodged by Kaisut & Hardware, claiming that motor vehicles: KBD 712D, KBD 714D, KAZ 424V and KAW 847U, offered as security herein belongs to it. That, the said objection Application was filed on the same date with the subject Application, which cannot be a coincident yet, the Applicant in this application, treats the said motor vehicles as its own. Therefore in the given circumstances, the Applicant is guilty of non-disclosure and crying wolf before this Court yet they are not completely honest with the Honourable Court.

8. The Respondent argues that, the motor vehicles Registration Nos. KBD 712D, KBD 714D, KAZ 424V and KAW 847U were transferred to Kaisut and Hardware on 4th May 2018, which transfer is aimed at frustrating the Respondent to execute the decree dated 31st January 2018. That due to the objection proceedings in the subordinate Court, the offer for deposit of the motor vehicles and title deed is not viable options for the Respondent especially faced with an objection in the lower Court in CMCC No. 7422 of 2016. As such it will not only open a plethora of suits and objections but will add up to more frustration upon the Respondent in executing the Decree.

9. Further, the title deed proposed as a security by the Applicants is not only still in the name of a proprietor but there is neither proof of a sale or transfer in favour of the 2nd Applicant herein nor is there a valuation report from the Government to prove that the said property is valued at Kshs 20,000,000.00. Thus both proposals are not backed with any evidence of commitment by the proprietors to allow such deposit of their title documents as security and faced with an objection, the Respondent is twice as shy to accept such offers from the Applicants which always end up being unfulfilled.

10. The parties addressed the Court orally on the issues raised herein. I have considered the subject Application and the arguments for and against it. The issue for determination is simply, whether; the Court will enlarge the period for compliance with the orders issued on 8th August 2018, and/or allow substitution of securities.

11. In consideration of the same, I find that the Applicants have conceded that, the various securities offered as a substitute are not registered in their respective names. The title to the property Marsabit/Jirne/1360 is not in the names of the Applicants. The Applicants argued that, the same will be “transferred and registered in the names of the 2nd Applicant and contemporaneously offered as an alternative security.” It is therefore clear that, the title is not easily available to the Applicants. The same position avails in relation to the subject log books herein, which are evidently a subject of objection proceedings.

12. In view of the above, the Respondents are justified in opposing the Application. The Court would have been inclined to consider the plea for enlargement of the period of compliance with the orders of 8th August 2018, if the substituted securities were easily and/or readily available and/or with a clean title in favour of the Applicant. The Respondent who has a fruit Judgment cannot be kept off it indefinitely as the Applicants undertake the process of acquiring properties to use as security herein.

13. As a result thereof, I decline to grant prayers (b), (c) and/or (d) and (e) of the Application. As regards prayer (f), the Court observes that, if the Applicants wish to substitute the security herein, it should avail a different security in its name. Finally as regards costs, I order the same be and are hereby ordered in favour of the Respondent.

14. It is so ordered.

Dated, delivered and signed in an open Court this 18th day of September, 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Wangila for the Applicants

Ms. Wanjala for the Respondent

DennisCourt Assistant