

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ENVIRONMENT & LAND CASE NO. 17 OF 2015

ELIZABETH JERONO YATOR..... PLAINTIFF

VERSUS

CONSOLIDATED BANK (K) LIMITED1ST DEFENDANT

PROTUS WANGA

T/A TIMELESS DOLPHIN AUCTIONEERS.....2ND DEFENDANT

LOMSON ENTERPRISES LIMITED.....3RD DEFENDANT

RULING

Elizabeth Jerono Yator herein referred to as the Plaintiff sued Consolidated Bank Ltd and Protus Wanga T/A Timeless Dolphin Auctioneers and Lomson Enterprises Limited. The suit was commenced by way of Plaint dated 20/1/2013 and filed on the same date. The Plaint was accompanied by an application for injunction filed under certificate of urgency. The statement of defence for 1st and 2nd defendant was filed on 11/2/2013 whilst the replying affidavit to the application was filed on 24/2/2015.

The reply to the 1st and 2nd Defendant's defence was filed on 3/3/2015. However the suit was compromised in terms that the Plaintiff has to liquidate the debt of Kshs.3,200,000/= by paying Kshs.200,000/= to the 1st Defendant on or before the 31/8/2013. The plaintiff thereafter was to pay Kshs. 100,000/= to the 1st defendant monthly. That the Plaintiff was to pay the balance outstanding thereto in equal installments for a period of 5 years. The 1st defendant was not to charge the plaintiff penalty interest incurred before the consent.

The only issue remaining is who pays costs. The firm of *Magare Musundi & Company Advocates* on behalf of the Plaintiff stated that they were successful party as the suit was compromised in terms of the Plaint. On the contrary, the firm of *Cheptumo & Company Advocates* for the 1st and 2nd Defendants submit that the prayers sought were not granted and that the Plaintiff admitted indebtedness to the 1st defendant and agreed to pay the sums declined by the 1st defendant to be outstanding.

I have considered the submission of both counsels on record and do find that it is not disputed that the plaintiff is the proprietor of Eldoret Municipality Block 9/912 as a Lessee for a term of 99 years from 1/1/1989 from the Eldoret Municipal Council. The property was charged to Consolidated Bank of Kenya on 13/8/2012 for Kshs.3,500,000/=. The charge was as a result of a guarantee executed by the Plaintiff in consideration of the 1st defendant granting a loan to the 3rd defendant. The Plaintiff as a guarantor to the 3rd defendant guarantee the liability of purported sum of Kshs.4,500,000/=. By consent dated 19/3/2015, the plaintiff agreed to liquidate the outstanding debt. The implication of the above is that the 3rd defendant was in arrears and therefore the successful party was the 1st defendant. In exercise of my discretion to award costs and looking at the circumstances of the case, that the plaintiff executed a guarantee on a financial facility granted to the 3rd defendant and charged his property to the 1st defendant and that the 3rd defendant failed or neglected to service the facility as agreed and that the plaintiff was willing to service her guarantee on *pro rata* basis, she has admitted that the 3rd defendant was indeed owing the 1st defendant and therefore she should be punished for costs. The upshot of the above is that I do award costs to the 1st defendant. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF AUGUST, 2016

ANTONY OMBWAYO

JUDGE