



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT NUMBER 201 OF 2012**

**FAMILY BANK LIMITED.....PLAINTIFF**

**VERSUS**

- 1. BERNARD GIKUNDI MWARANIA.....1<sup>ST</sup> DEFENDANT**
- 2. MARGARET KARWIRWA MWONGERA.....2<sup>ND</sup> DEFENDANT**
- 3. STEP UP HOLDINGS (K) LTD.....3<sup>RD</sup> DEFENDANT**
- 4. PETER MURIITHI MWARANIA.....4<sup>TH</sup> DEFENDANT**
- 5. CICILIA NYARUAI KIRAGURI.....5<sup>TH</sup> DEFENDANT**
- 6. JOHN MUTHAMI MURIITHI.....6<sup>TH</sup> DEFENDANT**
- 7. BANK OF AFRICA LIMITED.....7<sup>TH</sup> DEFENDANT**
- 8. MOUNT KENYA UNIVERSITY.....INTERESTED PARTY**

**RULING**

1. The application dated 16<sup>th</sup> September 2013 was brought by the third Defendant **Step Up Holdings (K) Ltd**. It is Premised on the provisions of **Sections 1A, 1B, and 3A of the Civil Procedure Act** and **Order 40 Rule 7 and 51 Rule 1 of the Civil Procedure Rules**. The applicant seeks that:

**(1) Spent**

**(2) The Honourable court be pleased to vary discharge and/or set aside the order barring the third Defendant from accessing and/or operating account No. 08011940005 held at Bank of Africa Ltd, Nakuru Branch.**

**(3) That the plaintiff be ordered to release forthwith. Title deeds for properties Kiambogo/Kiambogo Block 2/494(Mwariki), Block 2/497 Mwariki Kiambogo/Miroreni Block 1/1825 (Itherero) and Kiambogo Miroreni Block 1/1826(Itherero) to the first, second and third Defendants.**

**(4) That costs of the application be provided for.**

The application is supported by grounds as appear on the face of the application and affidavit sworn by the first Defendant.

The application is supported by the first, second and fourth Defendants and opposed by the Interested party, Mount Kenya University and the plaintiff, Family Bank Limited.

## **2. Brief background to the Application**

On the 15<sup>th</sup> April 2013, a consent order in respect of the issues subject of the suit was recorded between the plaintiff, the first, second, third and seventh Defendants in the following terms:

*1. That the 7<sup>th</sup> Defendant, Bank of Africa Ltd, be and is hereby permitted to deduct Kshs.5,560,000/= that is owed by the third defendant as at the date hereof from the Ksh.31,708,039.07 that was held in a fixed deposit account number 08011940018 together with interest earned thereon.*

*2. Thereafter, the seventh Defendant is to be discharged and released from the proceedings herein but on condition that the seventh Defendant shall hold the balance of the monies in the said fixed account number 08011940018, having added thereto all interest earned on the same from first July 2012 to the date hereof, in a fixed deposit account pending hearing and determination of the suit or other or further orders of this Honourable court, at the best available interest rate to be notified to the Advocates for the parties hereto as at the date of filing hereof.*

*3. The third Defendant herein to be at liberty to procure a purchaser for LR No 10386/28 and LR No 10386/29 and the proceeds of such sale and purchase to be applied to liquidate the book balance (notwithstanding, and without prejudice to the claims therein in relation to the loans secured thereby) due on the facilities for which there exists legal charges in respect of the same in favour of the plaintiff who shall thereafter discharge the same in the normal manner and release the titles thereto.*

*4. There be no orders as to costs in relation thereto.”*

3. The plaintiff filed a Replying affidavit as well as submissions to the application, so did the interested party, in opposition.

The fourth Defendant filed grounds in support of the application and also submissions.

At the hearing of the application by way of highlighting of their various submissions, Mr. Nyamwange Advocate stated that the first, second and fourth Defendants were in support of the application. That being the case and position and supported by Mr. Konosi Advocate for the first and second Defendants, the only opposing parties are the plaintiff/and the interested party, Mount Kenya University Limited which was represented by Mr. AIM advocate who relied on the submissions filed on the 8<sup>th</sup> March 2016, and various case law. I shall come to the submissions later in this ruling.

## **4. The Application:**

In support of the application dated 16<sup>th</sup> September 2013, it is the applicant's position that the consent orders dated 15<sup>th</sup> April 2013 compromised the application and in particular **Clause 3** whereof the applicant procured a purchaser for the two properties **LR No. 10386/28 and LR 10386/29** and paid off all liabilities owing by the applicant to the plaintiff from the sale proceeds. Indeed, it was submitted that the title documents to the two properties were released to the purchaser.

It is stated that despite settlement of all the liabilities to the plaintiff, the plaintiffs continued holding of the titles on simple deposit to the other four properties stated in **Prayer No. 3** and the continued freeze of

the applicants accounts held at the plaintiffs bank are illegal and prejudicial to its business interests.

It is further submitted that the third defendant/applicant owes no money at all to neither the plaintiff nor the interested party and therefore there is no justification to block the applicant from accessing its accounts, and that by Cause 2, parties were at liberty to apply to court for further orders as concerns the consent. Having met the conditions stated in the consent orders, the applicant invoked the said liberty – and approached the court for further orders as stated in the application.

5. The first, second and fourth defendants support the application. The fourth Defendant through his counsel, Mr. Wambeyi Makomere filed grounds in support on the 6<sup>th</sup> November 2015. He states that the interim orders enjoyed by the plaintiff need to be discharged as the plaintiff has no interest in having the case determined expeditiously.

In his written submissions, the fourth defendant states that by virtue of the discharge order of the seventh Defendant (Bank of Africa Limited) from the case, it was clear that the rest of the consent orders ought to be varied and/or set aside as it has settled in full its liability against the plaintiff.

#### **6. The Plaintiffs Objections to Application.**

Jackie Oyuyo Githinji, the company secretary of the plaintiff, in her Replying affidavit sworn on the 16<sup>th</sup> December 2013 deposes that the plaintiff has discharged and handed over all the titles it held as security for advances made to the third Defendant and therefore the plaintiff Bank holds no titles at all to the order of the third Defendant.

She further deposed that the plaintiff is not interested in the freezing of the third Defendants bank accounts, but only in the preservation of Kshs.31,708,039.07 traced to the third Defendant's accounts that were irregularly and illegally opened and held by the first, second and third Defendants with the plaintiff, and therefore the consent negotiated and recorded ought not be set aside, but, urges the court to formulate an appropriate order to enable the third Defendant to operate all its accounts at Bank of Africa but not to entitle it to access or withdraw the funds to the tune of Kshs.31,708,039.07 as that would tantamount to interference with the said sum, to the prejudice of the bank before hearing of the suit.

7. The plaintiff further deposes that the third defendant has not settled all the liabilities with the plaintiff bank, and referring to the subject consent, states that the discharge of the third defendant was made

***“without prejudice to the plaintiff's claims in the suit herein.”***

It is further submitted that the consent orders are not capable of being set aside or varied having been freely negotiated and agreed upon by all the parties, and there having been no undue influence, mistake, misrepresentation or fraud on the part of the plaintiff, they were to remain in force pending hearing and determination of the suit.

In view of the many obvious issues surrounding the said accounts, the plaintiff depones that only a full hearing would resolve the same and therefore urges that the court do disallow the application and await full determination in a full hearing.

7. The Interested party in its part swore a Replying Affidavit by its Deputy Vice Chancellor, Prof, Evans Kerosi on the 28<sup>th</sup> October 2013. He strenuously opposes the discharge of the orders of the court barring the third Defendant from accessing and operating the accounts at the Bank of Africa, Nakuru Branch.

The main reasons advanced are that it is interested and entitled to the remedy of tracing the sums illegally and irregularly transferred to the said accounts and if the orders are discharged, the third defendant will remove the said monies fraudulently that will be prejudicial to its interests as all liabilities to it by the third defendant are not settled, and lifting of the freeze orders would be disastrous to the interested parties in the funds held in the said accounts.

8. In its written submissions filed on the 8<sup>th</sup> March 2016, the Interested party reiterates contents of its Replying Affidavit. However, in its opening statements – **Paragraph 1(a), (b) and (c)**, the submissions are in support of the third defendant's application and basically contradict the averments as contained in the Replying Affidavit. That as it may, I have considered the submissions and the Replying Affidavit in their totality.

To that end, the lengthy submissions are to the effect that the application does not meet the legal threshold of setting aside or varying consent orders, that if the orders are set aside, the interested party will stand to suffer irreparably as the applicant may transfer the monies from the accounts out of reach by the party should the case be successful. The court is urged to disallow the application.

9. I have considered the rival submissions and arguments by all parties to the application.

The issue that arise from all submissions for the determination of the court is whether the third Defendant has put forth sufficient grounds to persuade the court to grant the orders sought.

It is trite that a consent order imposes a contractual obligation to all the parties and the same may not be set aside or varied without justifiable and valid reasons. See **The Board of Trustees National Security Fund -vs- Michael Mwalo (2015) e KLR**. J. Gicheru rendered thus,

***“A consent judgment or order has contractual effect and can only be set aside on grounds which would justify the setting aside of a contract, of if certain conditions remain to be fulfilled, which are not carried out.”***

Further, to set aside a **consent** a consent order, the applicant must prove that, in reaching the consent, there was:

***(a) fraud and collusion***

***(b) mistake or misrepresentation***

***(c) that the consent was contrary to public policy or***

***(d) Non-disclosure of material facts.***

See **Diamond Trust Bank of Kenya -vs- Ply and Panels Ltd & Others (2009) e KLR**.

10. I have considered the consent order entered into by the parties to this suit and dated the 15<sup>th</sup> April 2013. It was in partial compromise and settlement of the plaintiffs claim against the first, second, third and seventh Defendants. The interested party was not a party.

The consent as framed was conditional, and without prejudice to the plaintiff's claim in the suit. Various allegations of fraud and misrepresentation are labelled against the defendants. The Replying Affidavits by the plaintiffs and the interested party are quite detailed and I state they bring out all the issues very candidly. Those allegations cannot be ignored. They cannot be interrogated by way of summary procedure by interlocutory application. It is necessary that the suit proceed to full hearing where all the parties shall be accorded an opportunity to ventilate their cases in a fair and just manner. I agree with submissions by the fourth Defendant that if the application under consideration is granted, that will bring the case to a conclusion. But, looking at the issues raised, it would be a travesty of Justice to ignore the cardinal rule of law that all parties must be given a fair hearing without undue regard to procedural technicalities.

11. Coming back to the consent order sought to be discharged or set aside all parties agree that the title documents to the subject properties have since. been released to the first, second and third Defendants. I have seen a consent letter dated 31<sup>st</sup> October 2013, and executed by the plaintiffs Advocates, the first,

second and third Defendants Advocates and filed on the 1<sup>st</sup> November 2013. By the said consent, the title documents to the four land parcels were released to the third Defendant. Prayer No. 3 is therefore overtaken by events.

12. As to the second prayer, the plaintiff is not opposed to the discharge and lifting of the freeze order against the third Defendants accounts at Bank of Africa. Its interest, and that of the Interested party, Mount Kenya University is the preservation of the sum of Kshs.31,708.039.07 subject of the alleged fraudulent dealings by the Defendants.

How then would this court make an appropriate order for the continued preservation of that sum while at the same time being mindful of the defendants interests in their business accounts? In my opinion, any order by the court should not in anyway pave way to the defendants to proceed to withdraw, transfer or deal in any manner with the sum of Kshs.31,708,039.07/= pending final determination of the plaintiff's case.

13. It is evident that the plaintiff has been enjoying the interim preservative orders issued by the court in 2012 without due regard to the defendants interests. No action has been taken for four years towards prosecution of the case. Likewise, the defendants and the interested party have also not taken a step to set the case down for hearing or to prompt the plaintiff to the reality that prolonged and unexplained delay in prosecution of a party's case has dire consequences. Both are to blame for this.

14. Though not a party to the consent order sought to be discharged, the Interested party has a high stake in the outcome of the case and by implication the funds in the frozen accounts. This interest can not be ignored.

It is evidence that the consent order was voluntarily and unconditionally entered into. The applicant has not demonstrated to the court that there was any fraud, collusion, mistake or misrepresentation, nor any non-disclosure of material facts. See **Diamond Trust Bank Case** above.

Indeed, by consent, the **Bank Account No. 08011940018** was to remain frozen pending the hearing. The hearing and determination of the case. There was a rider though, that the court may issue further orders in respect thereof. This is what the applicant had done by approaching the court, not on the grounds as stated above which I have already found not to be applicable, but on the basis, stated in the application, that the applicant has settled the total liability it had with the plaintiff, an allegation that the plaintiff has denied, and supported by the interested party.

15. The courts finds that it would be disastrous to allow the application as the remedy of tracing is still available to the interested party and if the third Defendant is allowed access to the account there would be no guarantee that the money would not be withdrawn making the recovery should the case succeed in favour of the interested party impossible.

16. For those reasons, I proceed to make the following orders and directions:

***1. That the Orders sought by the third Defendant in its application dated 16<sup>th</sup> September 2013 in terms of Prayer 3 are overtaken by events as the subject title deed in respect of the four properties have since been released to the first, second and third Defendants.***

***2. That the court declines to vary discharge or set aside the consent orders dated 15<sup>th</sup> April 2013.***

***3. That for reasons stated, the plaintiff is directed to urgently take the necessary steps towards prosecution of this case, and in any event within 90 days from the date of this ruling.***

***4. That if there is default by the plaintiff to comply with this order/direction No. 3 above, the orders stated in(2) above shall automatically lapse and shall be forthwith substituted by an order in terms of Prayer No. 2 in the application, that the consent order dated 15<sup>th</sup> April 2013***

*barring the third Defendant from accessing and operating its Account No. 08011940005 at Bank of Africa Ltd, Nakuru Branch shall be discharged and set aside.*

*5. The court makes an order that costs of the application shall be in the cause.*

**Dated, signed and delivered in open court this 15<sup>th</sup> day of September 2016**

**JANET MULWA**

**JUDGE**