



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 169 OF 2011

PREPS INTERNATIONAL LIMITEDPLAINTIFF

VERSUS

BARCLAYS BANK KENYA LIMITED1ST DEFENDANT

J. M. GIKONYO T/A GARAM INVESTMENT.....2ND DEFENDANT

FARIDAN SULEIMAN ABDALLA.....3RD DEFENDANT

RULING

There are two applications before the court for consideration. The first is a Notice of Motion dated 14th November 2012 by the 1st and 2nd Defendants, and the second is a Notice of Motion dated 18th December 2012 brought by the Plaintiff.

The prayers sought in the 1st and 2nd Defendants' Notice of Motion are as follows:

1. That the Court be pleased to stay the execution of the consent order of 7th November 2012 pending the hearing and final determination of this application.
2. That the Court be pleased to review, vacate and/or set aside part one of the consent order of 7th November 2012 requiring that:-

“the Plaintiff’s application dated 26th September, 2012 be allowed in terms of prayer 2 and the balance of the purchase price of Kshs.34,100,552.00 be deposited in the Plaintiff’s account within 3 days from today’s date.”

AND the same be reviewed, vacated and/or set aside to state that:

“the 1st Defendant to pay into the Plaintiff’s bank account No. 0455225817 held with the 1st Defendant, the sum of Kshs.24,700,797.70 being the balance of purchase price due to the Plaintiff upon the application of the proceeds of sale of by the 1st Defendant as provided for under Section 101 of the Land Act within 3 days.”

The main ground for the 1st and 2nd Defendants’ application is that there is a mistake/error apparent on the face of the record of the consent order recorded and adopted as an order of the court on the 7th November 2012, as the same was recorded without consideration of the provisions of section 101 of the Land Act that allows for the application for the proceeds of sale. This ground is attested to in the

supporting affidavit sworn on 14th November 2012 by Castro. K. Mutai, the Recoveries Officer of the 1st Defendant.

The Plaintiff's Notice of Motion on the other hand seeks orders that the 1st Defendant herein, its managing director, and directors/and or senior management be held in contempt and disobedience of this Court's order granted on the 7th November 2012. Further, that in consequence thereof the 1st Defendant be appropriately fine and its managing director be committed to civil jail to a period of six months or as the court may please.

The main ground for the Plaintiff's Notice of Motion is that the 1st Defendant is in blatant disregard of the court order given on the 7th November 2012, and are therefore in contempt of the said orders. Further, that the said order was to be complied within 3 days from the 7th November 2012, which order has not been complied with to date by the 1st Defendant despite notice having been served. The Plaintiff also stated in the supporting affidavit sworn on 18th December 2012 by its Director, Susan Redempta Chetambe Kehr, that the order and penal notice was also personally served upon the 1st Defendant. She annexed a copy of the affidavit of service duly filed by the process server and a copy of a letter dated 12th November 2012 addressed to the 1st Defendant's Advocate demanding compliance.

The Plaintiff and 1st Defendant reiterated the arguments made in the foregoing in replying affidavits filed in opposition to each other's Notices of Motion. The parties prosecuted their respective Notices of Motion by way of written submissions on the basis of which this ruling is given.

The Plaintiff's counsel filed two sets of written submissions both dated 7th March 2013. On the 1st and 2nd Defendant's Notice of Motion the counsel argued that the Plaintiff would be prejudiced by the review orders sought as it had already withdrawn prayer (b) of their Plaint in the consent order adopted by the court on 7th November 2012. He also relied on the decisions in **Brooke Bond Liebeg (T) Ltd vs Mallya, Civil Appeal No. 18 of 1975** and **Diamond Trust Bank of Kenya vs Ply & Panels Ltd & Others, Civil Appeal No. 243 of 2002** for the argument that a consent judgment can only be set aside on certain ground which had not been shown by the 1st Defendant. Further, that the sums claimed by the 1st Defendant as costs in their replying affidavit cannot be claimed at this stage and only after the suit is finalized, and that in HCCC No 580 of 2009 orders had been given by the court as to who should bear the costs.

On the Plaintiff's Notice of Motion for Contempt, the counsel relied on the facts and arguments stated in the application and supporting affidavit, and argued that no explanation had been given by the 1st Defendant why the consent order was ignored and that it had thereby put the dignity of the court into ridicule.

The 1st Defendant's counsel filed submissions on both Notices of Motion dated 5th June 2013. The counsel argued that she had inadvertently not considered when recording the consent that the taking of accounts was necessary as section 101 of the Lands Act allowed the 1st Defendant to apply the proceeds of the sale. Further, that the statement of accounts relied upon by the Plaintiff was over 2 years old by the time the application was heard, and did not reflect the true sums being held by the 1st Defendant. The counsel submitted that a consent order can be set aside on the grounds of mistake, and she relied on the decisions in **Geoloy Investments Lts & Others vs Consolidated Bank Ltd, Nairobi HCCC No 383 of 2007** and **Tropical Food Products International Limited vs The Eastern and Southern African Trade and Development Bank, Civil Appeal 253 of 2002** in this respect.

On the merit of the Plaintiff's Notice of Motion for contempt, he counsel submitted that the Plaintiff moved the court *ex parte* on 13th December 2012 for leave to commence contempt proceedings when the matter was to be mentioned but was not cause listed, and failed to disclose to the court that the undisputed sum of Kshs 24,700,797.70/= had already been transferred to the Plaintiff's account on 11th December 2012. Counsel relied on the decision in **Rose Wakuthii Mwangi Njunu (Administrator of Julius W. Mwangi Njunu vs Edwrd Kithinji & 2 Others (2006) e KLR** in this respect on the requirement for full

and frank disclosure of all facts to seeking the exercise of the court's discretion.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. I will first address the Notice of Motion by the 1st and 2nd Defendants for the review and/or setting aside of the consent order adopted on 7th November 2012, as its outcome may have the effect of disposing of the Plaintiff's Notice of Motion.

The consent order which is the subject of the Notices of Motion herein was recorded pursuant to an earlier Notice of Motion filed by the Plaintiffs dated 26th September 2012 claiming the release of Kshs.34,100,55/= from the 1st and 2nd Defendants being the balance of the purchase price from of the public auction of the suit premises namely L.R. No. 3734/940 Lavington. The law on setting aside of consent orders has been ably submitted on by both parties, and in **Brooke Bond Liebig (T) Ltd vs Mallya, (1975) E.A 267** at page 269 the Court of Appeal stated as follows:

“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs Kassam (1952) 19 E.A.C.A. 131 where the following passage from Seton on Judgments and Orders 7th Edn Vol. 1 p. 124 was approved:

‘Prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.’ ”

Further, under the provisions of Order 45 Rule 1 of the Civil Procedure Rules the grounds on which an order may be reviewed are stated as follows:

“1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay. “

The Plaintiff's counsel argued that there was an error made and apparent on the consent order as the Defendant was at the time holding the sum of Kshs 26,411,652/= as the actual balance due to the Plaintiff and not Kshs 34,100,552/= . The deponents for the 1st Defendant gave a breakdown of the auction costs that were deducted from the sale price of Kshs 48,500,000/= which amounted to Kshs 23,799,202.30 including the debt owed by the Plaintiff of Kshs 16,993,000/=. They also relied on section 101 of the Land Act as allowing them to apply the proceeds of sale.

Section 101 of the Land Act of 2012 does indeed allow a chargee to apply the proceeds from the exercise of a power of statutory sale to certain payments which are ranked in priority. However, the date of commencement of the Land Act was 2nd May 2012, while the auction sale of the suit property took place on 12th April 2011. The Land Act of 2012 cannot therefore apply to the public auction of the suit property. The applicable law is the repealed Registration of Titles Act under which the suit property was registered, and the rights accrued, liabilities incurred and transactions undertaken under the said Act

before the commencement of the Land Act, are saved by section 162 of the Land Act.

The repealed Registration of Titles Act provided in section 46 as follows:

“(1) Whenever any land is intended to be charged or made security in favour of any person other than by way of deposit of documents of title as provided for by section 66, the proprietor or lessee or, if the proprietor or lessee is of unsound mind, the guardian or other person appointed by the court to act on his behalf in the matter shall execute a charge in form J (1) or J (2) in the First Schedule, which must be registered as hereinbefore provided.

(2) The charge when registered shall (subject to any provisions to the contrary therein contained) render the property comprised therein

subject to the same security, and to the same powers and remedies on the part of the chargee, as are the case under a legal mortgage of land which is not registered under this Act.”

These powers and remedies were provided by the substantive law that applied to transactions under the repealed Registration of Titles Act, namely the Indian Transfer of Property Act also since repealed, and which stated as follows under section 100A(1):

(1) A chargee under a charge executed in accordance with the provisions of section 46 of the Registration of Titles Act and duly registered under that Act shall have the same rights, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rent and profits, or any of them) as if the charge were an English mortgage to which section 69 of this Act applies.”

Section 69C of the Act provided for the application of the proceeds from the exercise of a statutory power of sale as follows:

“ The money which is received by a mortgagee, arising from a sale by him under the mortgagee’s statutory power of sale, after discharge of prior encumbrances to which the sale is not made subject, if any, or after payment into Court of a sum to meet any prior encumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.”

The 1st Defendant was therefore allowed to apply the money received from the sale to expenses and costs incurred as an incident to the sale, and had purported to do so by the time the consent herein was adopted on 7th November 2012. To this extent it appears that in the circumstances of this case there were some material facts not in the knowledge of the 1st Defendant’s counsel when she entered into the said consent, and there was thus a mistake and an error on the face of the record of the said consent orders.

The Plaintiff has however disputed some of the costs that were charged by the 1st Defendant, particularly the legal costs charged. Given this situation, I am of the view that this court cannot impose a consent on the parties by reviewing the said orders. This court can only set aside the said orders, and allow the parties to address the outstanding issues through the normal litigation processes.

The 1st and 2nd Defendants’ Notice of Motion dated 14th December 2012 is therefore allowed, and the consent adopted herein as an order of the court on 7th November 2012 is hereby set aside. As the mistake in the said consent arose from the 1st and 2nd Defendant’s own mistake, they shall bear the costs of the said Notice of Motion.

The finding and orders hereinabove dispense with the prayer by the Plaintiff in its Notice of Motion dated

18th December 2012, seeking that the 1st Defendant be committed to civil jail for contempt, as the consent orders that were the basis of that application have been set aside by this court. In addition, the deponent for the 1st Defendant in his replying affidavit sworn on 10th April 2013 states that they paid the sum of Kshs 24,700,797.70 into the Plaintiff's account on 11th December 2012 and attached a bank statement of the Plaintiff's account showing this deposit as evidence. The 1st Defendant cannot therefore be said to be culpable of contempt of court. The costs of the Plaintiff's Notice of Motion dated 18th December 2012 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___30th___ day of ___September___, 2013.

P. NYAMWEYA

JUDGE