East African Development Bank v Dari Limited & 5 others (Civil Case 001 of 2020) [2024] KEHC 3281 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3281 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 001 OF 2020

A MABEYA, J

MARCH 21, 2024

BETWEEN

EAST AFRICAN DEVELOPMENT BANK ..... JUDGMENT CREDITOR

AND

DARI LIMITED ..... 1ST JUDGMENT DEBTOR

RAPHAEL TUJU ..... 2ND JUDGMENT DEBTOR

MANO TUJU ..... 3RD JUDGMENT DEBTOR

ALMA TUJU ..... 4TH JUDGMENT DEBTOR

YMA TUJU ..... 5TH JUDGMENT DEBTOR

SAM COMPANY LIMITED ..... 6TH JUDGMENT DEBTOR

RULING

1. This matter came up for highlighting of submissions on 20/3/2024. All the parties were ready to highlight their submissions. However, the Court was involved in the Constitutional Petition Nos. 473 of 2023 and 481 of 2023, respectively. For that reason, the highlighting could not take place.

2. Since the matter could not proceed, the Advocates for the lender/ Judgment Creditor applied that the orders in force, for status quo be discharged. Leading the onslaught, Mr Ojiambo (SC) submitted that the borrowers Judgment/Debtors had enjoyed the status quo for long and for free. That the order made on 22/11/2023 was unconditional and that conditions should be imposed if there was to be extension.

3. Supported by Mr. Sullivan (KC) and Mr Wakhisi, it was submitted for the Lender that the amount due was as per the judgment of the UK Court, now already adopted in Kenya. That the borrowers had not shown any intention of settling even the principal amount which was not disputed.

4. Mr. Nyamondi appearing for the borrowers opposed the application. He submitted that it was not his clients to blame for the collapse of the highlighting. That the issues being raised now were considered by the Court before it rendered its ruling on 22/11/2023. That if the Lender sought to vary the orders of 22/11/2023, it should do so through a formal application to be contested.

5. I have considered the record and the submission of Learned Counsel. I have also reflected on the matter and the frustration that the Lender expresses. On the frustration by the Lender, all I can do is to reiterate what I stated in my ruling of 22/11/2023 that resulted in the orders that are sought to be vacated.

6. In that ruling, I observed that the borrowers had expressed the desire to pay but for the actions of the Lender. And that, due to the Induplum rule, which is a cardinal rule in matters borrowing, it was not clear what was the amount payable. Whether it was the sum of US$ 15 plus interest in terms of the decree from the UK Court or US$28M claimed by the Lender or the amount under the charge plus interest restricted to section 44A of the *Banking Act*.

7. After making the foregoing observations, the Court quipped: -

> " The Court is alive to the fact that a lender is not to be barred from recovering its outlay and/or realize its security in a case of default. However, the question is, what happens where the borrower says he is ready to pay but for the actions of the lender? That the equity of redemption is being stifled by the lender? Since the right of the lender is money and not security that is an issue to be interrogated".

8. Mr. Sullivan KC submitted that since there was a final judgment from the UK High Court and confirmed by the UK Court of Appeal, the issues being raised by the borrowers were res judicata. The question that arises is, under the law, if the Chargee opts to sue for the money rather than realize the security charged, is he entitled to recover more than set out in the law and in breach of the induplum rule set under section 44A of the *Banking Act*?

9. In the present case, already the amount being sought by the Lender is in breach of the induplum rule – US$ 28M plus. What I understand the borrowers to say is, "aware of the judgment and the order for interest, we are prepared to pay what is due but we don't know how much".

10. On 22/11/2023, I was of the view, as I am still, that, if the Lender is left to execute for US$ 28M or whatever it is claiming and later it is found that it was not entitled to anything more than double the amount due as at the date of default, an injustice would have been caused which would not be reversible.

11. In view of the foregoing, I am of the view that the position obtaining on 22/11/2023 still subsists. That the failure for the matter to proceed on 20/3/2024 was because the Court was overwhelmed. The borrowers cannot be blamed for the collapse of the matter. Neither can the advantage they have be taken away peremptorily for no wrong of theirs. In any event, the Court has directed the matter to be finalized on 19/4/2024. A waiting of one more month in my view, will not occasion irreversible prejudice to the Decree/Holder.

12. Accordingly, the oral application for the discharge of the orders inforce is hereby declined. The status quo orders will obtain until the next hearing date.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2024.

A. MABEYA, FCI Arb

JUDGE