



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
LAND CASE NO. 5 OF 2016
(FORMELY ELDORET ELD NO. 435 OF 2015)

AMIT AGGARWAL (*suing as*

Administrator of the Estate of the late

GURCHARAN DASS AGGARWAL).....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT/RESPONDENT

R U L I N G

1. The plaintiff/applicant brought an application dated 21/11/2016. The application sought two main orders. One is an order seeking that the sum of Kenya Shillings **Seven Million, Six Hundred and Fifty Eight Thousand, One Hundred and Ninety and Forty Cents(Kshs.7,658,190.40/=)** be deposited by the plaintiff/applicant in a joint interest earning account in the names of both Advocates on record pending the hearing and determination of this suit.
2. The second order sought is that upon the grant of the prayer above the defendant/respondent be ordered to release to the plaintiff/applicant all the title documents held by it as security together with duly executed discharges of charges in respect of some stated eleven (11) properties.
3. The grounds on which the application is made are that; the defendant advanced a banking facility of **Kshs.10,197,329.40** to the deceased, whose Estate the plaintiff is Administrator; that the deceased provided title documents and executed charge documents which were registered against the 11 titles; which titles the defendant is still in possession of; that the deceased and/or his Estate paid the amount advanced by the defendant in full but the defendant however alleges that the deceased's Estate owed **Kshs.7,658,191.40** as at **17/12/2015**; that the defendant has attempted to exercise its statutory power of sale; that the Estate of the deceased is desirous of having the title documents held by the defendant released and discharged so that it may use them for its own purposes; and that the defendant would suffer no prejudice if the orders sought were granted since the moneys said to be owing would be secured in a joint interest earning account.
4. The application has been partially compromised between the parties by a consent signed by both parties, dated **21/12/2016** and filed in court on **9/1/2017**, the two parties agreed that an enhanced sum of **Kshs.9,000,000/=** be deposited by the plaintiff in an interest earning account in the joint names of the Advocates pending any agreement by the parties or any order by the court.
5. The consent further states that upon the deposit of the sum of **Kshs.9,000,000/=** aforesaid, the

defendant do forthwith and in any event not later than 3 days thereafter release to the plaintiff the certificate of lease over Title Number **Eldoret Municipality Block 6/6** and a duly executed discharge in respect thereof, other than as affected by this consent, the application dated 21/11/2016 was to be fixed for hearing. Therefore, I can state without any fear of contradiction that Prayer No. 2 of the application is already completely disposed of. Now all that is left for this court to do is to determine whether Prayer No. 3 of the application is capable of being granted.

6. Despite the partial compromise the defendant filed a replying affidavit sworn by one Fatuma Mohamed, the Manager, Remedial in the Remedial Department in defendant Bank. Ms. Mohamed depones that the discharge and release of the titles would expose the defendant/respondent to great loss, irreparable damage and bring down the defendant's operation, which averment I find quite intriguing, unless the plaintiff is the defendant's sole or main customer, which cannot be the case if one considers the paltry sums involved against the background that the defendant is a National Bank. Ms. Mohamed considers the application an abuse of the court process as it seeks in her view, to interfere with the fair determination of the suit and seeks to alter the terms of a contract. If this be the case, I would state now that the application has been partially compromised, the defendant has already agreed to such alteration of the contractual terms by the consent filed in court on 9/2/2017. In support of her statement to the effect that the amount owed has accrued considerable interest and therefore the deposited amount would not be sufficient to settle the outstanding amount the Manager Remedial of the defendant in her affidavit exhibits a copy of the loan repayment statement marked as "FM4" which is valid for the period upto 28/2/2017.

7. It is good to note that the deponent has carefully avoided mentioning any sums or explaining how the amount has grown to the extent that is suggested by the statements. Whileas this may be out of caution not to prejudice the defendant's final position and evidence at the hearing of the main suit, in a partially compromised application, it is strange that the defendant's witness would not come out clearly to assert the manner in which the amount was arrived at in order to demonstrate to the court that there is a credible defence to the application or the main suit, and hence bar any further orders at this interlocutory stage if necessary. This observation is reminiscent of this court's observations in its Ruling dated **17/5/2016** in which granted the plaintiff an order of interim injunction against the defendant, restraining it from sale of the suit properties.

8. In paragraphs 10 – 13 of the Ruling, the conduct of the defendant is well outlined: the defendant had agreed with the plaintiff that the amount payable was **Kshs.10,756,972/=** soon after the demise of the deceased. It was further agreed that the outstanding amount would be repaid at the rate of **Kshs.270,000/=per month** for **3 years** with effect from **June, 2007**. It was also agreed that the plaintiff was to sell two properties by private treaty to assist in reducing the amount due.

9. The court at paragraph 11 of the ruling aforesaid observed that on **28/2/2008, 8 months** after the agreement, the defendant wrote to the plaintiff and claimed that the outstanding amount was **Kshs.23,374,501.40**. It is during the hearing of the injunction application that the plaintiff urged that contrary to what the defendant was claiming the plaintiff had overpaid the defendant by an amount of **Kshs.4,098,028/=**; when the plaintiff sought to be availed the loan account statements for the period **2008 to 2011**, the defendant declined to provide them. Only accounts for the period **2012 – 2015** were availed. In its Ruling this court observed that the defendant did not show how it arrived at the amount of **Kshs.7,255,001.42** which it was claiming from the plaintiff.

10. This court has observed previously that some of the charged properties have been valued at over **Kshs.100,000,000/=**. The court stated as follows:-

“There are eleven (11) properties which were charged. Only five have been valued. It will be ridiculous to allow properties of millions of shillings to be sold just because of an alleged debt of seven million which prima facie appears to be genuinely contested.... There must be a balance between what is owed and what is at stake”.

11. At paragraph 17 of the Ruling dated **17/5/2016**, this court stated as follows:-

“On the issue of balance of convenience, I have stated in paragraph 15 hereinabove that this is a case of balancing which side may suffer more than the other. For the reason given hereinabove, I find that the balance of convenience tilts in favour of grant of injunction”

12. While determining the current application the same principle should apply. According to the defendant’s own letter dated **17/1/2015**, the amount owing, and capable of redeeming the suit properties is **Kshs.7,658,191.40/=**. A year and a half after this letter was written, the consent to deposit **Kshs.9,000,000/=** into an interest earning account was filed. The latter amount is higher than the amount said to be owed by the plaintiff. That would still be the case even if interest for the period of one year since the date of the letter in question (17/11/2015) was taken into consideration.

13. For that reason I find that the application dated **21/11/2016** is merited and I therefore grant it in terms of **Prayer No. 3** thereof.

Signed, dated and delivered at Kitale on this 29th day of May, 2017.

MWANGI NJOROGE

JUDGE

29/05/2017

Before - Mwangi Njoroge Judge

Court Assistant - Isabellah

No appearance for the parties.

Ruling read in open court in the absence of the parties who had been notified.

MWANGI NJOROGE

JUDGE

29/05/2017