



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 245 OF 2010**

**ABDULGADER SHARIFF SALEH & JAMAL SHARIFF SWALEH**

**t/a JINGO TOURS & SAFARIS LTD.....PLAINTIFFS**

**VERSUS**

**SOUTHERN CREDIT BANKING CORPORATION LIMITED**

**DALALI TRADES.....DEFENDANTS**

**AS CONSOLIDATED WITH**

**CIVIL SUIT NO. 165 OF 2010**

**ABDULGADER SHARIFF SALEH & JAMAL SHARIFF SWALEH**

**t/a JINGO TOURS & SAFARIS LTD.....PLAINTIFFS**

**VERSUS**

**SOUTHERN CREDIT BANKING CORPORATION LIMITED**

**JOHNSTONE K MULI t/a**

**KITHEMU AUCTIONEERS .....DEFENDANTS**

**R U L I N G**

1. This court is called upon to determine the plaintiffs' application dated 18/5/2016 which seeks in the main an order for stay of public auction which scheduled for the 20/5/2016 pending the hearing and determination of the suit; an order that the 1<sup>st</sup> defendant be compelled to comply with court orders of 24/9/2015; an order that any suitable orders be made. In the plaintiffs own words, the application sought:-

- 1) THAT this application be certified as urgent and be heard ex-parte in the first instance.**
- 2) THAT this Honourable Court be pleased to issue a temporary stay of execution of the scheduled sale by public auction slated for the Friday 20<sup>th</sup> May 2016 and/or in any other**

**manner interfering with the Plaintiffs properties to wit L.R. No. MOMBASA BLOCK XVII/797 STADIUM AREA ALONG WAJIR ROAD, MOMBASA CITY, MOMBASA COUNTY (hereinafter “the suit property”) by the Defendants whether by themselves, their servants, agents, workers, employees, proxies to wit Messers REGENT AUCTIONEERS and/or any other person howsoever pending the hearing of this application interparties.**

**3) THAT this Honourable Court be pleased to issue a temporary stay of execution of the scheduled sale by public auction slated for the Friday 20<sup>th</sup> May 2016 and/or in any other manner interfering with the Plaintiffs properties to wit L.R. No. MOMBASA BLOCK XVII/797 STADIUM AREA ALONG WAJIR ROAD, MOMBASA CITY, MOMBASA COUNTY (hereinafter “the suit property”) by the Defendants whether by themselves, their servants, agents, workers, employees, proxies to wit Messers REGENT AUCTIONEERS and/or any other person howsoever pending the hearing and determination of this suit.**

**4) THAT this Honourable Court be pleased to issue an order requiring the First Defendant to comply with the orders issued by this Honourable Court on the 24<sup>th</sup> day of September 2015.**

**5) THAT this Honourable Court be pleased to issue such other it deems just and convenient to meet the ends of justice.**

**6) THAT the costs of this application be provided for.**

2. As can be seen all the prayers, except (stet) and the incidental prayers on costs, have been spent and therefore I can only decide whether there is justification to grant prayer 4 & 5. Looked at from all angles, the application wholly depend on the interpretation of the Ruling by Kasango J dated 24/9/2015 which the plaintiff says have not been complied with.

3. To the plaintiff/applicant, the defendant have been in defiance of the court orders of 24/9/2015 which according to the plaintiff compelled the defendant to issue statutory notice and to provide the plaintiff with requisite statements of accounts to show how much is exactly owed. It is added by the plaintiff that while the defiance persisted the defendant sought to advertise the suit property for sale by public auction on the 20/5/2016. These are the basis of the application as pleaded in the application and deponed to in the affidavit of ABDULGADER SHARIFF SALEH sworn and filed in support thereof.

4. The application is opposed by the defendant/respondent who filed grounds of opposition dated 10/6/2016 and a replying affidavit sworn on the 10/6/2016. The gist of the opposition in the Replying affidavit is that pursuant to the court orders sought to be enforced, the defendant did issue fresh statutory notices dated 16/10/2015 and had the same served upon the plaintiff by Registered Post to his known postal address at 40115- 80100 Mombasa. The Notices were served by registered post and statements of accounts were duly exhibited. The Notice were never complied with hence the defendant moved to exercise its statutory power of sale and staged an action on the 24/5/2016.

5. It is that action that provoked the plaintiff to present the present application. I have taken into account the affidavit filed and the rival positions taken on the same. I have as well taken into account the written submission filed and the oral submissions offered before me in court.

6. To make a determination it is imperative that the court seek to find out what Judge Kasango said in her ruling of 24/09/2015. The judge said in that ruling, and I quote:-

**“I have considered the plaintiff’s Notice of Motion and as well as the defendant’s replying affidavit and the parties written submissions. Having so considered those documents, I do find that the defendant failed to shift the burden of proof in respect of issue of the alleged lack of statutory notices and statements of account. For that reason the plaintiffs are entitled to an injunction. Such an injunction however will be limited up to the time the defendant serves the plaintiffs with statutory notices as required under the Land Act 2012; and up to the time the defendant complies with all other requirements set out under the Land Act 2012; and up**

**to the time defendant supplies the plaintiffs with up to date bank statements. Such a limited injunction is in keeping with the court of Appeal decision in the case NATIONAL BANK OF KENYA LIMITED -V- SHIMMERS PLAZA LIMITED (2009) eKLR where the court of Appeal stated:-**

***“We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit”.***

7. The defendant/respondent has exhibited in the Replying affidavit documents marked ECB – 1,2 4 and 5 being the Notices under Section 96(1) (2), Land Act and the evidence of Registration. There is equally the Notice issued by the Auctioneer dated 18/3/2016 an affidavit of service sworn by Peter Mburu Wathaka as well as a newspaper advertisement in the Daily Nation of 16/5/2016. All these are to this court in full compliance with the dictates of the Land Act as well as the Auctioneers Act. I am in no doubt that the orders by Kasango J have been complied with regarding compliance with the provisions of the Land Act and I see no reason why I should order a repeat.

8. It may only be necessary to add that it is the duty of this court to enforce the contract between the parties but never to re-write the agreement between them.

9. Equally it is a rudimentary learning that parties are bound by their pleadings. The pleadings commencing this litigation is the plaint dated 28/5/2010. In it and at Paragraphs 8, 10 & 11 the plaintiff plainly admit indebtedness and attempts at settlement. In fact beyond the prayer for permanent injunction the plaintiff only other prayer is for accounts on the overdraft facility. That being the state of the pleadings by the plaintiff to date, can it be genuinely said that even after this court gave its orders of 24/9/2015, the plaintiff has a genuine claim against the defendants without offending the rule of law that a party is not permitted to depart from his pleadings? I don't think so. The fact of the matter is that there is a lending contract between the parties which obligated the plaintiff to pay the debt owed and a corresponding right for the bank to sell the property given as security in case of default so as to recover the debt. To this court to grant the order sought would be tantamount to this court undoing the terms of an agreement between the parties. However, strongly a party to a contract feels he got a bad bargain, it is not the duty of the court to intervene in every situation. Equity would however intervene, but only in very special circumstances beyond the maxim that equity imputes an intention to fulfil an obligation.

10. In the instant case, I have said, the obligation to pay is not in doubt. In fact it is admitted by the plaintiff. I hold that the cure to a debt is payment of it. So critical is this obligation in law that our own court of Appeal in FINA BANK LTD VS SPARES INDUSTRIES LTD, CASE NO. 51 OF 2000, had this to say regarding application of equity to contracts:-

***“It is clearly beyond peradventure that save for those special cases where equity might be prepared to, to relieve a party for a bad bargain, it is no part of equity's function to allow a party to escape from a bad bargain”.***

11. Be it as it may, even if the plaint was to be amended to breath other grievances into the suit, one day, whether the parties will sit down as they did while negotiating the financial facilities and agree on the debt due or the court may, when it comes to that, determine how much is due, out in all events the debt will have to be paid. It may be necessary to add that the continued pendency of this matter before this court, unresolved, is to the court, of no benefit to anybody. No benefit at all because as the debt continues swell, the value of the security when compared to the debt continues to shrink. The plaintiff continues to be burdened by additional interests while the bank risks loosing the worth of the security. I say it is undesirable to encourage that state of affairs.

12. All the foregoing point to the decision I have come to that the application dated 18/5/2016 cannot succeed but must fail. I order it dismissed with costs.

Dated at Mombasa this 7<sup>th</sup> day of **November 2016**

**HON. P.J.O. OTIENO**

**JUDGE**