



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 886 (O.S) OF 2005

GENERAL TOOLS & ELECTRICAL EQUIPMENT.....PLAINTIFF

VERSUS

ORIENTAL COMMERCIAL BANK LTD.....DEFENDANTS

AND

TAMINI KARAMA YISLAM.....INTERESTED PARTY

Consolidated with

HIGH COURT CIVIL SUIT 26 (O.S) OF 2005

C.B GOR & GOR ADVOCATES.....APPLICANT

VERSUS

1. ORIENTAL COMMERCIAL BANK LIMITED.....1ST RESPONDENT

2. GENERAL TOOLS & ELECTRICAL

EQUIPMENT LIMITED.....2ND RESPONDENT

J U D G M E N T

Outline

1. There are two originating summons which were consolidated and directed to be heard together. The dispute in the two matters is for the determination as to whom between General Tools and Electrical Equipment Limited and Tamini Karama Yislam should have titles regarding **MN/Section I/subdivision No. 1264(original no. 67 Revision/551)** , released.

2. The short history of the dispute is that, General tools and Electrical Equipment Limited, the applicant herein, in 886 of 2005, charged the suit property to one Delphis Bank Ltd (the predecessor to the current defendant) to secure some financial accommodation. There appears to have been a default in repayment of the facility which prompted the bank to move toward the exercise of its statutory power of sale. That move prompted the plaintiff to file 389 of 2002 against the defendant in which interim orders of injunction were granted and severally extended by consent as parties negotiated a sale by private treaty to enable the plaintiff raise the sum due to the defendant. In the words of the plaintiff it was agreed that the property be sold at Kshs.7,000,000/= which sum was then paid to the defendant by the interested party after which payment the defendant is accused of having demanded that the sum be reviewed upwards to Kshs.7,700,000/= which the plaintiff said the third party agreed to and an agreement reached but the defendant has refused to discharge the charge and then for the second time threatened to sell the property hence the suit.

3. The parties to HCC No. 260 of 2005 (OS) is an advocate against an erstwhile client, the bank. It is an interpleader seeking courts directions as to who between the chargee and the chargor the two defendants to that action, the title to the suit property ought to be released. Essentially the two summonses seek order that pursuant to negotiations which culminated into payment to the Defendant's advocate some Kshs.7,700,000/= the defendants debt was settled and the defendant is obligated to have a discharged executed.

4. Both summonses rely on some correspondence between, Ouma, Weloba & company Advocates for the chargor, those form C.B. Gor & Gor Advocates for the chargee and letters by the chargee itself. Having gone through that trail of correspondence and the Affidavit filed as well the agreements for sale, I have identified the following issues to isolate themselves for determination by the court:

- a) Was there a meeting of minds that the charger would sell the suit property with the concurrence of the chargee?
- b) What were the agreed terms and consideration of such sale?
- c) Was a sale ever reached with the concurrence of the Chargee/defendant?
- d) Is the chargor entitled to have the suit property discharged?
- e) Can this court, in the originating summons, order payment of general damages?
- f) What orders should be made as to costs?

5. I propose to deal with the said issues in a seriatim manner set out above in order to be sequential and easy to follow:-

Was there a meeting of mind to sell between the chargor and the chargee?

6. That there was a prior suit, HCC No. 389 of 2002, between the charger and chargee is not in dispute. It is also not disputed that there were negotiations documented by correspondence not only between the advocates but also letters written by and to the parties themselves. What is in dispute is whether such correspondence discloses a meeting of minds so as to disclose a valid and enforceable contract to settle the suit and therefore to sell the suit property to a third party.

7. To enable one to determine this issue there are six letters I find of assistance. The letters are as follows:-

- a) Letter by Ouma, Weloba & Co. Advocates dated 11/5/2005 expressing frustration at the constant change of goal posts.
- b) Letter by the defendant as chargee accepting a sale at Kshs.7,700,000.00 on condition that the sum of Kshs.7,000,000.00 is applied towards part payment of the outstanding sum for the 1st plaintiff.
- c) Letter by C.B. Gor & Gor Advocates communicating the terms of sale as approved by the defendant.
- d) Letter by the 1st defendant clarifying that the sale of the property was not tied to the balance of the sum due to the 1st defendant and the balance due to Silica Gel Chemicals Ltd but only subject to payment of Kshs.7,000,000.00 and the debtor meeting all legal costs and expenses for the transfer and pending suit but without extinguishing the indebtedness to the bank.
- e) Letter by Ouma Weloba & Co. Advocates forwarding the cheque for Kshs.7,000,000/= to Ms. C.B. Gor & Gor Advocates and demanding an undertaking not to release the funds till a confirmation is made that the discharge of charge shall have been registered.
- f) Letter by C.B. Gor & Gor to Ms. Ouma Weloba & Co. Advocates confirming that the sum of Kshs.7,000,000/= paid to them shall not be released until a discharge of charge is registered.

8. For a contract to be clinched, an offer made ought to be accepted on its terms bereft of conditions. In this case the bank made an offer for the payment of Kshs.7,700,000/= of which Kshs.7,000,000/= was toward part payment of the outstanding debt and the balance towards legal costs and expenses of transfer and pending suit. Here there is evidence that the sum of Kshs.7,000,000/= was paid to the defendant on 8/6/2005 through the counsel then retained, Ms. C.B. Gor and Gor. I do find that there was an offer by the bank which was duly accepted and performed by the 1st plaintiff by payment of the sum agreed.

9. There was also the agreement that the sum of 700,000/= be for legal costs and for transfer and the pending suit. One may ask was the legal costs a condition for the delivery of the discharge of charge?

10. The answer to this question is to be found in the letter by the bank to its advocates dated 14/5/2005 in which the bank wrote and said:

“We wish to clarify that the sale of the property is not tied to the balance of Kshs.3 million and also the balance on account of Silica Gel Chemicals Industries Ltd. The sale should proceed to its final. *The sale of the property is only subject to the bank receiving Kshs.7,000,000/= and the debtor meeting all legal costs and expenses from this transfer and the pending suit*”.
(emphasis provide)

11. I interpret the foregoing words to mean that once the debtor paid the sum of purchase price the only other condition to be fulfilled was to defray the legal costs for the transfer and the pending suit. I therefore do find that there was a concurrence and meeting of minds that the suit property be sold at Kshs.7,000,000 and that the debtor or the purchaser thereof meets the costs of the sale and pending suit. It shouldn't be lost sight of that the questions of costs were ancillary and incidental to the germane issue of payment of purchase price

12. This determination also settles the second and third question as to the terms for the sale and if the sale was concluded. The terms were that the Kshs.7,000,000.00 would be applied towards reduction of the outstanding debt, without discharging the debtor, even after the property was discharged, from its duty or obligation to pay the balance of the sum outstanding. In so far as there is exhibited proof that the agreed purchase price was paid by the interested party to the defendants duly appointed agent, there was negotiated and settlement on sale of the subject parcel of land and it matters not that the defendant and its advocates have differed on remittance of that sum or on any other grounds. Such a disagreement would not affect the crystalized and vested rights of a third party, like the purchaser.

13. Having so found and determined, issues **No. a, b & c** as isolated by the court, the next question is, to whom should the title document be released? *To the defendant or the interested party?*

14. Having said that the rights of the interested party had crystalized and vested, it would be an act of reprobation and abrogation to make any order that would negate the interests determined to have so crystalized and vested. The only just and reasonable order to make is that the title document be released to the interested party to enable the transaction be concluded. However, for clarity and avoidance of doubt, all legal costs of the earlier suit as well as the costs necessary and incidental to the preparation, lodgment and registration of the discharge and transfer in favour of the interested party shall be met and paid by the said interested party. That is what I consider the parties had agreed upon.

15. There was the fifth question concerning the prayer for general damages for breach of agreement in prayer 5 in the originating summons in HCC No. 886 of 2005. That summons is evidently taken out pursuant to the provisions of the then order XXXVI Rule 3 & 12 Civil Procedure Rule and the inherent powers of the court. The procedure of approaching court by way of an originating summons is designed for the determination of summary and *ad hoc* points of law or facts or like in the HCC No. 260 of 2005 and intended for straight forward matters expected to concluded by prompt dispatch^[1].

16. An originating summons as a procedure for dispute resolution must be confined and limited to simple issues not meriting a suit by a plaintiff^[2].

That being the purpose and intendment of an originating summons, there is no power in a court to award damages in an action initiated by an originating summons. Indeed the then Order XXXVI Rule 3 also did not grant the award of general damages as one of the reliefs to be sought or granted in an originating summons. To that extend that prayer was wholly and utterly misconceived and must be dismissed.

Rendition

17. Following the foregoing determination, I make the following orders:-

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a) There was a binding and enforceable agreement reached between the plaintiff and the defendant for the sale of that parcel of land known as plot no. 1264, section I, mainland north (cr 12002/1 subdivision no. 1264) original no. 67 REV/551 and upon the agreed purchase price having been paid, the plaintiff is entitled to a discharge of the defendants charge.

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b) Having ordered that the title be discharged, and to avoid a passible dispute between the plaintiff and the interested party, let the discharge and the original document of title be released to the interested party and upon such release, let the plaintiff, General Tools & Electrical Equipment Ltd do forthwith execute a transfer in favour of the interested party.

19. On costs, I consider the stand taken by the defendant to have beenwholly inconsiderate and not reasonable at all since it necessitated the suits which were otherwise avoidable. For that reason and the plaintiffs having succeeded, I direct and order that the defendant shall pay costs of the plaintiffs in the two suits as consolidated as well as the costs of the interested party.

20. It is so ordered.

Dated and delivered at Mombasa this 5th day of October 2018.

P.J.O. OTIENO

JUDGE

^[1] Kenya Commercial Bulk Ltd vs Osebe [1982] eKLR

^[2] Ramji Kalsumbai vs Ramigi Executors and others [1957] EA1