



REPUBLIC OF KENYA



KENYA LAW
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**Kiprono v Consolidated Bank Kenya & another (Civil Suit
28 of 2018) [2024] KEHC 4054 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 28 OF 2018
JRA WANANDA, J
APRIL 26, 2024**

BETWEEN

MATHEW KIPRONO PLAINTIFF

AND

CONSOLIDATED BANK KENYA 1ST DEFENDANT

IGARE AUCTIONEERS 2ND DEFENDANT

RULING

1. Before this Court for determination is the Plaintiff's Notice of Motion dated 30/06/2023. The same is filed through Messrs Lusinde Khayo & Co. Advocates and seeks prayers as follows:
 - a. There a temporary order of injunction be issued compelling the 1st Defendant/Respondent to forthwith discharge the Plaintiff/Applicant's land parcel number Nandi/Cheptiret/1403 and release the title deed document to the Plaintiff/Applicant.
 - b. That costs of the Application be provided for.
2. The Application is expressed to be brought under Article 40 and 159 of the *Constitution* of Kenya 2010, Sections 1A, 1B, 3, 3A, 3B and 63(e) of the *Civil Procedure Act* Cap. 21, Order 40 Rule 1 and 2 and Order 51 Rule 1 of the *Civil Procedure Rules* and "all enabling provisions of the law". The Application is then premised on the grounds stated on the face thereof and on the Supporting Affidavit sworn by the Plaintiff/Applicant, Mathew Kiprono.
3. In the Affidavit, the Plaintiff deponed that he is the registered owner of the said parcel of land Nandi/Cheptiret/1403 on which he has constructed his matrimonial home, that on or about May 2016, he applied for a solid loop line loan facility from the 1st Defendant to the tune of Kshs 1,000,000/- and he used his land title for the said property as security for the loan, that it was agreed that the County Government of Nandi would make the payments directly to the 1st Defendant, that he did the



work and fully completed though the amount was not released by the County Government to the 1st Defendant, that on 28/06/2018, he was shocked to learn from his neighbour that the 2nd Defendant had published in the newspaper that the Plaintiff's said property was due for auction on 6/07/2018, that the 1st Defendant without notice to him commenced the auction process, that he rushed and sought the Court's intervention and the process of auction was temporarily stayed pending full hearing of an Application, that the Application was heard and on 6/06/2019 and was allowed to the extent that the Defendants were ordered to regularize the issuing of the Redemption Notice, that on or about July 2019, the Plaintiff cleared the outstanding loan but efforts to have the 1st Defendant release the security title has proved futile, that on 13/09/2021, he learnt through his Advocates that there were outstanding costs the 1st Defendant was claiming from the Plaintiff as Auctioneer's costs and bank charges, that he followed up with the 1st Defendant and cleared everything but the 1st Defendant still did not release the title documents, that on 18/01/2023 he sent a letter to the 1st Defendant but there was no response and on 6/03/2023, his Advocates sent a follow up letter, that on 12/04/2023, his Advocates received a response indicating that the title will not be released unless the matter is withdrawn and the Plaintiff pays the Defendant's Advocates fees, that it will be unfair for the 1st Defendant to retain the title documents and coerce him to pay the Advocates' fees when the Defendants did wrong to initiate auction of the property without adhering to the procedures and noting that it was the County Government that was to effect payment, and that he now seeks the Court's intervention since he is losing on other opportunities since he needs the title to help him secure cash from other sources.

Replying Affidavit

4. In opposing the Application, the Defendants on 2/09/2023 filed the Replying Affidavit sworn by one Lilian Ntongai who described herself as the 1st Defendant's Recoveries Officer. The Affidavit is filed through Messrs Mburu Maina & Co. Advocates.
5. In the Affidavit, she deponent that without the benefit of the orders being sought as a substantive prayer in the Plaint, the Application remains bad in law, that after the Plaintiff's account was credited with the loan amount, it experienced serious defaults in repayment causing the same to be in arrears, that due to the failure of the Plaintiff to honour his obligations, the 1st Defendant had no choice but to exercise its statutory power of sale, that the Plaintiff challenged the manner in which the 1st Defendant exercised the power of sale, that under clause 10 of the Charge, the title remained a continuing security towards settlement by the Plaintiff of the secured obligations under clause 4 to include charges, costs and expenses agreed therein and as a consequence, the claim for costs is well founded under the contract, that it was a term in the letter of offer dated 24/05/2016 in clause 13 paragraph 13(vii) that in the event that a legal opinion or any other action is necessary in relation to the borrower's account/recovery of debt, the legal costs and all legal charges shall be covered by the borrower, that the Plaintiff is bound by the terms of the letter of offer and should thus settle the legal costs and auctioneer's fees, that the Defendants have incurred costs which would not have arisen if the Plaintiff dutifully serviced the loan, that the 1st Defendant will be greatly prejudiced and shall suffer irreparable loss should the Application be allowed as it shall not be in a position to recover its costs with the title deed being its only security, that releasing the title deed will amount to rewriting the contract between the parties and that from the foregoing, clearly the Plaintiff has approached the Court with unclean hands and through non-disclosure of material facts.



Hearing of the application

6. It was then agreed, and I directed, that the Application be canvassed of by way of written submissions. Pursuant thereto, the Plaintiff filed his Submissions on 9/11/2023 while the Defendants filed theirs on 27/11/2023.

Plaintiff's Submissions

7. Counsel for the Plaintiff submitted that the Plaintiff brought this case upon learning of the auction since the proper procedure had not been followed, that the Court heard the parties and the Application for injunction was issued, that the Defendants cannot depend on the letter of offer to interpret it to their benefit, that had the Defendants correctly followed the procedures for recovery of the loan then clause 13(vii) of the letter of offer could apply, that however they failed and this is the reason the Judge ordered them to regularize the issuing of the redemption notice, that the Defendants cannot fail on their mandate and have the Plaintiff suffer on their behalf, that moreso, the fact that the charge was executed, it now incorporates all aspects and conditions since that the letter of offer was just a guideline. He cited the case of *Muriithi Gacugo Nga'ng'a v HFCK & Another*, Nairobi HCCC No. 15 of 2005.
8. He submitted further that in any event, the matter being now in Court, award of costs is at the discretion of the Court and the Defendants cannot rely on the letter of offer.

Defendant's Submissions

9. On his part, Counsel for the Defendants submitted that under Section 27 of the *Civil Procedure Act* costs follow the event, that as stated by the Plaintiff in the authority of *Muriithi Gacugo Nga'ng'a v HFCK* (supra), cited by the Plaintiff's Counsel, where there is a conflict between the letter of offer and the charge, the terms of the charge will supersede the letter of offer, that however, in this case, there is no conflict between the two documents.
10. Counsel then reiterated the matters already set in the Defendants' Replying Affidavit and added that the guiding principles applicable in awarding of costs are as was stated in the case of *Jasbir Singh Rai & 3 Others v Tarcholan Singh Rai Estate of & 4 Others* [2013] eKLR as cited in the case of *Sonko v Clerk, County Assembly of Nairobi City & 12 Others* (Petition 14(E021) of 2021) [2022] eKLR where the Supreme Court stated that costs follow the event with the discretion of the Court exercised judiciously. He submitted further that the Defendants having defended the case up to the point of having the application determined and preparing for trial, has demonstrated grounds to warrant exercise of the Court's discretion in their favour and to be awarded costs.

Determination

11. Upon considering the pleadings, response thereto and the respective submissions filed, I find the following to be the one issue that arises for determination:

“The Plaintiff having now cleared the loan herein in full, whether the 1st Defendant should be compelled to discharge the charge lodged on the Plaintiff's land parcel number Nandi/Cheptiret/1403 and release the tile deed to the Plaintiff or whether the Plaintiff should first settle the Defendant's Advocates' fees”
12. In this case, the Plaintiff, after filing the suit and obtaining an interim injunction, subsequently and before the suit could proceed to trial, settled the loan in full, together with the Auctioneer's and bank charges. This act of payment of the loan therefore brought the substantive dispute herein to an end.



Needless to state, the act of settling the loan was clearly an admission that, indeed, the Plaintiff was in default in his repayment obligations.

13. In response to the Plaintiff's plea for release of the title, the 1st Defendant contends that due to the failure by the Plaintiff to honour his obligations, the 1st Defendant had no choice but to exercise its statutory power of sale. The 1st Defendant contends further that under clause 10 of the Charge, the title remains "a continuing security" towards settlement by the Plaintiff of the secured obligations under clause 4 and which includes "costs, liabilities, taxes, expenses and charges and other amounts payable by the chargor".
14. I agree with this argument since it was also a term in the letter of offer dated 24/05/2016 in clause 13, paragraph 13(vii) that "in the event that a legal opinion or any other action is necessary" in relation to the loan account, the "legal costs and all legal charges shall be covered" by the borrower. I also agree that the Defendants have, as a result of the filing of this suit, incurred costs which would not have arisen had the Plaintiff dutifully serviced the loan. The Plaintiff is bound by the terms of the letter of offer and the charge and therefore cannot escape the contractual obligation to settle the legal costs.
15. It is true, as argued by the Plaintiff, that where there is a conflict between the letter of offer and the registered charge, the terms of the charge will supersede the letter of offer. This is because a letter of offer is merely a document signed to show commitment and the main document, the charge, once executed, is the one that incorporates all aspects and conditions of the loan transaction. This argument however, though true, turns on nothing since in this case, there is no allegation of any conflict between the two documents. In fact, the documents are in unison as pertains to the Plaintiff's obligation to pay the costs and charges mentioned.
16. It is however also clear that the Plaintiff filed this suit on the ground that he had not been served with the statutory notices required to be so served before a chargee can exercise its power of sale. By his Ruling delivered on 6/06/2019, Hon. Justice Githinji agreed that service of the Redemption Notice was not proved and, on that ground, proceeded to issue the interlocutory injunction to be in force until the Defendants regularized the position by serving a fresh Redemption Notice. To this end, it is therefore also true, as contended by the Plaintiff, that regarding the issue of Advocates' fees, the Defendants cannot fully or entirely depend on the letter of offer and the charge document to their benefit. This is because clause 13(vii) of the letter of offer would only fully apply had the Defendants followed the correct procedure for recovery. In this case, Justice Githinji found that the Defendants had failed to do so and ordered them to regularize the defect or omission by issuing a fresh Redemption notice. The Plaintiff's argument that the Defendants cannot fail on their mandate and then still impart the consequences of such failure upon the Plaintiff is therefore correct.
17. Besides the arguments preferred above, the issue of award of costs is now before this Court, and it is generally agreed that award of costs is at the discretion of the Court and that under Section 27 of the *Civil Procedure Act*, costs generally follow the event. Further, the guiding principles applicable in awarding of costs were set out in the Supreme Court cases of *Jasbir Singh Rai & 3 Others v Tarcholan Singh Rai Estate of & 4 Others* [2013] eKLR and also in *Sonko v Clerk, County Assembly of Nairobi City & 12 Others* (Petition 14(E021) of 2021) [2022] eKLR.
18. In this case, the Plaintiff having failed to settle the loan in time and causing the same to run into arrears, he cannot avoid blame for being the primary cause of the commencement of steps by the Defendants to auction the property and which is what, in turn, led to the Plaintiff instituting this suit. On the other hand, the Defendants, although entitled to recovery, cannot also escape blame for setting in place a defective recovery procedure. Both parties must therefore shoulder some level of blame for either causing the filing of this avoidable suit or contributing to the further or protracted litigation that



ensued and thereby adding to the costs incurred. Had the Plaintiff sought an order that the Court determines generally the issue of award of costs in the suit, then I would have, without hesitation, ordered that each party bears its own costs. The prayers made however only relate to determining payment of the Defendants' Advocates' fees. I will therefore confine myself thereto.

19. In the circumstances, in my view, the most convenient order that commends itself to issue is for the two parties to equally share the Defendants' Advocates' fees and I so order.

Final Orders

20. The upshot of my findings above is that the Plaintiff's Notice of Motion dated 30/06/2023 partially succeeds and this suit is now marked as concluded, on the following terms:
- i. The Plaintiff having now settled the loan herein in full, he shall now further settle ½ of the Defendants' Advocates fees in this suit which fees shall be taxed by the Deputy Registrar in the ordinary manner upon filing of a Bill of Costs.
 - ii. The parties are however at liberty to negotiate and agree on the quantum of the Defendants' Advocates said fees without the necessity of taxing the same.
 - iii. Upon the Plaintiff complying with (i) above, the 1st Defendant shall within a period of seven (7) days thereafter, commence steps to discharge the charge lodged against Plaintiff's said land parcel number Nandi/Cheptiret/1403 and upon finalization, forthwith release the title deed document to the Plaintiff.
 - iv. As far as the substantive suit is concerned, this suit is now marked as closed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF APRIL 2024

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WANANDA J.R. ANURO
JUDGE

