



**Velos Enterprises Limited v Paragon Electronics Limited; I & M Bank Limited  
(Formerly Investment & Mortgage Bank) & 6 others (Garnishee) (Civil Case  
289 of 2009) [2024] KEHC 4116 (KLR) (Civ) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4116 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
CIVIL  
CIVIL CASE 289 OF 2009  
JWW MONG'ARE, J  
APRIL 29, 2024**

**BETWEEN**

**VELOS ENTERPRISES LIMITED ..... JUDGMENT DEBTOR**

**AND**

**PARAGON ELECTRONICS LIMITED ..... DECREE HOLDER**

**AND**

**I & M BANK LIMITED (FORMERLY INVESTMENT & MORTGAGE  
BANK) ..... GARNISHEE**

**KENYA COMMERCIAL BANK LIMITED ..... GARNISHEE**

**WANANCHI GROUP KENYA LIMITED ..... GARNISHEE**

**BEVAJ FURNITURES LIMITED ..... GARNISHEE**

**HORIZON CONTACT CENTER LIMITED ..... GARNISHEE**

**HUAWEI TECHNOLOGIES (K) LIMITED ..... GARNISHEE**

**SIMBANET COM LIMITED ..... GARNISHEE**

**RULING**

1. On 23<sup>rd</sup> October 2015, the Court delivered judgment in the matter and made the following orders: -
  - a. The Defendant (Paragon Electronics Limited) is hereby granted an order of specific performance directing the Plaintiff to cause a separate title to be issued in favour of the



Defendant for all that property known as LR No. 209/16027 or the suit property, in accordance with the sale agreement dated 23<sup>rd</sup> August, 2006.

- b. The Specific performance should be effected within thirty (30) days from the date of this Judgment.
  - c. Pending the Specific Performance to be done as per prayer (a) above, the Plaintiff (Velos Enterprises Limited) shall pay to the Defendant (Paragon Electronics Limited) a sum of Kshs.1,178,000/= per month being the value of the lost rent until the said Specific Performance is actualized and a separate title is issued to the Plaintiff as per this Judgment.
  - d. Cost herein assessed at 70% and awarded to the Defendant.”
2. Following the judgment, the parties have been embroiled in a long drawn out dispute regarding the execution of the decree. At the heart of the matter is the issue of whether the judgment debtor, Velos Enterprises Limited (Velos) has satisfied the decree by issuing the decree holder, Paragon Electronics Limited (Paragon) with the Sublease dated 9<sup>th</sup> May 2007 for the suit property, being the office block known as Block C that was erected on Land Reference Number 290/16027. Presently, there are three applications for determination before the Court.

### **Application of 30<sup>th</sup> May 2023 by Paragon Electronics Limited**

3. The 1<sup>st</sup> application is the notice of motion dated 30<sup>th</sup> May 2023 by Paragon seeking leave to file a further affidavit to produce new evidence, material and information and therefore the affidavit of JOHN K. BARREH filed on 22<sup>nd</sup> May 2023 be admitted on record. The application is premised on the grounds on its face, the supporting and further affidavits sworn by Bulent Gulbahar on 30<sup>th</sup> May 2023 and 21<sup>st</sup> September 2023 respectively. In addition, Paragon filed primary and further written submissions dated 25<sup>th</sup> September 2023 and 11<sup>th</sup> October 2023.
4. Paragon’s case is that the Court in HCCC 8 of 2016, Paragon Electronics Limited v I & M Bank ordered the parties to appear before the Chief Land Registrar to establish the facts on the title L. R. No. 209/16027 and Sublease IR 111891 which are issues before this Court; that on 23<sup>rd</sup> March 2023, the parties’ advocates and Mr. John K. Barreh as an expert appointed by Paragon, appeared before the Chief Land Registrar, Mr. Nyandoro who advised Paragon to apply for cancellation of the illegal, unprocedural, fraudulent subdivision of the head title LR No. 209/16027 and that Velos would suffer no prejudice if the orders sought are granted as they can have leave to respond.
5. In response, Velos Enterprises Limited filed grounds of opposition dated 9<sup>th</sup> June 2023, a replying affidavit sworn by its director Rameshchandra Jayantilal Sheth (R. J. Sheth) on even date and written submissions dated 26<sup>th</sup> September 2023. Velos opposed the application on grounds that the evidence sought to be admitted was hearsay; that under paragraph 4 of the affidavit sworn on 30<sup>th</sup> May 2019, the affidavits that Paragon wishes to rely on were filed in another suit, where Velos was not a party; that under the *Evidence Act*, this is only permissible where the witness cannot be found and that evidence of extinguishment of the sublease through registration can only be by way of documentation. Velos further faulted Paragon for relying on the new evidence in its submissions before its admission.

### **Application of 15<sup>th</sup> August 2017 by Velos Enterprises Limited**

6. The 2<sup>nd</sup> application is the notice of motion dated 15<sup>th</sup> August 2017 by Velos Enterprises Limited (Velos) seeking declaration of satisfaction of the judgment of 23<sup>rd</sup> October 2015 and decree of 3<sup>rd</sup> November 2015. The application is anchored on the grounds on its face, the supporting affidavit sworn by R. J. Sheth on the same date. The grounds are that the official search dated 11<sup>th</sup> August 2017 shows that



there is a charge registered in favour of Investment and Mortgages Bank Limited (I & M Bank Limited) against the sub-lease in favour of Paragon Electronics Limited (Paragon) for monies advanced is proof of satisfaction of the decree of 3<sup>rd</sup> November 2015; that Paragon will be unjustly enriched if it is allowed to retain the property, the sublease and the money that it seeks to recover from the garnishees; that Velos faced difficulty in complying with the Judgment of 23<sup>rd</sup> October 2015 because it does not have control over the issuance of Titles which is the purview of the Ministry of Lands and the National Land Commission; that following the enactment of the Sectional Titles Act, 2020, Paragon is now at liberty to apply for a certificate of lease.

7. In opposing the application, Paragon filed written submissions dated 17<sup>th</sup> May 2023, through which it argued that the application is bad in law as this Court has no jurisdiction to grant declaratory orders under Order 3 Rule 9 of the Civil Procedure Rules sought by a post-judgment application; that the application is res judicata as it has to do with the issue of the sublease; that the Court is functus officio; that the application does not meet the threshold for review; that Velos has not issued it with a separate title in compliance, a fact confirmed by R. J. Sheth and the former Chief Land Registrar Sarah C. Maina; that Velos has not produced evidence that it has started the process of issuing a separate title; the sublease dated 9<sup>th</sup> May 2007 was issued before and cannot be deemed to have been issued in compliance with the Judgment of 23<sup>rd</sup> October 2015; that the sublease was extinguished after Velos subdivided the land; that pending issuance of a new title to Paragon, Velos has not been paying Paragon the default sum of Kshs. 1,178,000/= per month from November 2015 for rental income loss and that Velos and its directors ought to be held in contempt and punished for committing perjury.

#### **Application of 10<sup>th</sup> July 2023 by Velos Enterprises Limited**

8. The 3<sup>rd</sup> application is the notice of motion dated 10<sup>th</sup> July 2023 by Velos, seeking that an order directing the 3<sup>rd</sup> and 7<sup>th</sup> garnishees to pay all the outstanding rental arrears of Kshs. 177,175,030.65/= as at 26<sup>th</sup> June 2023, to it or as directed by the Court within thirty (30) days and to forthwith honour their rental obligations through payment of monthly rent to it as and when it falls due. The application is based on the grounds on its face, the supporting affidavit sworn by its director R. J. Sheth on 9<sup>th</sup> June 2023.
9. In summary, the grounds are that Velos owns and manages a commercial real estate property situate within Nairobi City County being L.R. No. 209/115 and L.R. No. 209/116 on which it has developed four office blocks; that it has leased part of the property to the 3<sup>rd</sup> and 7<sup>th</sup> garnishees in consideration of payment of rent and service charge; that from August 2019 the 3<sup>rd</sup> and 7<sup>th</sup> garnishees have failed to pay their monthly rent arrears, which stood at Kshs.177,175,030.65/= as at 26<sup>th</sup> June 2023, on the basis that the payment would result in their being in contempt of this Court's orders; that the issue of payment of rent is not the subject of these proceedings, save for a garnishee order nisi which was discharged through the ruling of 22<sup>nd</sup> July 2019; that unless the orders are granted, the 3<sup>rd</sup> and 7<sup>th</sup> garnishees will persist with their default to a point where they will be unable to pay and that it is in the interest of justice that the orders are granted because while the 3<sup>rd</sup> and 7<sup>th</sup> garnishees have enjoyed a rent holiday and unjust enrichment, Velos has struggled to meet its financial obligations.
10. In response, Paragon filed a grounds of opposition dated 2<sup>nd</sup> August 2023 and written submissions dated 25<sup>th</sup> September 2023. Paragon argued that the Court lacks jurisdiction to preside over any issues or obligations that may arise between a landlord and a tenant with respect to unpaid rent and that the orders sought does not form the basis of this suit.



## Analysis and Determination

11. I have considered the three applications, the grounds, rival affidavits, submissions and authorities. The issues for determination are:-
  1. Whether Paragon has made out a case for grant of leave to file a further affidavit to produce new evidence, material and information.
  2. Whether Velos has satisfied the judgment of 23<sup>rd</sup> October 2015.
  3. Whether the Court ought to order the 3<sup>rd</sup> and 7<sup>th</sup> garnishees to pay the monthly rent arrears of Kshs. 177,175,030.65/= as at 26<sup>th</sup> June 2023 to Velos and to forthwith pay their monthly rent to Velos.
12. Before I address the substantive issues, Paragon argued that the application is res judicata as it raises the issue of the sublease which has already been determined by the Court. However, I am inclined to disagree with that argument as this Court has the jurisdiction to determine all questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree. See Section 34 of the [Civil Procedure Act](#).
13. I now move to the issue of whether Paragon has made out a case for grant of leave to file a further affidavit to produce new evidence, material and information. According to Velos, the new evidence is not relevant and should not be admitted because it is based on hearsay, affidavit evidence which is not admissible under the [Evidence Act](#). Paragon insisted that the evidence is admissible because it was first-hand information obtained from the Chief Lands Registrar and that it is relevant in determining the questions of fraudulent subdivision of the land and whether the sublease was extinguished.
14. In determining whether or not to admit additional evidence, the Court is guided by the interests of justice. The Court's power to admit additional evidence is discretionary and must be exercised with caution. The Court of Appeal in [Walter Joe Mburu v Abdul Shakoor Sheikh & 3 Others civil Appeal No. 195 of 2002 \[2015\]](#) eKLR stated as follows:-

“Having considered the application, the various affidavits for and against it, as well as the submissions made and authorities cited, we come to the inescapable conclusion that this application for the taking of additional evidence is wholly devoid of merit. First, the taking of additional evidence lies in the discretion of the Court and is intended to aid in the attainment of the ends of justice. Being a plea to the Court's discretion, we take the view that the length of time it takes to bring the application, in this case well over a decade, is a relevant consideration that militates against a favourable exercise of our discretion. The delay is inordinate and no attempt was made to explain it. Its timing bears the hallmarks of dilatoriness and is not in keeping with the salutary object of expeditious justice.....,that the principal rule has been that there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at this stage.”(emphasis added).
15. In this matter, the application dated 30<sup>th</sup> May 2023 by Paragon seeks to introduce new evidence obtained in the course of another suit, HCCC no. 8 of 2016, Paragon Electronics Limited v I & M Bank, in which Velos is not a party. In my view, the introduction of new evidence at this stage would be of great prejudice to Velos as the case has been closed and judgment has been entered. Moreover, the application has been brought with delay, long after the judgment and raises issues which are res



judicata. Under Section 7 of the Civil Procedure Act, which provides for the principle of res judicata, Explanation (4) stipulates that:-

“ Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

16. Guided by the above, I find that Paragon has not made out a case for the grant of leave to adduce additional evidence.

#### **Whether Velos has satisfied the judgment of 23<sup>rd</sup> October 2015**

17. Moving on, Velos argued that it has satisfied the judgment since the sublease of 2007 was issued to Paragon. It relied on the official search showing that Paragon was the registered owner of the sublease and charged the property to I & M Bank for Kshs. 75,000,000/=. However, Paragon asserted that Velos has not complied with the decree by issuing it with a new title. Its position is that the sublease dated 9<sup>th</sup> May 2007 was issued before and cannot be deemed to have been issued in compliance with the Judgment of 23<sup>rd</sup> October 2015.
18. With respect to the registration of titles for leasehold land in Kenya, the Registration of Titles Act (RTA), Cap 281 of the Laws of Kenya (now repealed) was applicable on when the Paragon and Velos entered into the agreement dated 23<sup>rd</sup> August 2006 for sale of the leasehold interest in Block C. Under the RTA, Paragon and Velos executed a sublease on the 9<sup>th</sup> May 2007 that was registered on 24<sup>th</sup> July 2008 as a sublease as entry no. 9 against the certificate of title also referred to as the mother title, LR No. 209/16027. At that time, the Sublease was in effect the title to the office block and its registration as an entry in the certificate of the title to the land on which the office block was erected on sufficed. Velos presented evidence of an official search showing that Paragon registered a charge on 24<sup>th</sup> July 2008 in favour of I & M Bank. In the recitals, the charge described Paragon as the registered proprietor as lessee from Velos Enterprises Limited of all those premises known as Office Block 1C erected on L. R. 209/16027.
19. Accordingly, I find that the Sub-Lease Number I. R 111891 is a valid Title to the suit property, Block C. I also find that Velos has satisfied the judgment of 23<sup>rd</sup> October 2015 and the decree of 3<sup>rd</sup> November 2015.

#### **Whether the Court ought to order the 3<sup>rd</sup> and 7<sup>th</sup> garnishees to pay the monthly rent arrears of Kshs. 177,175,030.65/- as at 26<sup>th</sup> June 2023 to Velos and to forthwith pay their monthly rent to Velos.**

20. Velos argued that the garnishee orders were effectively discharged following the consent order of 18<sup>th</sup> February 2019 and the Court's Orders of 22<sup>nd</sup> July 2019. Following the orders of 22<sup>nd</sup> July 2019, the parties entered into a consent order dated 7<sup>th</sup> November 2019 which resolved the issue of the garnishee orders. The order was clear that the rent was to be paid directly to the judgment debtor.
21. Through an application of 23<sup>rd</sup> October 2019, the 3<sup>rd</sup> and 7<sup>th</sup> garnishees sought the Court's clarification on whether the garnishee orders have been discharged. They confirmed their willingness to pay the net rent arrears of USD 1,175,027.00, subject to the necessary statutory deductions in 6 monthly instalments.
22. The record shows that on 7<sup>th</sup> August 2017, Paragon filed garnishee proceedings against the 3<sup>rd</sup> to 7<sup>th</sup> garnishees and the Court gave garnishee orders attaching rent receivables. On 18<sup>th</sup> October 2018, the



3<sup>rd</sup> garnishee filed a statement of accounts on 18<sup>th</sup> October 2018. On 18<sup>th</sup> February 2019, the parties entered into a consent to the effect that Velos would deposit Kshs. 60 Million in a joint account within 7 days. On 27<sup>th</sup> March 2019, the orders of 18<sup>th</sup> February 2019 were varied so that the funds from the three garnishees would be used to top up to Kshs. 60 Million. On 22<sup>nd</sup> July 2019, the Court directed that the sum of Kshs. 40 Million held by the garnishees to be released to Velos.

23. Having found that Velos has satisfied the judgment of 23<sup>rd</sup> October 2015 and decree of 3<sup>rd</sup> November 2015, I find that the 3<sup>rd</sup> application is merited.

### **Final Disposition**

24. For the avoidance of doubt these are the orders made by this court in respect of the 3 applications herein:-
1. The application by Paragon Electronics Limited dated 30<sup>th</sup> May 2023 is dismissed for want of merit with costs.
  2. The application by Velos Enterprises Limited dated 15<sup>th</sup> August 2015 is allowed with costs.
  3. The sum of Kshs. 69,540,498/= held in the joint account held by the parties' respective advocates be released to the judgment debtor, Velos Enterprises Limited forthwith.
  4. The application by Velos Enterprises Limited dated 10<sup>th</sup> July 2023 is allowed as prayed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF APRIL, 2024**

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**J.W.W. MONG'ARE**

**JUDGE**

**In the Presence of:-**

Ms. Aurora and Mr. Ajak Jok Ajala H/B for SC Oraro for the J/D.

Bullent Gulbahar appearing in person for the D/H.

Isaac Kuche for the 1<sup>st</sup> Garnishee.

Amos - Court Assistant

