



Virchand Virpal & Sons Limited v NIC Bank Limited (Civil Case 636 'B' of 2009 & 419 of 2010 (Consolidated)) [2024] KEHC 7884 (KLR) (Commercial and Tax) (28 June 2024) (Order)

Neutral citation: [2024] KEHC 7884 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 636 'B' OF 2009 & 419 OF 2010 (CONSOLIDATED)**

GL NZIOKA, J

JUNE 28, 2024

BETWEEN

VIRCHAND VIRPAL & SONS LIMITED PLAINTIFF

AND

NIC BANK LIMITED DEFENDANT

ORDER

1. On 26th June 2020 this court delivered a judgment in this matter and ordered at paragraph 103 inter alia as follows:

“ 103. The provisions of Article 159 of the *Constitution* of Kenya, implores upon the court to promote substantive justice. In the same vein justice is done when it is seen to be done. In view of the facts and/or the circumstance of this case I order as follows:

- a) Within 30 days of the date of this order, the parties shall engage an independent third party and supply the party with all the material information required to ascertain inter alia, when the 60% trigger point occurred base on the terms of letter of offer and the value of the total shares pledged, the price of each share at the time and the outstanding balance on the overdraft facility; at that time.
- b) If the parties do not agree on an independent party for the exercise, either party is at liberty to apply to the court for further orders or directions;



- c) If the parties agree and provide a final report, the report shall form the basis of the final orders herein;
- d) The cost of the report shall be borne in equal proportion by the parties”

2. Apparently the parties did not agree on a common independent third party and did not file the report within 30 days. It suffices to note that, the court ordered in the judgment that if the parties did not comply with the orders given within timelines set each party’s claim would stand dismissed.
3. However, on 27th July, 2020, the parties informed the court that they had not agreed on a common independent third party but had agreed by consent that each party files its own report. In the interest of justice, the reports were admitted by the court.
4. The parties were then given an opportunity to submit on the reports filed. The learned counsel for the plaintiff submitted that the report filed by the defendant did not include inter alia 300 and 350 shares held by Atul Shah, at KCB shares and pledged as security and 4,000,000 held at Safaricom (K) Limited.
5. That there were duplicated shares as seen in items No 12 duplicated at No 18, No.13 at No 17, No 11 at No 15, No 14 at 16. Further, the defendant’s computation of 60% of total value shares of Kshs 9, 067, 200 as Kshs 377,800, is erroneous and the correct value is Kshs 5, 440, 320 and similarly calculation of 60% of total value of Kshs 18, 899,160 as Kshs 1,268,400 is not correct as the correct value is Kshs 11,339,496.
6. Further the defendant seeks to explain the trigger point on correspondence which the court cannot rely on. Furthermore, the matter herein is a test suit for other matters being; HCCC No(s), 724, 725 and 420 of 2009.
7. However, the defendant submitted that, there is no documentation to support the shares allegedly omitted as having been pledged as security. That the further supplementary list of documents filed by the plaintiff indicate shares pledged and there is no duplication. The defendant denied the allegation that its report was erroneous or improper.
8. The defendant submitted that a comparison of the reports filed indicate that the difference between the value of pledged shares is Kshs 1, 266, 188,00, which is nominal given the sum involved. Further from the reports the plaintiff states that the trigger was between 16th October, 2006 and continued on 21st April, 2008 and the defendant states that it was 21st December, 2006 and continued to 31st March 2008, thus the common denominator is between 29th December, 2006 to 31st March 2008.
9. That the plaintiff’s trigger date is 21st August 2008 and the defendant’s date is on 31st July 2008. Further the defendant’s valuation on is Kshs 353, 478, 370 as against the plaintiff’s on the same date stated to be Kshs 352, 212,190.
10. In response Mr Odera argued that if the trigger was on 31st July 2008 the shares should have been sold then and maintained that the defendant failed to respond to the inquiry as to shares pledged.
11. To revert back to the matter, on 7th August 2020 the plaintiff filed a report prepared by MDN Kenya dated 29th July 2020 while, the defendant filed a share valuation report prepared by Deloitte & Touche dated 14th August 2020 and filed the same date.
12. The report by the plaintiff starts with a brief background of the overdraft facilities advanced to plaintiff, the last being the overdraft facility reviewed on the 15th September 2008, allowing the plaintiff to draw up to a limit of Kshs 210,000,000.



13. The report further indicates that the overdraft was secured by a lien over the plaintiff's shares listed at the Nairobi Stock Exchange (NSE), together with personal, joint and several guarantees supported by the individual portfolios and/or shares held by each of the plaintiff's directors to a limit of 60% of the current market value of the shares.
14. The firm indicated that it relied on the following documents to prepare the report:
 - a. Overdraft offer letters dated 27th September 2006, 27th October 2006, 1st October 2007, 20th February 2008 and 15th September 2008.
 - b. Statements of account from NIC Bank Limited.
 - c. CDSC statements of account of account from various brokers i.e (Dyer and Blair & Faida Securities) relating to various share portfolios pledge to NIC.
 - d. NIC portfolio of pledge shares.
 - e. Various correspondences on the subject.
15. The report further indicates that the share valuation was calculated on a daily basis based on the trading price at the NSE, tabulating the overdraft levels with corresponding market value of the pledged shares to ascertain adherence to the requisite 60% cover.
16. The findings are tabulated at page 3 and 4 of the report which show that the overdraft amount exceeded the 60% value of the pledged shares on the following dates:
 - a. 16th October 2006 till 31st October 2006 when it was regularized, 7th November 2006 till 30th April 2008 when it was regularized; and
 - b. 31st July 2008 to 29th May 2009.
17. However, its noteworthy that in the summary of the report, at page (5) it is stated that the last time the overdraft amount exceeded the 60% value of the pledged shares was from 25th August 2008. That the total value of shares pledged as at 25th August 2008 was Kshs 350,215,070 with the 60% value being Kshs 210,129,042 whereas the total overdraft amount as at 2nd September 2008 was Kshs 210,256,250.83.
18. The report states that after the trigger the plaintiff failed to provide any additional security with 5 days as stipulated in clause 2 which period ended on 2nd September 2008 and which date is deemed as the date of exercising the right of sale or the 60% trigger point.
19. The report further states that the total value of shares pledged as at 2nd September 2008 is Kshs 340,024,695 with the 60% value being Kshs 204,014,817. Attached to the report is shareholding valuation analysis for the plaintiff and its directors between 24th September 2006 and 31st May 2009. Also attached is the report NIC portfolio of pledged shares schedule during the same period. The report concludes and reiterate that the total overdraft amount as at 2nd September 2008 was Kshs 212,938,783.63.
20. The defendant's report was prepared by Nasser Adam, attached to the Risk Advisory department of Deloitte & Touche Limited. The reports start with a brief background of the overdraft facilities offered to the plaintiff.
21. The report then underlines the procedure undertaken to prepare it including reviewing of documentation, discussions with the defendant's personnel and lawyers and re-computation of the



market values of the shares using historic daily price list from the NSE for period under review against the outstanding overdraft balance.

22. The report shows that the following documents reviewed: -
 - a. Contracts between the plaintiff and the defendant.
 - b. Letters from the CDSC for confirmation of pledges of various shares between September 2006 and January 2009.
 - c. Account statements of the plaintiff between 3rd October 2006 and 31st May 2010.
 - d. Correspondences between the plaintiff and the defendant with regards to the reduction of the outstanding overdraft balance and sale of pledged shares.
 - e. The plaintiff witness statements and affidavit by Wilfred Abincha Onono on behalf of the plaintiff and exhibits.
 - f. Witness statements of the defendant's witnesses and exhibits.
23. The report made findings that the 60% trigger was reached on:
 - a. 29th December 2006 to 31st March 2008 when the overdraft exceeded 60% vale of pledged shares.
 - b. 31st July 2008 to 28th February 2009 when the defendant started selling the shares.
24. That the total value of the shares pledged at the time of the 60% trigger on 31st July 2008 was Kshs 353, 478, 370 with the 60% value being Kshs 196,953,406. However, the correct figure should be Kshs 212,087,022. Further, the total overdraft amount at 31st July 2008 was Kshs 210,307,054.63
25. Be that as it were, further analysis of the two reports reveal variances in the shares pledged to the defendant and respective prices as at 31st July 2008, as indicated under page 23 of the MDN Kenya report and page 7 of the defendant's Deloitte report as here below analysed: -
 - a. The share price of KPLC shares differs; the plaintiff's report shows the unit share price as Kshs 175 while the defendant unit share price is Kshs 185 per share, giving a variance of Kshs 10 per share.
 - b. The price of each shares of ICDC shares as stated in the plaintiff's report is Kshs 24.25/- while in the defendant's report it is Kshs 24/-, giving a variance of 25 cents.
 - c. The price of each shares of; KENGEN as per the plaintiff's report is Kshs 23/- while; the defendant's report is Kshs 23.25/- giving variance of Kshs 25 cents.
 - d. The price of each share of Kenya-Re in the plaintiff's report is Kshs 14.95/- while in the defendant's report is Kshs 14.90/-. The variance being Kshs 5 cents.
 - e. The plaintiff's report indicates that A. C. Shah had a total of 1,000,000 KCB shares valued at Kshs 30,750,000/- while the defendant's report indicates that he had a total of 350,000 shares valued at Kshs 10,762,500/, thus a difference of 650,000 shares.
 - f. The defendant's report indicates that V.V & Sons Ltd had 417,600 shares in KCB Ltd while the plaintiff's report does not indicate that he had any shares in KCB Ltd.
 - g. Whereas the defendant's report, indicates S.C. Shah has 375,000 shares in Sameer/Firestone, that information is not reflected in the plaintiff's report.



26. The above analysis clearly indicates that there is no consensus on the number of shares pledged by the plaintiff to the defendant and the market price thereof. It is evident that any differences in the price of the shares, however minimal, of even if it is cents will affect aggregate value of all the shares and by extension the 60% trigger date.
27. To demonstrate the same, whereas the plaintiff's report indicated the price of Kenya-Re shares at Kshs 14.95 per share giving a total value of Kshs 18,962,580, the defendant priced the same shares at Kshs 14.90 per share giving a total value of Kshs 18,899,160. The difference between the two prices is only 5 cents per share but totalling Kshs 63,420 for all the shares.
28. In summation, I note the following global variance in the two reports:
 - a. The price per share differs for KPLC, KENGEN, Kenya-Re and ICDC shares.
 - b. There are differences in the number of shares held in both KCB and Sameer/Firestone Companies
 - c. Date of 60% trigger date differs as the plaintiff it was 2nd September 2008 and defendant on 31st July 2008.
 - d. Total value of shares pledged at the time of the 60% trigger date as Kshs 340,024,695 as per the plaintiff and Kshs 353,478,370/- as per the defendant.
 - e. Total value of 60% of shares pledged at time of trigger is Kshs 204,014,817 as per the plaintiff's report and Kshs 196,953,406. aa per the defendant.
 - f. Value of overdraft at time of 60% trigger as per the plaintiff was Kshs 210,256,250.83 and the defendant Kshs 210,307,054.63
29. The variance could only have been reconciled by the makers of the report giving oral evidence to support their findings and whereas the plaintiff was amenable to calling the makers of their report the defendant opposed the same.
30. Be that as it may, it is clear to the court that the parties will not be able to agree on the salient issues of; the total shares were pledge as security, the 60% trigger date, the value of the shares then and the overdraft balance, as at that date.
31. As the reports did resolve these issues, the court has to conclude this matter based on the evidence on record including the experts' reports as they are.
32. In that regard, I find and make the following observation and orders: -
 - a. The defendants having been responsible for realization of the security upon trigger of 60% margin, it is only fair and just that their evidence as to the trigger date be considered.
 - b. In that case, according to the defendant the last trigger date was 31st July, 2008, in that the previous trigger were overtaken when the plaintiff remedied the situation by offering additional shares and/or when the defendant indulged the plaintiff. As such the applicable trigger date is 31st July, 2008 and not 2nd September, 2008 as submitted by the defendant.
 - c. Pursuant to the afore the value of the shares, the trigger date and overdraft amount will be based on the reports of the parties as at that date.
 - d. Subsequently the workings from the reports of the parties indicate figure as at 31st July 2008 as follows: -



- (i) The plaintiff's report indicates as at 31st July 2008 the total value of shares was 352,212,190; 60% total value of shares was 211,327,314; and the overdraft was 210,307,054.63.
 - (ii) The defendant's report indicates as at 31st July 2008 the total value of shares was 353,478,370; 60% total value of shares was 212,087,022 (the figure in the report of 196,953,406 is incorrect); and the overdraft was 210,307,054.63
 - e. From the afore and defendants report on the 31st July, 2008, the 60% value of shares exceeded the overdraft outstanding balance and therefore there was no default.
33. In further analysis of the matter, I find that, the parties did not give the court information as to when the sale took place and the sum realised when the shares were sold. If that information had been given the court would have been able to finally determine which party owed the other any sum of money.
34. In that case each party's claim on any special or liquidated sum will lie where it has fallen. Finally, in the judgement delivered herein the court observed that each party had contributed to the circumstances that delayed realization of the shares and therefor in the interest of justice I order each party will bear its own costs.
35. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 28TH DAY OF JUNE, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr Odera for the plaintiff

Ms Mburu for the defendant

Ms Ogutu: Court Assistant

