



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 28 OF 2015

JOHN PAUL GACHUHI.....PLAINTIFF/RESPONDENT

-VERSUS-

NATIONAL BANK OF KENYA LTD.....1ST DEFENDANT/APPLICANT

JOSEPH M. GIKONYO T/A GARAM INVESTMENTS.....2ND DEFENDANT

RULING

Introduction

1. This ruling relates to the notice of motion dated **17th June, 2016** in which the 1st defendant (applicant) seeks the following orders:

- 1) An order of review of the order made on 29th January, 2014 by correcting and substituting the incorrect names of Messrs WVK Associates with the correct names and description of Messrs EKV Associates.**
- 2) Enlargement of time within which the auditors ought to have filed their report by a further 90 days to allow the appointed auditors, Messrs EKV & Associates and Messrs Ernest & Martin Associates, to prepare and submit a joint audit report.**
- 3) An order settling the terms and mandate of the auditors by adopting the binding terms and mandate set out in the 1st defendant's advocates letter of 7th December, 2012.**
- 4) Costs of the application be borne by the plaintiff.**

2. The application is premised on the supporting affidavit of the applicant's advocate, **Victor Odhiambo Adundo**, sworn on 17th June, 2010 in which it is deposed that the plaintiff and the defendant had mutually appointed the firms of Messrs EKV & Associates and Messrs Ernest & Martin Associates to jointly carry out the intended audit exercise, within 60 days and that owing to unjustified refusal by the plaintiff/respondent to jointly instruct the appointed auditors, the intended audit has never taken off.

3. Arguing that the plaintiff completely misapprehended the finding of the court in the judgment delivered on **12th December, 2007** pertaining to the scope, impartial and independent role of auditors, the applicant urges the court to affirm the settled terms and mandate of the auditors as set out in its advocates letter dated **7th December, 2012**.

4. With regard to the prayer for review of the consent order made on **29th January, 2014**, it is pointed out that there is an error in the consent order, relating to the description of one of the auditors, EKV & Associates, wrongly described as Messers WVK Associates.
5. Arguing that no prejudice will be occasioned on the plaintiff if the orders sought are granted, the applicant urges the court to, in the interest of justice, allow the application.
6. In reply and opposition to the application, the plaintiff/respondent has deposed that he is opposed to prayer 3 of the motion as it opens the decided case by incorporating new matters which were not canvassed in the case and amounts to review or an appeal of the judgment hereto; that vide his letter dated **30th July, 2014** he explained why he is unable to execute the joint mandate to the appointed auditors.
7. In essence, the plaintiff contends that the joint auditors and the advocates for the respective parties must agree on the documents and the law to be relied on in advance. He goes ahead and proposes the documents the auditors must rely on in carrying out the audit and the law to wit, the documents listed or mentioned in paragraphs 8, 13, 17, 18, 19, 20, 21, 22, 24, 27 29 in his replying affidavit.
8. With regard to the law applicable, he suggests that the joint auditors be guided by the Banking Act and the Central Bank of Kenya Amendment Act 2000 No.4 of 2001 dated 6th August, 2001 (Regulation of interest rates of specified banks or specified financial institutions) and all the finance bills contained in the successful budgets for all the years during the audit period of the existence of the loan in question.
9. It is submitted that the issue to be decided by the court is whether the mandate of the joint auditors is restricted to the evidence, exhibits, statements of accounts, letters, documents, proceedings and judgments already in court or whether the mandate of the auditors should include taking fresh evidence, statements of accounts, documents, letters and other materials not presently in court.
10. It is further submitted that the mandate of the auditors should be restricted to the documents, letters, statements of accounts, evidence, proceedings and judgment already in the court file.
11. According to the plaintiff/respondent, the auditors have no mandate to take fresh evidence, statements of accounts, letters, documents not already in court because doing so would amount to hearing the case afresh or sitting on appeal of the court's decision.
12. I have read and considered the cases of the respective parties; the judgment of **Kasango J.**, delivered by **Makhandia J.**, (as he then was) on **12th November, 2007** and the consent orders made on **29th January, 2014** by the parties herein.
13. Vide the judgment hereto, it is clear that the plaintiff, *inter alia*, sought to compel the 1st defendant (the applicant herein) to supply him with a comprehensive statement of his account and an order for the suit property to be valued jointly between the plaintiff and the 1st defendant.
14. In her judgment the court, *inter alia*, stated:

“What came out during cross examination is that the defendants produced various sets of accounts in respect of the plaintiff's account...In all these accounts different rates of interest were charged to the plaintiff's account...If the defendant's witness accepted that the amount on Dexhibit 3 as at March, 1996 when the interest rate was 15% was the correct amount, they ought to have availed before court a calculation showing the credit of the amount reflected on Dexhibit 1 page 63. This is the amount the plaintiff said he had paid to the 1st defendant. If that credit was given to that amount, the court would have been able to know the correct amount owed by the plaintiff. ...I am of the view that the plaintiff having raised the issue that the defendants did charge him interest rate contrary to what was allowed by the charge instrument, the burden of proof shifted to the 1st defendant to prove otherwise...the defendant produced three statements. One was marked as defendant exhibit No.2 from page 9-85. This statement did not indicate the rate of interest charged on the plaintiff's account.

The second statement was also in Dexhibit 2 page 4-8. This indicated interest which revealed that before restructuring when the rate of interest should have been constantly 15% per annum, the 1st defendant were charging 28%. This 2nd statement did also contradict the statutory demand sent to the plaintiff by the 1st defendant's advocate dated 5th December, 1995. That demand indicated the applicable rate of interest to be 30%. The third statement marked as Dexhibit No.3. This reflected a constant charge of 15% per annum interest rate. This however failed to show credit of plaintiff's payment made after February 1996. After that date by Dexhibit No.1 page 63 the plaintiff made payments to the 1st defendant of ...at various times. It is a mystery why these payments were not reflected. One does wonder what would have been the state of the plaintiff's account had those payments been reflected. The court's finding is that the 1st defendant failed to satisfy the burden of proof in this issue. The plaintiff has therefore on a balance of probability proved that the 1st defendant did charge varying rates of interest when the charge instrument did not permit it...on that basis the plaintiff would be entitled to an injunction to stop the defendant from selling the property for the incorrect amounts in his loan accounts.

The judgment of this court is that an injunction is hereby granted to the plaintiff restraining the 1st defendant from selling the plaintiff's property LR. No. Loc.10/Kirogo/33. The court does hereby award the plaintiff costs of this suit."

15. It is clear from the above quoted judgment, that the court did not address the question as to whether the 1st defendant should supply him with a comprehensive statement of his account and an order for the suit property to be valued jointly between the plaintiff and the 1st defendant.

16. It is also clear that the court was unable to determine whether or not the plaintiff owed any money to the 1st defendant.

17. It appears that as a result of the gap in the judgment and in a bid to resolve the dispute between them, the parties to this dispute recorded a consent in the following terms:

"It is hereby ordered by consent that:

a). M/S WVK Associates Auditors and Ernest & Martin Associates are hereby appointed as joint auditors to prepare and deliver a report to the court in terms of the judgment of the court;

b). The two auditors to present a joint report within 60 days from the date of appointment;

c). That by further consent the joint report is extended by a further 3 months from 29/1/2014 and the matter be mentioned on 7/5/2014 for further orders."

18. Given the above cited gap in the judgment, I am of the considered view that the intention of the parties in recording the consent was to assist the court to do what it was in effect unable to do on the basis of the evidence availed to it. I say this because in its judgment, the court lamented that on the basis of the evidence availed before it, it was unable to know the correct amount owed by the plaintiff, if any.

19. In view of the foregoing, the question to answer is whether the auditors can reasonably be expected to reach a different determination based on the evidence adduced before the court or put in another way, whether the auditors are expected to merely rely on the evidence adduced before the court, as submitted by the plaintiff.

20. Being of the view that the intention of the parties is to get a solution to the dispute presented before the court by establishing whether or not the plaintiff is indebted to the 1st defendant and if yes, the extent of indebtedness and owing to the fact that the evidence presented before the court is insufficient to help the auditors make that determination, I find and hold that in making that determination, the auditors cannot be restrained to the evidence adduced before the court.

21. With regard to the contention that taking further evidence by the auditors would amount to sitting on appeal of its own decision, having determined that the question of the plaintiff's indebtedness to the 1st defendant was not determined by the trial court, I am unable to agree with the plaintiff's contention that by entertaining further evidence on that issue, the auditors will be exceeding their mandate. After all, under the consent in question, the auditors are supposed to present their report to this court for further orders.

22. Having determined that it would be unreasonable, in the circumstances of this case to limit the auditors to the evidence adduced before the court and the court record, I make the following directions; that the auditors shall:

i) On the basis of the judgment herein, establish whether the plaintiff/respondent is indebted to the 1st defendant/ applicant and if so the extent of indebtedness;

ii) Obtain and review any additional documents/ information that may assist them in making the above determination.

iii) File a report concerning the document/information relied on in compiling the report and their findings/recommendations, within 90 days from the date hereof to enable the court make further directions thereon.

iv) The auditors fees shall be shared equally between the plaintiff and the 1st defendant.

v) The costs of this application to abide further orders to be issued in respect thereof.

23. As the respondent is not opposed to prayers 1 and 2 of the notice of motion herein, I allow those prayers as prayed.

24. Prayer 3 and 4 succeeds only to the extent contemplated in this ruling.

Orders accordingly.

Dated, signed and delivered at Nyeri this 31st day of January, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Wachira h/b for Mr. Odhiambo for the 1st & 2nd defendant

N/A for the plaintiff

Court clerk - Esther