



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 6 OF 2016

NGUVU CONSTRUCTION & MINING LIMITED.....PLAINTIFF

VERSUS

AARON KITUNGI MBUVI.....1st DEFENDANT

CHRISPIN MUSEMBI MULIKA.....2nd DEFENDANT

SEIKE INDUSTRIES LIMITED.....3rd DEFENDANT

AND

CFC STANIC BANK LIMITED....INTERESTED PARTY/APPLICANT

RULING OF THE COURT

The Application

1. The Notice of Motion application before the court is dated **31st May, 2016** and filed herein on **6th June, 2016** by the Interested Party. The motion is pursuant to **Section 3A, 63 of the Civil Procedure Act, Order 1 rule 1 and 10, Order 40 rule 1, Order 42 rule 6** of the **Civil Procedure Rules**. The motion prays for the following Orders:

- a. This Application be certified as extremely urgent and service be dispensed with in first instance for purposes of prayers 2, 3& 4 below.
- b. That the Applicant, CFC Stanbic Bank Limited be enjoined as a party to this suit.
- c. There be an order for stay of execution of the ruling of the court delivered on the 18th May, 2016 and the ensuing order pending the hearing and determination of this Application *inter-partes*.
- d. This court be pleased to issue an order restraining the defendant, either by itself, employees, servants and or agents from disposing off, leasing, wasting, alienating, and or in any other manner whatsoever interfering with the equipment namely Unit Crusher Volvo Dumper, Caterpillar Dumper, IH Bulldozer Volvo, Wheel Loader and Bucket Kobelco Excavator as well as the Crushing Plant.
- e. This court be pleased to set aside the order issued on the 18th May, 2016.
- f. Pending the hearing and determination of the suit herein, the court be pleased to restore

possession and or control of the equipment, namely Unit Crusher Volvo Dumper, Caterpillar Dumper, IH Bulldozer Volvo, Wheel Loader and Bucket Kobelco Excavator, as well as the Crushing Plant, to the Plaintiff herein.

g. In the alternative to prayer 5 above, the court be pleased to order that the equipment, being the Unit Crusher Volvo Dumper, Caterpillar Dumper, IH Bulldozer Volvo, Wheel Loader and Bucket Kobelco Excavator, as well as the Crushing Plant be preserved in safe custody pending the hearing and determination of the suit.

h. That pending the hearing and determination of this suit, the court be pleased to issue an order restraining the Defendant, either by itself, employees, servants and or agents from wasting, alienating, disposing off, leasing, and or in any other manner whatsoever interfering with the equipment namely Unit Crusher Volvo Dumper, Caterpillar Dumper, IH Bulldozer Volvo, Wheel Loader and Bucket Kobelco Excavator as well as the Crushing plant.

i. Costs of this application be in the cause.

2. The application is premised on the grounds set out herein, being that the applicant financed the plaintiff for the purchase of the suit properties, which have now been put at the disposition of the defendants, and unless that is reversed the applicant as the financier will suffer irreparable loss.

3. The application is supported by affidavit of **Ann Kaswii Muli** sworn on **31st May, 2016**. The applicant's case is that the Plaintiff in this case is a customer of the Applicant, and through which relationship the Plaintiff was advanced facilities as follows;

i. The sum of Kshs. 19,900,000.00 to be applied towards the purchase of a Unit Crusher Volvo Dumper, Caterpillar Dumper, IH Bulldozer Volvo, Wheel loader and Bucket Kobelco Excavator,

ii. The sum of USD 117,666.00 to be applied towards the purchase of a crushing plant.

4. The Applicant further availed to the Plaintiff an invoice discounting facility to the limit of Kshs. 30,000,000.00. The facilities were secured in favour of the Applicant as follows;

i. Pursuant to the facility agreements dated 3rd August, 2015 and 2nd January, 2015, by way of a first ranking all assets debenture created in favour of the Applicant, to the tune of Kshs.61,000,000.00

ii. Joint and several personal guarantees and indemnity of similar amount

iii. Hire Purchase agreements and lodgment of all the logbooks to be jointly registered between the bank and the Plaintiff,

iv. By the letter dated **19th June, 2015**, the Applicant through the Hire Purchase agreement and by virtue of the financing, constituted owner of the equipment, with the owner retaining the right to recall and take possession of the said equipment for such reasons as are more particularly set out in the agreement of the parties.

5. The securities mentioned above are to subsist until the facilities advanced to the Plaintiff have been cleared in full. Further, by virtue of the Hire Purchase agreement of 19th June, 2015, the Applicant is the owner of the equipment until such time as the facility has been repaid in full. According to the records of the bank, the amounts currently outstanding and due to the Applicant are the sum of sum of Kshs.17,837,227.20 on account of the term loan, and the sum of Kshs. 10,094,539.54 on account of the Hire Purchase facility. The revolving facility currently has the sum of Kshs. 13,458,959.73 as the outstanding amount, hence the total amount due from the Plaintiff to the Applicant, as secured by the aforementioned securities is ksh.41,390,726.47. The applicant's case is that the said agreements were

executed between the Applicant and the Plaintiff, and it is important to point out that the 2nd Defendant as a matter of fact witnessed the execution of the financing agreements, as well as executing the Hire Purchase agreements and the guarantees thereto, and is aware of the position. According to the said agreement, the Plaintiff is also the party which has been servicing the facility. However, the Applicant has been made aware of this case between the Plaintiff and Defendants in which a dispute allegedly pertaining to rental charges and the ownership of the equipment listed above has arisen. That the Applicant has also been made aware of the ruling delivered in this matter on the 18th May, 2016, by which ruling the Court allowed the 1st Defendant's application dated 23rd March, 2016 as amended, which included an order that any items collected by the Plaintiff be returned to the 1st Defendant, and these included the Unit of primary crusher, Kobelco excavator and one dump truck caterpillar. Having perused the ruling, the applicant states that the effect of the orders of the Court was to restrain the Plaintiff from taking possession of the equipment within the Defendant's possession. A further consequence of the said ruling is to have the 1st Defendant retain possession of the equipment which had been erected on the property to undertake contracted works, for the duration of this suit. The applicant's case is that the 1st Defendant herein is not known to, neither does it have any relationship, be it contractual or otherwise, with the Applicant bank. That the effect of the court ruling is to hand over to the Defendant possession and control of the equipment, which the Applicant has got substantial interest in as set out hereinabove, without considering or having taken into account the interest of the Applicant. Having the 1st Defendant retain the equipment means him having control thereof. The Applicant is aware from information received from the Plaintiff that the equipment had been taken to the site by the Plaintiff for the purposes of executing contracted works, and pursuant thereto have always been in the control of the Plaintiff. That similarly, according to the Applicant's records, it is the Plaintiff who not only took out the facility for purchase of the equipment, but is also similarly paying the same by way of monthly installments currently of Kshs.1,060,538.00 and it is not thus clear how the interest of the Defendants would arise in the said equipment. The applicant's case is that it is not aware of the claim by the Defendant, and such claim, if any, can only be subservient to the rights of the bank which holds title to the equipment as financier thereof. The said action exposes the equipment, which are still charged to the bank, to danger of wastage, alienation, sale or any other action that may otherwise place the equipment beyond the reach of the bank which holds an interest that is secured by law and ranks in priority. The applicant further points out that the agreement between the Applicant and the Plaintiff was, having sought finances to purchase the equipment, for the Plaintiff to apply the same towards generating income, which income, amongst that from other sources of the plaintiff, would be applied towards repaying the facility, and denial of the Plaintiff of the right to use the said equipment for such purposes similarly jeopardizes the right of the Applicant by exposing the bank to possible losses arising from possible default. The applicant states that the effect of the ruling of court is to alienate the interest of the Applicant without the Applicant having been heard on the same, and this is in breach of the rules of natural justice. The applicant's case is that it is common knowledge that these type of equipment deteriorate in value at a faster rate due to wear and tear, associated with their use, as well as effects of weather and other surrounding circumstances. The cumulative effect of the above is to expose the Applicant to great risk of loss of its securities. As a matter of fact, the plaintiff has already defaulted in the payment of the revolving facility, and as a result of which the bank has issued notice, and unless the said equipment are available for attachment, the Applicant shall most definitely suffer loss. The applicant states that it is therefore necessary that the equipment be returned to the custody and control of the Plaintiff so that the Applicant can also be able to exercise its rights as an when it is necessary. In the alternative, it is necessary that the movable equipment be placed in safe custody, and the non-movable equipment be preserved in its state and condition, without interference by the Defendant, pending the determination of this suit. That in the circumstances, it is in the interest of justice that this court does allow this application.

The Response

6. In response to the application the plaintiff has filed a replying affidavit sworn on 17th June, 2016 and filed herein on 20th June, 2016. It is a three (3) paragraph affidavit which merely acknowledges the application herein but does not state whether or not the plaintiff opposes the application.

7. On his part the 1st defendant filed Grounds of Opposition on 20th June, 2016 opposing the application

and stating that the same is spurious, incompetent, frivolous, vexatious and an abuse of the court process, and is made in bad faith. The 1st defendant further states that the applicant is guilty of non-disclosure of material facts and that the application is belated or premature and lacks merit and that there are no sufficient grounds upon which the orders prayed for can be granted. The 1st defendant also filed a replying affidavit sworn by himself on 16th September, 2016 opposing the application.

8. On their part the 2nd and 3rd defendants opposed the application vide Grounds of Opposition filed herein on 15th September, 2016. The 2nd and 3rd Defendants' case is that the said application is bad in law, incurably defective and an abuse of the court process as a ruling was made on the 18th May, 2016. The issue as to whether an appeal may be rendered nugatory or not, is an issue for the Court of Appeal to decide while considering stay pending appeal and not this Court as this court had made a ruling on the issues. This application is not brought in good faith as the applicant is guilty of fraudulent concealment of the material facts with a sole motive of misleading this court. The 2nd Defendant is the beneficial owner of the Machinery and Motor Vehicles at the center of the said suit namely IH Bulldozer, Caterpillar dump truck, Volvo dump truck, Caterpillar truck Shovel, Kobelco excavator and a Crushing plant. The 2nd Defendant negotiated for a lease for mining Pozollana on the 1st defendant's land namely LR.9775 at Lukenya and thereafter signed the lease and further moved the subject machinery and equipment to the 1st defendant's Property. In the circumstances, if the application is granted as prayed, it would prejudice the 2nd and 3rd defendants' rights. The said application lacks merit and is frivolous, vexatious and an abuse of the court process. The 2nd and 3rd Defendant/Respondents herein pray that the said application be dismissed/struck out with costs to them.

9. The 2nd defendant also filed a replying affidavit sworn by himself on 16th September, 2016 in opposition to the application.

Submissions and Determination

10. Parties with the leave of court filed submissions to the application which I have carefully considered.

11. I will not write a long ruling on this matter. I will consider a brief history of the application and then raise the issues for determination.

12. The bone of contention is the legal ownership of the suit properties herein. However, by the ruling of Justice Muriithi herein dated 18th May, 2016, the judge clearly stated that issue would be determined in a full hearing. Of course by that time, the Interested Party/Applicant was not part of these proceedings.

13. The background to this matter is that the plaintiff, vide its application dated 3rd March, 2016 had sought injunctive orders against the 1st defendant. The application was heard ex-parte and allowed. The 1st defendant was aggrieved with the said orders, arguing that the application was never served, and that the hearing which took place ex-parte was illegal. The 1st defendant then challenged the orders given to the plaintiff vide the 1st defendant Notice of Motion dated 18th March, 2016 as amended on 23rd March, 2016. The motion was heard and the judge delivered his ruling on 18th May, 2016 allowing the 1st defendant's application as follows;

a. For the reasons set out above the court grants the defendant's Amended Notice of Motion of 23rd March, 2016, with costs to the defendant.

b. The court further orders that one Chrispin Musembi Mulika and M/S Seike Industrials Limited be joined as Defendants in this suit.

c. On the basis of urgency in view of the accrual of asset financing debt, the matter shall be mentioned on a date to be fixed in consultation with the parties for directions as to hearing of

the plaintiff's application dated 3rd March, 2016

It is in the above orders that the Interested Party herein now seeks to set aside.

14. The issue I raise for determination is whether or not the said orders should be set aside. It is firstly, to be noted that by the said orders of 18th May, 2016 the original orders granted on 8th March, 2016 on the plaintiff's application dated 3rd March 2016 were lifted, with the court ordering a fresh hearing of the said application dated 3rd March, 2016. In other words, the effect of this court's orders of 18th May, 2016 was to restore the *status quo* that existed with respect to the suit property prior to the grant of the said orders of 8th March, 2016 which were obtained ex-parte and without service.

15. However, instead of fixing the said application dated 3rd March, 2016 for hearing, the plaintiff/applicant chose to appeal the ruling of 18th May, 2016. The decision to appeal however, does not render irrelevant the direction given by the court for a fresh hearing of the application. It is the finding of this court that a valid order directing the fresh hearing of the plaintiff's application dated 3rd March, 2016 has not been complied with, and that the parties should forthwith comply with that direction. If that is done, the Interested Party/Applicant herein will have a chance to participate in that application, and all the issues raised herein. It is important that the issue as to the ownership of the suit properties be canvassed in a forum in which all the parties participate. In order for the said application dated 3rd March, 2016 to be heard, it is important to secure the suit properties so that the same is not sold or disposed off by the 1st defendant, and so that the same also does not go to waste.

16. In the upshot, this court makes the following orders;

- a. The Interested Party/Applicant, CFC Stanbic Bank Limited is hereby enjoined to these proceedings.
- b. The Notice of Motion application by the plaintiff dated 3rd March, 2016 to be heard within thirty (30) days of this order, and the Interested Party be at liberty to participate therein.
- c. Pending the hearing and determination of the said motion dated 3rd March, 2016, the suit property herein being Unit Crusher Volvo Dumper, Caterpillar Dumper, IH Bulldozer Volvo, Wheel Loader and Bucket Kobelco Excavator, as well as the Crushing Plant shall be preserved where they are, and the defendants are hereby restrained from selling or in any way interfering with the said suit property whatsoever and howsoever.
- d. Each party to bear own costs of the application.

Orders accordingly.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 15TH DAY OF FEBRUARY, 2017

.....

DAVID KEMEI

JUDGE

In the presence of:

Nyakiangana for Plaintiff

Kimeu for Nyandieka for 1st Respondent