



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 314 OF 2016(OS)

FAMILY BANK LIMITED.....APPLICANT

VERSUS

CONSOLIDATED BANK OR KENYA.....DEFENDANT

RULING

1. Commenced by way of an Originating Summons dated 2nd August 2016 is an action by Family Bank Limited (Family) seeking the following prayers:-

1. THAT this Honorable Court be pleased to issue an order directing the Land Registrar Thika Land Registry to cancel the entries made under numbers 3,4, and 5 in the proprietorship section and entries made under numbers 1 and 2 in the encumbrances section over parcel of land known as Thika Municipality block 18/1032 and re-issue the title in the name of Clement Muchiri Njai as per the terms of the undertaking issued on the 16th October, 2014.

2. THAT the Applicant be discharge from the undertaking with the Respondent by returning the security documents being Thika Municipality Block 18/1032 to the Respondent in the state that they were received from the Respondent as per the terms of the undertaking dated 16th October, 2014.

Consolidated Bank of Kenya Limited (Consolidated) is named as a Respondent to the said proceedings.

2. The Applicant is now desirous of amending the Summons and has sought leave through a Notice of Motion of 4th October 2016. The proposed Amendments seek to expand the Prayers sought. These shall be discussed in greater detail in this Decision. Importantly, as well the Applicant seeks to enjoy Tabitha Wothaya Ndigirigi (Tabitha) and Clement Muchiri Njai (Clement) as Respondents and to move Consolidated from being a Respondent to an Interested Party.

3. Understanding, even in brief, the nature of controversy herein helps to determine the application now before Court.

4. Vide a Sale Agreement dated 7th August 2016, Clement agreed to sell and Tabitha to purchase Land Reference No. Thika Municipality Block 18/11032 (The property) at a consideration of Kshs.

2,200,000/-. The property was then charged to Consolidated and Family was to grant to Tabitha a loan facility of Kshs. 800,000/- being part of the purchase price.

5. To facilitate the Sale, Family as would want to in a transactions of this nature, gave an undertaking on the following terms to Consolidated:-

“We hereby irrevocably undertake that within fourteen (14) days of the due and effective registration by Messrs Susan Kahoya & Company Advocates of the Discharge of the Consolidated Bank of Kenya Limited Charge (the “Discharge”) and registration of a Charge over the Property securing the obligations of the Borrower in our favour (the days after receipt of Security Documents by our Advocates whichever is earlier, we will pay to you the Undertaking amount (as defined below) failing which our Advocates shall, upon first written demand by you, return the Security Documents to you in the state in which they were sent to them and they shall procure the Registrar’s cancellation of any entries made against the subject Title. Our Advocates shall give you a professional undertaking on the handling of the Security Documents.”

6. On the strength of that undertaking, Consolidated secured a Discharge of charge over the property and passed it on, together with the Title Deed, to the Family. On its part, Family appointed the Firm of Susan Kabogo & Company Advocate to represent it in the transfer and perfection of its security over the property.

7. It is averred on behalf of Family that its Lawyers informed it that because of failure of Tabitha to put them in funds for Stamp Duty, completion of the transfer took a considerable time (more than one year). The Advocates for Consolidated informed the Advocates for Family that as at 31/03/2016, Clements indebtedness to Consolidated stood at Kshs. 3,916,636.55 and demanded for its payment. But the security held by Family could not cover the amount now demanded.

8. In this quagmire, Family thought that the only way out would be to reverse the transfer and charge the chase in favour of Consolidated hence the request in the Originating Summons as it currently stands.

9. Through a Replying Affidavit of Anne Nyongesa sworn on 19th September 2016, Consolidated takes a simple position. That Family should be compelled to honour its undertaking as the difficulty of Family does not concern it.

10. Family seeks a change in strategy and in addition to the prayers made in the Originating Summons, its plea is that Tabitha and Clement be ordered to bear and pay the interest so far accrued on the undertaking and which is due to Consolidated. In the draft Amended Originating Summons, Family proffers same reasons. That Tabitha impeded the timely completion of the transfer in her favour and Registration of the Charge in favour of Family. As to Clement, it is the argument of Family that notwithstanding the delay, he was obliged to continue meeting his obligations with Consolidated. And in addition, it is alleged that he continues to collect Rental Income from the suit property.

11. The application for leave to amend was prosecuted and defended by way of written submissions pursuant to an agreement by Counsel to proceed in that manner. This Court has read and understood those arguments.

12. The leave sought by Family intends to attain the twin objectives of Amendment and joinder of two new Parties. The Principles to be applied in considering a request of this nature are now common place. In **J M K v. M W M & another** [2015] eKLR, the Court of Appeal stated:-

“Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commencing on this provision, the learned authors of Sarkar’s Code of Civil Procedure (11th Ed.

Reprint, 2011, Vol. 1 P.887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties”

This Court adapted the same approach in *CENTRAL KENYA LTD. V. TRUST BANK & 4 OTHERS*, CA NO. 222 OF 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs”.

13. The view of Family is that Tabitha and Clement would be necessary parties to the dispute as they have substantial interest on the outcome of this suit. And that as they are to blame for the untidy situation now obtaining the two will assist the Court in determining the real issues in controversy which would include reasons why the undertaking was not fulfilled and who should bear the consequences thereof.

14. Family does not see any prejudice to be suffered by Consolidated which cannot be compensated by an award of costs and that in any event,

‘.....the Respondent will still be a party to the Amended Originating Summons, and therefore, in the spirit of fair hearing, the Respondent will be accorded an opportunity to respond to the Amended Originating Summons if it so wishes’.

15. Consolidated thinks the proposed amendments to be wholly unmerited and maintains that Family has no reasonable Cause of Action against it. It opposes the amendments which it contends will only confuse issues and laden proceedings against which no orders can issue against it.

16. Consolidated has then sought to demonstrate that the suit is so hopeless that it should be dismissed summarily for failure to disclose a reasonable cause of Action against the Defendant. The Court says nothing of these arguments as it is not considering an Application for striking out.

17. It is apparent that, from the Originating Summons as it stands and the Amendments sought to it, Family acknowledges that it issued a undertaking to Consolidate which it has failed to keep. As a result of the failure to keep the undertaking, the amount that ought to be paid to Consolidated is beyond the Kshs.2,200,000/= that was envisaged at the time the undertaking was made. Importantly however, Family does not dispute that Consolidated ought to be paid the monies as they are now due.

18. Nevertheless, Family posits that Tabitha and Clement, who are to blame for the failure of the undertaking, should meet the interest so far accrued on the amount promised. And to the extent that Family seeks their joinder so that the controversy as to who bears the blame for the failure of the undertaking can be resolved, the Court sees merit in their joinder and the Amendments that the joinder will necessitate.

19. In addition the Prayers sought in the Originating Summons affect Tabitha and Clement. Prayer 2 seeks that the proprietorship of the property reverts from Tabitha to Clement. These are drastic orders that affect the two and they cannot be made without hearing them. It is easy to see why their joinder is not only necessary but inevitable.

20. What has caused this Court some anxiety is the proposal to move Consolidated Bank from a substantive party to an Interested Party. As earlier noted, Family does not doubt that the undertaking to Consolidate should be honoured and the amount now due paid. And as correctly argued by Consolidated no Orders are sought against it in this cause. One can see through the game plan of Family! By retaining Consolidated as an Interested Party herein the discharge of the undertaking is predicated on the outcome

of Family's litigation with Tabitha and Clement. Evidently, that prejudices Consolidated and it is not a prejudice that can simply be compensated by an order of costs. Family can elect to leave Consolidated out of these proceedings altogether or retain them as Defendants (in which event Consolidated can defend itself).The Court will not allow an Amendment that will cause an injustice to a party.

21. The Leave sought to make Consolidated an Interested Party is declined but Leave is granted to enjoin Tabitha and Clement as Defendants herein. Only to that extent is the Notice of Motion dated 4th October 2016 allowed but with no order as to costs as it has partly failed.

Dated, Signed and Delivered in Court at Nairobi this 11th day of May, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Kazungu for Applicant

N/a for Respondent

Alex – Court clerk