



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL CASE NO.17 OF 2017

(FORMERLY HCCC.62/2014)

MWATECH ENTERPRISES LTD.....PLAINTIFF

- VERSUS -

EQUATORIAL COMMERCIAL BANK LTD.....DEFENDANT

RULING

The plaintiff applicant, Mwatech Enterprises filed the Notice of Motion dated 28/11/2016 seeking the following orders.

(1) Spent

(2) Spent

(3) That until such time as the respondent shall have fully complied with the terms of the consent order recorded and/or filed in court on 13/10/2015, there be a stay of the sale of LR.No.Nyahururu Municipality/Block 4/132 by way of public auction or otherwise;

(4) That costs of this application be provided for.

The application is premised on grounds found in the body of the application and the affidavit of Douglas Mwangi Muteru, a director of the plaintiff sworn on 28/11/2016. The firm of Olonyi Advocates also filed submissions in support of the application.

The application was opposed.

Mercy Mwobobia, the Debt Recoveries Manager of the defendant swore two affidavits dated 6/12/2016 and 27/2/2017 respectively.

In contention is one of the terms of the consent that the plaintiff and defendant entered into in an attempt to settle this suit. The consent reads as follows:

“By Consent:

(1) The outstanding liabilities of the plaintiff to the defendant are agreed at Kenya Shillings Twenty Four Million (Kshs.24,000,000/=) as at 1st October, 2015 excluding the auctioneers costs and the legal fees.

(2) The plaintiff shall settle the sum of Kenya Shillings Twenty Four Million (Kshs.24,000,000/=) within the next Sixty One (61) days with effect from 1st October, 2015 and in any case, not later than the 30th day of November, 2015 as follows:

a) Kenya Shillings Eight Million (Kshs.8,000,000/=) to be paid on or before 9th October, 2015 as follows:

i. The sum of Kenya Shillings One Million (Kshs.1,000,000/=) deposited with the defendant pursuant to the court order dated 17/09/2014 and 07/10/2014 to be released to the defendant.

ii. The sum of Kenya Shillings Three Million (Kshs.3,000,000/=) held by the defendant's advocates are to be released to the defendant forthwith with no deductions whatsoever.

iii. On or before 9th October, 2015 the plaintiff shall transfer by RTGS of cash deposit of Kenya Shillings Four Million (4,000,000/=) to his mortgage account with the defendant.

b) The balance of the outstanding liabilities being Kenya Shillings Sixteen Million (Kshs.16,000,000/=) shall be paid by the plaintiff to his mortgage account with the defendant on or before the 30th November, 2015.

(3) Upon the receipt of Kenya Shillings Eight Million (Kshs.8,000,000/=) as per clause 2 above, and the endorsement of the decree resulting from his consent by Court, the defendant shall notify the Credit Reference Bureau (CRB) to remove the name of the plaintiff from its data base of defaulters.

(4) That the Kenya Shillings Four Hundred Thousand Four Hundred (Kshs.400,400/=) deposited in court by the plaintiff as security for auctioneers fee be and is hereby released to the Auctioneers on account of their fees. The plaintiff to settle the balance of the auctioneer part of fees of Kshs.5,028.80.

(5) The plaintiff shall pay the defendant's advocates costs to be agreed between the plaintiff and the said advocates.

(6) If the plaintiff fails to comply with clauses 2, 3, 5 and 6 above;

a) Without any further notice to the plaintiff the defendant shall be at liberty to refer the plaintiff back to the CRB pending full realization of any pending recovery of the outstanding liabilities.

b) The defendant shall load interest on the sum Kenya Shillings Twenty Four Million (Kshs.24,000,000/=) calculated from the 1st December, 2015 until payment in full and the outstanding sum shall fall due and owing and

c) Without any further notice to the plaintiff, that the defendant will be at liberty to re-advertise the suit property and continue with the statutory recovery process.

(7) This matter shall be mentioned on 1st December, 2015 to confirm compliance.”

It is the plaintiff's case that it was a term of the consent that the plaintiff pay the defendant Kshs.24,000,000/= in full and final settlement of the liabilities with the defendant. It was agreed that the plaintiff pay the defendant Kshs.8,000,000/= on or before 30/11/2015 which the plaintiff complied with; that it had also been agreed that upon the plaintiff paying the Kshs.8,000,000/= the defendants would notify the Credit Reference Bureau (CRB) to remove the plaintiff's name from its data base of defaulters to enable the plaintiff seek credit from another financial institution so that it could settle the balance of the debt; that the defendant refused/failed to remove the plaintiff from the CRB list; that the plaintiff continued to make effort and paid a total of Kshs.15,000,000/= to the defendant leaving a balance of Kshs.9,000,000/=. However, the defendant still continued to list the plaintiff with CRB as owing Kshs.22,350,558/70; that the plaintiff had now advertised to sell its (plaintiff's) property by public auction on 1/12/2016 as per the Daily Nation Advert of 28/11/2016. It is the plaintiff's prayer that the court should bar the defendant from unjustly and unfairly enriching itself from the consent when it is in breach thereof.

Mr. Muchangi who argued the application on behalf of the plaintiff urged that though the defendant claims to have instructed CRB to remove the plaintiff's name from the list of defaulters, it has no evidence to prove it.

Ms. Mwibobia, in opposing the application admitted that they indeed entered into a consent to settle the suit; that the plaintiff paid Kshs.8,000,000/= on the date of recording the consent and that the plaintiff's name was de-listed from the CRB; that the plaintiff however failed to pay the balance as agreed in the consent which necessitated the defendant to list the plaintiff's name with CRB again. Ms. Mwibobia referred to an annexure MN2; that by March, 2016, the plaintiff had only paid Kshs.14,000,000/= leaving a balance of Kshs.10 million which has remained unpaid to date and that is the reason why they invoked Clause 6(c) of the consent to advertise the property for sale by Public Auction.

Mr. Musesya, counsel for the defendant submitted that a consent is in the nature of a contract between the parties and the court cannot interfere with it unless on grounds of fraud or mistake; counsel relied on the case of *Samwel Mbugua v Barclays Bank of Kenya Ltd CA.1/2015* where the Court of Appeal declined to interfere with a consent recorded by the parties. Counsel submitted that by the report from Equity Bank, the plaintiff demonstrated that indeed the defendant caused the plaintiff to be de-listed by CRB; that the plaintiff's account was indicated as active; that the plaintiff was not entirely removed from CRB list but was listed as a performing account; that the plaintiff could not be completely removed from CRB list because the debt was still outstanding. It is the defendant's contention that the plaintiff was a perennial defaulter and has approached this court with unclean hands since the plaintiff have done nothing to settle the loan since 2015.

The law on whether or not a consent judgment can be varied is long settled ;that a consent judgment is binding on the parties and cannot be set aside or varied except on the grounds by which a contract can be varied which includes fraud, collusion, illegality, mistake or when the agreement is contrary to public policy, absence of sufficient material facts and ignorance of material facts. The Court of Appeal in *Samwel Mbugua Ikumbu v Barclays Bank K Ltd – CA.1/2015 (NRB)* considered the various cases where the issue of the setting aside or variation of a consent order. In *Flora Wasike v Destimo Wamboko (1982 – 1988) I KAR 625 (1626)*, Hon. Hancox J.A stated as follows:

“...it is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

In *Brook e Bond Liebig v Maliya 1975 E.A. 266* the court held:

“A consent judgment may only be set aside for fraud, collusion, or for any reason which would enable the court to set aside an agreement.”

Earlier in *Hirani v Kassam (1954) 19 EA 131* the East African Court of Appeal held:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them.....and cannot be varied or discharged unless obtained by fraud or collusion or by agreement contrary to the policy of the court; or if consent was given without sufficient material facts or in misapprehension or ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement”.

The Court of Appeal agreed with the above holdings in Samuel Mbugua Case.

In the instant case, the respondents do not deny that the consent was entered into. The respondent does admit that indeed the applicant complied with clause 2(a) on the payment of Kshs.8,000,000/= on or before 9/10/2015.

In clause 2(b), the balance of Kshs.16,000,000/= was to be on or before 30/11/2015.

What is in dispute is Clause 3. The issue is whether the respondent complied with the terms of clause by notifying the Credit Reference Bureau (CRB) to remove the name of the plaintiff from its database of defaulters.

After the consent was filed and the sum of Kshs.8,000,000/= was paid, the applicants wrote to the respondents the letter dated 22/10/2015 enquiring why the respondent had not complied with clause 3 of the consent i.e. to have its name removed from the CRB list of defaulters. A second letter was addressed to the respondents on 12/12/2015. There is no reply to it by the respondent.

In the replying affidavit, the debt recoveries manager of the defendant, Mercy Mwobobia explained that the plaintiff's name was indeed delisted from the CRB list but that when the applicant failed to pay the balance of Kshs.10,000,000/= the name was reinstated. The respondents have attached a bank statements but from a look at them, there is no evidence that the applicant was ever delisted from CRB list. Further, there is no evidence to confirm that the respondent ever notified CRB to delist the applicant. The statements exhibited to Mwobobia's affidavit as NM-2 do not show that the CRB was ever notified to delist or that it delisted the applicant have its name removed from CRB list of defaulters. A second letter was addressed to the respondent on 12/12/2015. From the consent it seems the removal of the applicant by the respondent was supposed to take effect immediately.

It's the applicants intention that their intention was to get another loan to effect the defendants loan did failure to remove from the CRB frustrated their efforts to. Of course if listed on the CRB, the applicants are not legible to loans; and if they were relying on Clause 3, then they would not be able to realize their obligations.

I am satisfied that the respondent did not comply with clause 3 of the terms of the consent.

The defendant blames the applicant for coming to court with dirty hands in that they also failed to comply with 2 (b) that provided that the applicant should have paid the balance of the loan of ksh 16,000/= on or before 30/11/2015. According to the applicants, they came paid ksh 15,000,000/= leaving a balance of ksh 9,000,000/=. The applicant exhibited as DMM3, An E- mail from the firm of Munyiithya Advocates to the applicant's advocate dated 4/10/2016, demanding the balance of ksh 9,000,000. In the respondent's counsel submissions, however, it was alleged that ksh 10 million is still owed by the applicant what sum, the fact is that the applicant also failed to comply with Clause 2(b) of the consent. The consent had not provided that the performance of Clause 2(b) was dependent upon Clause 3.

Having failed to pay the full debt by 30/11/2015, I find that the applicant is also in breach of the consent. As the applicant came to court, their hands were obviously tainted with uncleanness. I find that both the applicant and respondent are in breach of the consent. Instead of bringing each other to court may be they should have tried to reconsider the terms and arrive at another consent.

In doing my best to ensure justice is done, I will grant the parties an opportunity to enter into fresh negotiations that may result in a fresh consent or the consent will be deemed to be nullity and the parties will proceed as if no contract had not be entered into.

I will therefore stay execution of the consent order for a period of 45 days. ***(The legal position is that a party should never be allowed to take advantage of his wrongs/omissions at the expense of the other party).***

If the parties will not agree, the parties will be deemed to have gone back where they began.

Dated, Signed and Delivered at NYAHURURU this 9th day of October, 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

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Soi - Court Assistant