



ITCO Investments Limited v KCB Bank Kenya Limited & another (Commercial Case E575 of 2023) [2024] KEHC 4028 (KLR) (Commercial and Tax) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4028 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E575 OF 2023**

PM MULWA, J

APRIL 25, 2024

BETWEEN

ITCO INVESTMENTS LIMITED PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

KAMAL ANANTROY BHATT 2ND DEFENDANT

RULING

1. Before the court for determination are two applications. The first one is dated 5th November 2023 and was filed by the plaintiff while the second one is dated 5th December 2023 and was filed by the 1st defendant.
2. The 1st application is by a notice of motion brought pursuant to the *Companies Act*, Cap 486, Section 3A of the *Civil Procedure Act*, Order 40 Rule 1, Order 51 Rule 1 of the *Civil Procedure Rules*, the *Banking Act*, *Prudential Guidelines* and the CRB Act and regulations.
3. The plaintiff sought the following orders:
 - “ 1. Spent
 2. Spent
 3. This Honourable Court be pleased to issue a temporary injunction restraining the Defendants/Respondents whether by themselves, their employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on their behalf and/or under their mandate and/or instructions from seizing control of, alienating, advertising for sale, offering for sale, selling,



taking possession of, leasing, transferring or taking up the management of ITCO Investments Limited or in any manner whatsoever dealing with the assets of the Applicant or otherwise taking up the management of ITCO Investments Limited pending the hearing and determination of this suit.

4. Spent
 5. That in the alternative, the unprocedural and illegal appointment of the receiver be set aside pending hearing and determination of this suit and the receiver be restrained from taking up his duties as such, safeguarding and preserving control of the Applicant to its present registered Directors and staff.
 6. Spent
 7. That the OCS Diani Police Station be directed to ensure status quo and the peaceful and quiet enjoyment and possession of the suit assets by the Applicant is maintained pending the hearing and determination of this suit.
 8. That the Court be pleased to issue any other or further orders.”
4. The grounds of the application are set out on its face and the supporting affidavit sworn by Alnoor Kanji.
 5. It was deposed that on or about December 2010, Pearl Beach Hotels Limited (PBHL), obtained a loan facility from the 1st defendant for purposes of developing the English Point Marina on all that parcel of land known as Subdivision No.6628/1/MN English Point Mombasa.
 6. The plaintiff’s director averred that the 1st defendant required supplementary security for the facility and the plaintiff offered to create a debenture over its own assets which was done and a debenture was duly registered and that at all material times that this security, and any other securities made, were supplemental to the primary security being Subdivision No.6628/i/MN English Point Marina Mombasa, and that the Suit Asset would only be utilised to settle any arrears after the bank had exhausted its options in respect of the primary security.
 7. That to the plaintiff’s shock, on 2nd August 2023, the defendants stormed the Pinewood Beach Resort and Spa (the suit property) indicating that the plaintiff would be placed under receivership and that by a deed of appointment dated 2nd August 2023, a receiver had been appointed. Further that the plaintiff reached out to the principal borrower PBHL and was able to establish that the debt had been settled in its entirety and that there was an overpayment.
 8. The plaintiff’s case was that the 1st defendant bank was overpaid and lost the right to appoint a receiver and that the debenture intends to unjustly curtail its operation and growth without first realising the principal security in the charge registered against PBHL and/or exploring all possible avenues of compelling the principal debtor to redeem the facility.
 9. The 2nd application was filed *inter alia* pursuant to Order 40 rule 7 and rule 10, Order 2 rule 15 of the Civil Procedure Rules and Article 159 of the Constitution.
 10. The 1st defendant prayed for the following orders:
 - “ 1. Spent.
 2. Spent.
 3. Spent.



4. This Honourable Court do set aside, discharge and/or vacate the ex parte orders issued by this Honourable Court on 24th November 2023.
 5. This Honourable Court order the preservation and inspection of the assets and business of Pinewood Beach Resort & Spa by the 2nd defendant for the purpose of taking an inventory and recording the same.
 6. This Honourable Court does strike out the suit filed in this matter on grounds that it is scandalous, frivolous, vexatious and is otherwise an abuse of the process of this Honourable Court.
 7. The costs of this application be borne by the Plaintiff/Respondent.
 8. This Honourable Court be pleased to grant any other orders as it may deem fit for the expeditious and fair disposal of this application.”
11. The grounds of the application were set out in its body and the supporting affidavit of Oscar Obuna, the head of Credit Support Unit at the 1st defendant bank.
 12. Mr. Obuna averred that undisputed background to this matter is that pursuant to various facility letters and addendums thereto, the Bank agreed to advance to Pearl Beach Hotels Limited (the principal debtor) a credit facility of a total cumulative principle sum of KES 5.2 billion (the facility) across a period spanning from 2010 to 2016 for the purpose of funding the development and construction of the English Point Marina Project; that the facility was secured by (among others) debentures issued by the principal debtor as well as an all-asset debenture dated 26th September 2012 issued by the plaintiff herein (ITCO) to secure an aggregate principal amount of KES 225,000,000.00 advanced to the principal debtor together with interest thereon.
 13. That following the placement of the principal debtor under receivership and in view of its continued default in its repayment obligations, the Bank, on 2nd August 2023, appointed the 2nd defendant herein as the receiver and manager over all the property and assets of ITCO, which included but was not limited to the business of Pinewood Beach Resort & Spa situated on KwaIe/Galu Kinondo/796.
 14. The 1st defendant contended that the Bank’s right to enforce the Pinewood debenture crystalized upon default by the principal debtor and ITCO of their repayment obligations under the facility, and upon the placement of the principal debtor under receivership on 31st May 2022. That soon after the appointment of the receiver over all of the assets of the plaintiff including Pinewood Hotel, Mr. Kanji instituted proceedings before the High Court in Mombasa being HCCC No.E063 of 2023 whereby Mr. Kanji filed an application dated 7th August 2023 seeking injunctive orders to restrain the receiver from taking control of Pinewood Hotel on grounds, among others that the Pinewood debenture was supplemental to the securities given by the Principal Debtor, and that no statutory notices were issued pursuant to the provisions of section 90 of the *Land Act* (the Mombasa Application) Mr. Kanji also falsely misrepresented that he was the owner of Pinewood Hotel and argued that the receivership of Pinewood was irregular.
 15. It was deposed that via a ruling dated 7th September 2023, the court allowed the Mombasa application and proceeded to restrain the Bank from enforcing the Pinewood debenture against Pinewood Hotel by taking over or in any way disposing or selling it on grounds among others that no evidence had been presented of the nexus between ITCO and Pinewood.
 16. That the 1st defendant was aggrieved by the aforementioned ruling and appealed against it in the Court of Appeal in Mombasa and simultaneously filed a stay application of the ruling dated 7th September



- 2023 and upon consideration the appellate court, by an order issued on 25th October 2023 (the Mombasa Court of Appeal Order), stayed the said ruling and the related proceedings in the High Court at Mombasa pending delivery of a formal ruling on the Bank's stay application on 8th March 2024.
17. Mr. Obuna averred that the plaintiff deliberately failed to disclose the existence of the proceedings before the High Court and Court of Appeal and as a result thereof obtained an ex parte injunction order dated 24th November 2023. That in so far as the ex parte injunction order contradicts the Mombasa Court of Appeal order, it is tantamount to an appeal against the same order.
 18. The 1st defendant was adamant that the conduct of ITCO demonstrates bad faith and is a blatant abuse of the process of this court as there are parallel proceedings in the High Court and the Court of Appeal dealing with the same or similar issues as those raised in these proceedings.
 19. Based on the foregoing, the plaintiff prayed to have the plaintiff's application and suit struck out for being an abuse of the process of the court.
 20. The 2nd defendant lodged a replying affidavit sworn by himself on 20th December 2023 in response to the plaintiff's application dated 5th November 2023 and in support of the 1st defendant's application of even date.
 21. The averments in the replying affidavit largely echo those found in the supporting affidavit sworn in support of the 1st defendant's application.
 22. The 2nd defendant further averred that the verifying affidavit in this suit was sworn by Alnoor Kanji in Mombasa on 5th November 2023 while the supporting affidavit to the plaintiff's application was sworn by the same Alnoor Kanji in Mombasa on the same date in Nairobi, and therefore the two affidavits are fatally defective, do not constitute an oath and ought to be struck out.
 23. That he was appointed as receiver and manager under the debenture dated 26th September 2012 created by the plaintiff in favour of the 1st defendant and that the aforementioned debenture is not a supplemental debenture as alleged by the plaintiff.
 24. The 2nd defendant contended that the plaintiff's failure to disclose the existence of other court proceedings on the same subject matter as the matter herein amounts to material non-disclosure of facts and as such the plaintiff cannot continue to benefit from orders obtained in such a manner.
 25. In opposition to the 1st defendant's application dated 5th December 2023, the plaintiff filed a replying affidavit sworn on 20th December 2023 by Alnoor Kanji.
 26. He averred that the plaintiff is a separate legal entity from the principal debtor and the plaintiff is not privy to the agreements annexed to the application and that the plaintiff is not the proprietor of Pinewood Beach Resort and Spa situate on LR. No. Kwale/Galu Kinondo/796 but is appointed as an operator of the asset.
 27. Mr. Kanji averred that the plaintiff did not participate and is not privy to the suit in Mombasa being HCCC No. E063 of 2023 nor the appeal in the Court of Appeal in Mombasa. Further that the 1st defendant's application is designed to mislead the court.
 28. The plaintiff prayed to have the 2nd application dismissed with costs.

Analysis and determination.

29. The plaintiff, 1st defendant and 2nd defendant filed written submissions dated 5th February 2024, 14th February 2024 and 14th February 2024 respectfully.



30. The court has carefully analysed the pleadings, annexures and submissions filed in this matter.
31. The first issue for determination is whether the present suit violates the doctrine of sub judice.
32. The defendants submitted that the suit herein filed by the plaintiff offends the doctrine of sub judice as the matters raised herein are directly and substantially the subject of ongoing litigation between the same parties in Nairobi High Court Civil Case No.E201 of 2022 (Nairobi case) and the resultant appeal being Nairobi Court of Appeal Civil Appeal Number E261 of 2022 (Nairobi Appeal) and Mombasa High Court Civil Case Number E063 of 2023 (Mombasa case) and the resultant appeal being Mombasa Court of Appeal Civil Appeal Number E151 of 2023 (Mombasa appeal).
33. The record shows that the director of the plaintiff, Mr. Alnoor Kanji, instituted the suit Mombasa HCCC No. E063 of 2023 - *Alnoor Abdulmalik Kanji vs KCB Bank Kenya Limited & Kamal Anantroy Bhatt*. In the suit, the plaintiff prayed for a declaration from the court stating that the appointment of the receiver was irregular and therefore null and void and a permanent injunction to restrain the defendants (who are also the defendants herein) from seizing control of or interfering in any way with Pinewood Beach Resort and Spa.
34. In the same suit, the plaintiff's director filed an application dated 7th August 2023 seeking inter alia a temporary injunction to restrain the defendants herein from seizing control of or interfering in any way with Pinewood Resort and Spa pending determination of the Mombasa suit or in the alternative, the plaintiff's director sought to have the appointment of the receiver stayed pending determination of the Mombasa suit. A copy of the plaint and application dated 3rd August 2023 are annexed as 'KB-10' in the 2nd defendant's replying affidavit.
35. Vide a ruling dated 7th September 2023, the High Court in Mombasa delivered its ruling whereby it granted an injunction restraining the defendants from enforcing a debenture between the 1st defendant and the plaintiff herein as against Pinewood Beach Resort and Spa pending determination of the suit. The ruling is annexed as 'KB-11' in the 2nd defendant's replying affidavit.
36. An appeal was lodged against the aforementioned ruling by the 1st defendant, that is Civil Appeal Number E151 of 2023 in the Mombasa Court of Appeal. Simultaneously, the 1st defendant filed an application seeking a stay of the ruling dated 7th September 2023 pending determination of the appeal.
37. The Court of Appeal in Mombasa vide a ruling delivered on 9th February 2024 granted the application and stayed proceedings in Mombasa HCCC No. E063 of 2023 pending determination of the appeal before it.
38. The High Court and Court of Appeal proceedings in Mombasa as discussed above reveal that the issues in the suit before this court are also directly in issue in the two fora. The prayers sought in the plaintiff's plaint and notice of motion application dated 6th November 2023 in this court are similar to the prayers sought in the Mombasa High Court. The subject matter of the above-mentioned High Court case and the resultant appeal is the appointment of a receiver and the takeover of operations of the Pinewood Beach Resort and Spa by the receiver.
39. Sub judice is codified under Section 6 of the *Civil Procedure Act* which states:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under



the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

40. The criteria for establishing whether a suit is sub-judice was established in the Supreme Court case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties)* [2020] eKLR, which held:

“ 1) there is more than one suit over the same subject matter; 2) that one suit was instituted before the other; 3) that both suits are pending before courts of competent jurisdiction and lastly; 4) that the suits are between the same parties or their representatives.”

41. Having analysed the circumstances of this case, I am convinced that the plaintiff’s suit and application before me violate the doctrine of sub judice as stipulated under section 6 of the *Civil Procedure Act* and as per the holding by the Supreme Court in the authority cited hereinabove.

42. The Court of Appeal stayed the injunction order of the High Court pending determination of the appeal before it. This in effect meant that the defendants herein are not restrained from implementing the Pinewood debenture pending determination of the appeal before the Court of Appeal.

43. I note further that the issue of the 1st defendant enforcing the other debenture given by the principal debtor, Pearl Beach Hotels Limited, is the subject of proceedings in Nairobi High Court Civil Case No. E201 of 2022 and the resultant appeal being Nairobi Court of Appeal Civil Appeal Number E261 of 2022.

44. Consequently, I find that both the suit and application dated 5th November 2023 before me were filed in bad faith as the plaintiff did not reveal material information concerning the active proceedings touching on the same subject matter particularly before the High Court and Court of Appeal in Mombasa.

45. The purpose of the sub judice rule is to prevent the filing of multiplicity of suits over the same subject matter and the same parties or their representatives. It would embarrass the court if it were to hear and determine the suit and deliver a conflicting decision to that of the Court of Appeal.

Disposition

46. This Court makes the following findings:

- i. The plaintiff’s suit and application dated 5th November 2023 are grossly incompetent and bad in law and are hereby struck out with costs awarded to the defendants.
- ii. The 1st defendant’s application dated 5th December 2023 is granted in terms of prayer 6 and 7 thereto.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF APRIL 2024.

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P. MULWA

JUDGE

In the presence of:

Mr. Nduati & Mr. Mingo h/b for Mr Maloba for Plaintiff



Ms. Noella Lubano h/b for Mr. Oraro for 1st Defendant

Mr. Amakhobe for 2nd Defendant

Court Assistant: Carlos

