Capricorn Freight Forwarders Ltd v Cemtec Engineering Ltd & another (Civil Suit 75 of 2021) [2022] KEHC 12095 (KLR) (25 April 2022) (Ruling)

Neutral citation: [2022] KEHC 12095 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 75 OF 2021

OA SEWE, J

APRIL 25, 2022

BETWEEN

CAPRICORN FREIGHT FORWARDERS LTD ..... PLAINTIFF

AND

CEMTEC ENGINEERING LTD ..... 1ST DEFENDANT

APOLLO MUTISYA MUINDE & PARTNERS ADVOCATES T/A MUINDE &PARTNERS ADVOCATES ..... 2ND DEFENDANT

RULING

1 This ruling is in respect two applications. The 1st application is the plaintiff's Notice of Motion dated 10th August 2021. It was filed under Sections 1A, 1B, 3, 3A, 63(c) and (e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 51 Rule 1 of the *Civil Procedure Rules* for the following orders:

[a] Spent

[b] An order compelling the 2nd defendant to release to the plaintiff the below listed loan security documents pending the hearing and determination of the application:

(i) The original Title Deed for Title Number 3453/III/MN in the name of Kennedy Mwangi;

(ii) Duly executed Transfer of the property in favour of the lender;

(iii) Copy of the borrower's Identity Card and Pin Certificate;

(iv) Three (3) coloured passport size photographs of the borrower;

(v) Duly executed Consent by the borrower's spouse and Identity Card pending the hearing and determination of this application.

[c] In the alternative, an order compelling the 2nd defendant to deposit the aforesaid loan security documents in court pending the hearing and determination of the application;

[d] An order compelling the 2nd respondent to release to the plaintiff the loan security documents pending the hearing and determination of this suit;

[e] In the alternative, an order compelling the 2nd defendant to deposit the aforesaid loan security documents in court pending the hearing and determination of the suit;

[f] Such orders as the Court may deem fit and just to grant in the circumstances of this case.

2 The 1st application was premised on the grounds that the plaintiff loaned the 1st defendant Kshs. 14,000,000/= on the terms and conditions set out in the Loan and Collateral Agreement dated 10th January 2020; and the Collateral Supplementary Agreement dated 15th June 2020, respectively. It was the contention of the plaintiff that the initial loan was payable within 3 months at an interest rate of 30% per month. By the Supplementary Agreement, the repayment period was extended for a further 90 days effective from 10th April 2020; and was therefore to expire on 11th July 2020.

3 It was further averred by the plaintiff that out of the total principal amount of Kshs. 14,000,000/= and the interest amount of Kshs. 26,600,000 as at August 2021, the 1st defendant had only paid Kshs. 11,000,000/= leaving a balance of Kshs. 29,600,000/= which is still due and outstanding. Thus, the plaintiff was constrained to file this suit and the subject application after the defendants failed to respond to notices calling upon them to remedy the default and to release the security documents to enable the plaintiff exercise its right to sell the pledged property.

4 The 1st application was filed contemporaneously with the Plaint; and was therefore placed before the Court under a Certificate of Urgency, pursuant to the High Court (Organization & Administration) General Rules, 2016, for interim orders. Prayers 1 and 3 of the said application were duly granted on 12th August 2021 by Hon. Chepkwony, J. pending hearing inter partes. Being aggrieved by the said orders, the 1st defendant moved the Court to have the said orders vacated and/or set aside. This it did *vide* Notice of Motion dated 12th October 2021 (the 2nd application).

5 In addition to the 2nd application, the 1st defendant filed a Notice of Preliminary Objection dated 17th September 2021, contending that the entire suit is fatally defective and ought to be struck out on the following grounds:

a That the suit was filed without due authority from the plaintiff company as envisaged under Order 4 Rule 1(4) of the *Civil Procedure Rules*;

b That Lamech Oluoch has no authority from the plaintiff company to swear the Supporting Affidavit dated 10th August 2021; and

c That there is no resolution or no valid resolution of the plaintiff company appointing or authorizing Lamech Oluoch to institute this suit for and on behalf of the plaintiff company.

6 In the circumstances, it is only logical to first pay attention to the 1st defendant's Notice of Preliminary Objection and then the 2nd application, in that order; and depending on the outcome, a determination shall thereafter be made in respect of the plaintiff's application. Starting with the Preliminary Objection, it is now trite that a preliminary objection can only be raised on a pure point of law. In

Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd 1969 EA 696, a preliminary objection was held to be:

> "...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."

7 The three points relied on by the 1st defendant are all hinged on the Order 4 Rule 1(4) of the *Civil Procedure Rules*; which provides that:

> "Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an office of the company duly authorized under the seal of the company to do so."

8 Accordingly, when the 1st defendant stated in its Notice of Preliminary Objection that the suit was filed without due authority from the plaintiff company as envisaged under Order 4 Rule 1(4) of the *Civil Procedure Rules*; that Lamech Oluoch has no authority from the plaintiff company to swear the Supporting Affidavit dated 10th August 2021; and that there is no resolution or no valid resolution of the plaintiff company appointing Lamech Oluoch to institute this suit for and on behalf of the plaintiff company, it was, in effect inviting the Court to investigate the affidavits filed and confirm the truthfulness of those assertions. Indeed, Lamech Oluoch denied the allegations and equally asserted that he was duly authorized by a resolution of the plaintiff company to file this suit and make the impugned depositions.

9 Where factual details are to be gleaned from affidavits to prove a point, as the Court has been asked to do in this case, such a point cannot qualify for consideration as a preliminary objection. I am consequently in agreement with the expressions of Hon. Ojwang, J. (as he then was) in *Oraro vs. Mbaja* [2005] 1 KLR 141 that:

> "...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

10 Thus, without further ado, it is my finding that the 1st defendant's Preliminary Objection is untenable and is accordingly dismissed.

11 Turning now to the 2nd application, I note that it was filed under Sections 1A, 1B, 3A, 63(e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 51 Rule 1 of the *Civil Procedure Rules* and all enabling provisions of the law for orders that:

a Spent

b Spent

c That the Court be pleased to vacate, vary or discharge and/or set aside the orders given on 12th August 2021;

d that the costs of the application be provided for.

12 The application was premised on the grounds that the interim orders given herein on 12th August 2021 were obtained through misrepresentation and/or non-disclosure of material facts; that the same are anchored in a vacuum since the Plaint initiating the suit is bad in law; and that the entire suit as filed is incompetent, bad in law and an abuse of the court process as the same offends the express and mandatory provisions of Order 4 Rules 2 and 4 of the *Civil Procedure Rules*.

13 The application was predicated on the Supporting Affidavit sworn by Kennedy Mwangi, the Managing Director of the 1st defendant. He deposed that he had received legal advice to the effect that the suit is incompetent since the Verifying Affidavit was sworn by a stranger without the authority of the plaintiff's Board of Directors to file the suit or sign the Verifying Affidavit. For that reason, the orders given on 12th August 2021 were obtained through misrepresentation and/or non-disclosure of material facts. It was further the contention of the 1st defendant that the impugned orders were dispositive in nature; and therefore that their effect is to render the rest of the trial purely an academic exercise; thereby emasculating the 1st defendant's right to a fair hearing as enshrined in the Constitution.

14 Mr. Mwangi further averred that, as matters stand, he has fully paid back to the plaintiff the principal monies advanced to the various recipients at his behest; and that the only issue pending for determination is that of interest. He therefore deposed that it is in the interest of justice, fairness and equity that the orders given on 12th August 2021 be discharged, varied, vacated and/or set aside as the same are anchored in a vacuum.

15 The 2nd defendant also filed an affidavit in response to the 1st defendant's Notice of Motion dated 12th October 2021. He was in agreement with the assertions made by the 1st defendant and added that he is neither a party to the Loan and Collateral Agreement dated 10th January 2020 nor the Supplementary Agreement dated 15th June 2020; and that there was no provision under the agreements obligating him to release the loan security documents to the plaintiff in the case of default. He therefore averred that releasing the said documents to the plaintiff or anyone else before the full determination of the suit would expose him to civil liability.

16 In response to the 1st defendant's application, the plaintiff filed a Replying Affidavit on 25th October 2021, sworn by Lameck Oluoch. He averred that he executed the Verifying Affidavit as a director of the plaintiff, having been duly authorized by the board of directors by a resolution under seal. He therefore maintained that the orders issued in the plaintiff's favour on 12th August 2021 were validly issue and there was no misrepresentation or non-disclosure of material facts of any kind. He further averred that, since the 1st defendant has expressly admitted its indebtedness to the plaintiff, the plaintiff's claim is not disputed. He therefore asserted that the instant application is an afterthought, intended solely to assist the 2nd defendant in evading the consequences of his disobedience of a lawful court order.

17 The application was canvassed by way of written submissions, pursuant to the directions given herein on 28th October 2021. In his written submissions dated 18th February 2022, Mr. Makau for the 1st defendant proposed the following issues for determination:

a Whether the plaintiff was deserving of the orders issued on 12th August 2021;

b Whether the 1st defendant will suffer any loss and/or prejudice;

c Whether the plaintiff's suit is bad in law and/or incurably defective.

18 It was the submission of Mr. Makau that the interim orders issued on 12th August 2021 were issued prematurely without hearing the defendant's case; especially taking into account the principles laid down for the issuance of mandatory orders. Counsel argued that there are serious issues about the rate of interest charged by the plaintiff and therefore that it would only be fair that the parties be heard before dispositive orders can be made. He also submitted that the plaintiff failed to demonstrate to the Court that the title deed, transfer forms and all the documents kept in the custody of the 2nd defendant are in danger of being disposed of or interfered with in any way; to warrant the orders of 12th August 2021.

19 On the competence of the suit, Mr. Makau submitted that no resolution of the plaintiff's board of directors was filed to show that the plaintiff approved the institution of this suit; or even that Lameck Oluoch was authorized to draft, file and execute documents on its behalf. He took issue with the fact that no document was exhibited, such as a CR12 form, to confirm that indeed Lameck Oluoch is a director of the plaintiff. Reliance was placed on *Thome Farmers Company No. 4 Ltd v Farm of Faith Investors Ltd* [2019] eKLR, and *Philomena Ndanga Karanja & 2 Others v Edward Kamau Maina* [2015] eKLR. Accordingly, Mr. Makau was of the view that, from the standpoint of Order 4 Rule 1 of the *Civil Procedure Rules*, there is no valid Verifying Affidavit accompanying the Plaint; and therefore the suit is incompetent. According to him, that is reason enough to discharge and vacate the orders issued herein on 12th August 2021.

20 On behalf of the 2nd defendant, written submissions were filed on 25th February 2022 by Ms. Ngigi, Advocate. She likewise questioned whether the Verifying Affidavit was executed by an authorized person and in compliance with Order 4 Rule 1(4) and (6) of the *Civil Procedure Rules*. She relied on *Affordable Homes Ltd v Henderson & 2 Others* [2004] eKLR and *Bayusuf & Sons Ltd v Aunashamsi Hauliers Limited* [2016] eKLR for the proposition that a company, as an artificial person, can only take decisions through its duly authorized agents. She argued that, since no resolution of the board of directors of the plaintiff company were annexed to the Verifying Affidavit, it follows that the suit and the application pursuant to which the orders of 12th August 2021 were granted, are defective and invalid. On that account, she prayed that the orders in question be set aside. She added that the question as to whether the 1st defendant is indeed in default as to warrant the release of the security documents is yet to be determined; and that it has not been demonstrated that the 2nd defendant has dealt with the said documents in any manner adverse to the parties' interests.

21 On his part, Mr. Mkan, learned counsel for the plaintiff, proposed the following issues for determination vide his written submissions dated 29th November 2021:

a Whether the applicant came to Court with clean hands;

b Whether the 1st defendant was deserving of the orders of stay issued herein;

c Whether the 2nd defendant would have suffered any loss and/or prejudice had they obeyed the Court;

d Whether the plaintiff's suit is bad in law and incurably defective.

22 According to Mr. Mkan, it is the 1st defendant who approached the Court with unclean hands by alleging that it had paid the entire principal amount to the plaintiff, and that the only issue pending determination is the issue of interest. Counsel submitted that a party who comes to court with misleading information and falsehoods does not deserve the orders of the Court. He relied on *Re Estate of Rongo Kiuri & Another v Hannah Wanjiku Kamau* and *Jane Wangare & Another v Thuku Wairindi* [2011] eKLR. On that score, he prayed for the dismissal of the 1st defendant's application.

On whether the 1st defendant was deserving of the orders of stay issued herein on 12th October 2021, Mr. Mkan relied on *E A M v P A A* [2017] eKLR to support his argument that the Court would be encouraging defiance, which would be akin to perpetuating impunity and anarchy, by ignoring the fact that the 1st defendant is in contempt of court; and therefore ought not to have been heard, let alone granted stay.

23 On whether the defendants would suffer any loss or prejudice, Mr. Mkan submitted that the 2nd defendant has not shown what substantial loss or prejudice he will suffer if the orders issued on 12th August 2021 are complied with and the security documents deposited in court. He added that, in any case, the 2nd defendant will still have the opportunity to challenge the said orders at the hearing. In the same vein, it was the submission of Mr. Mkan that the plaintiff's suit is competent; and that the Court has discretion on whether or not to order the striking out of the plaint for non-compliance. He relied on *Szaredo Investments Ltd v Chief Land Registrar & 2 Others* [2018] eKLR; *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu* [2019] eKLR; *Spire Bank Ltd v Land Registrar & 2 Other* [2019] eKLR and *Coast Development Authority v Adam Kazungu Mzamba 49 Others* [2016] eKLR, among others, for the proposition that, in exercising its discretion under Order 4 Rule 1(6) of the *Civil Procedure Rules*, the Court must be alive to its obligations under Article 159 of the Constitution, to see to it that justice is administered without undue regard to procedural technicalities.

24 I have given careful consideration to the 2nd application within the backdrop of the Plaint and the proceedings held thus far. I have likewise paid particular attention to the written submissions filed by learned counsel on behalf of the parties. In my careful consideration, the only issue for consideration is whether the plaintiff's suit is competent from the standpoint of Order 4 Rule 1(4) of the *Civil Procedure Rules*. The answer will undoubtedly determine whether or not the entire suit is tenable; and if the suit falls, it will fall along with the impugned orders. But before embarking on a consideration of that issue, I find it necessary to address, in passing, the untenable assertion by both the 2nd defendant and his counsel that to obey a lawful court order would expose him, as an officer of the Court, to prejudice. As was aptly stated by the Court of Appeal in *Fred Matiangi v Miguna Miguna & 4 Others* [2018] eKLR:

> When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities."

25 Accordingly, unless and until a court order is set aside, varied or vacated, all to whom such an order is addressed is duty-bound to obey. I note however that the matter of contempt of court is not directly in issue in the two applications. It is for this very reason that I find the arguments around the disobedience the order dated 12th August 2021 irrelevant for purposes of this ruling. Thus, the arguments by Mr. Mkan that the defendants did not deserve an order of stay are likewise misplaced, if not premature. Indeed, even a contemnor has a right of audience, even if for the purpose of defending an application for contempt. The Court of Appeal made this clear in *AB & Another v. RB* [2016] eKLR, thus:

> The straight forward issue before us is whether we should hear the applicants in their application for stay of execution of the order of the High Court committing them to jail

for contempt of court before they have purged their contempt. We affirm that under our constitutional framework, there is no general rule that a court cannot hear a person in contempt of court before they have purged their contempt. The importance of the right to fair hearing which is expressly underpinned by Article 50(1) of the *Constitution*, and in particular the right to access the court for purposes of ventilating a grievance cannot be gainsaid. A general rule curtailing those rights in all and sundry cases of contempt of court would not easily pass constitutional muster. Way back in 1952, Lord Denning, LJ. articulated the balancing act that is required when a court is confronted with two contending principles of great legal and constitutional moment pitting, on the one hand the need to uphold the constitutional right to fair hearing, and on the other the need to protect and uphold the rule of law without which civilized society is in peril. In *Hadkinson v. Hadkinson*, [1952] 2 All ER 567; the eminent Law Lord stated:

> " I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed".

26 In the instant matter, an application for contempt is yet to be brought, and therefore the argument, by Mr. Mkan, that the defendants ought not to have been heard in respect of their application dated 12th October 2021 is clearly untenable. Moreover, the plaintiff having obtained ex parte mandatory orders on 12th August 2021, the defendants were entitled to approach the Court for vacation of those orders, as they did. Under Section 63(e) of the *Civil Procedure Act*, the Court is empowered to make such interlocutory orders as may appear to the Court to be just and convenient, with a view of preventing the ends of justice from being defeated.

27 That said, I now turn to the issue for determination, namely whether the plaintiff's suit is incompetent from the standpoint of Order 4 Rule 1(4) and (6) of the *Civil Procedure Rules*. There is no gainsaying that the objector is a limited liability company; and therefore a separate legal entity capable of suing and being sued in its own right. For this reason, it is a procedural requirement, by dint of Order 4 Rule 1(4) of the *Civil Procedure Rules*, that:

> Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

28 Hence, the defendants submitted that, in so far as the objector did not file a resolution of its board of directors authorizing Lameck Oluoch to swear the Verifying and Supporting Affidavits in support of the Notice of Motion dated 10th August 2021, the suit and by extension the said application are incurably defective. Counsel relied on *Affordable Homes Africa Ltd vs. Henderson & 2 Others* [2004] eKLR, wherein it was held that:

> " ... As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its shareholders. One of these should therefore authorize the use of the company's name in litigation so that the company can properly come to court and enforce a breach of a director's duty..."

29 I have accordingly perused the Verifying Affidavit filed with the Plaint on 11th August 2021. The deponent, Lamech Oluoch, simply averred therein that:

> "...I am a male adult of sound mind and the Managing director of the plaintiff herein thus competent to swear this affidavit."

30 He neither deposed that he had been authorized by the board of directors of the plaintiff to swear that affidavit or to institute the suit on its behalf. A similar averment is replicated at paragraph 1 of the Supporting Affidavit annexed to the Chamber Summons dated 10th August 2021 by which leave was sought for the hearing of the matter during the August 2021 Recess of the High Court. It was much later, after the 2nd application was filed that Mr. Oluoch deemed it apt to aver, at paragraph 5 of the Replying Affidavit to that application that:

> "...I have been advised by my advocates on record which advise I verily believe to be true that our suit herein is not bad in law and incurably defective as alleged since I executed the verifying affidavit as a director of the plaintiff and the requisite legal authority and valid board of directors resolution under the seal of the plaintiff authorizing me to sign the said verifying affidavit are not mandatory legal requirements."

31 Granted the clear provisions of Order 4 Rule 1(4) of the *Civil Procedure Rules*, it is manifest that the plaintiff was misadvised by his counsel, for the above provision is indeed couched in peremptory terms. What is in the discretion of the Court is whether or not to strike out the suit for non-compliance. In this regard, Order 4 Rule 1(6) of the *Civil Procedure Rules* is explicit that:

> "The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2), (3), (4) and (5) of this rule."

32 The defendants having demonstrated non-compliance on the part of Lameck Oluoch, the question that then arises is, what consequences flow from the breach? The Court's attention was drawn to the Affordable Homes Case in which it was held that:

> "...in the absence of this action by the Company, the Company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff."

33 The authority has been followed in a host of other cases, including *Bayusuf & Sons Limited v Aunashamsi Hauliers Limited* (*supra*) in which an attempt by the party in default to rely on Article 159 of the *Constitution* was rejected by the Environment and Land Court, Mombasa, and the suit struck out for non-compliance. The aforementioned decisions are merely persuasive; and therefore not binding on me. On my part, I share the viewpoint expressed by Hon. Odunga, J. in connection with Order 4 Rule 1(4) and (6) of the *Civil Procedure Rules* in *Leo Investments Limited v Trident Insurance Company Limited* [2014] eKLR, in which the learned judge held that:

> "Clearly from the foregoing provision, nowhere is it required that the authority given to the deponent of the verifying affidavit be filed. The failure to file the same, in my view, may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere

failure to file the same with the plaint does not invalidate the suit. I associate myself with the decision of *Kimaru, J in Republic vs. Registrar General and 13 Others* Misc. Application No. 67 of 2005 2005 eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit."

34 Indeed, the same posturing has been taken by the Court of Appeal in various decisions; one of them being *Spire Bank Limited v Land Registrar & 2 Others* (*supra*) in which it was held that:

> " Whether or not an officer is authorized to institute the proceedings is a matter of evidence, which requires to be canvassed before the court. In concluding that Ms. Musembi was unauthorized to bring the proceedings on behalf of the appellant because there was no document produced under seal showing that she was authorized, we find that the learned judge misdirected himself. The learned judge ought to have ordered that such authorization be produced before the commencement of the trial..."

35 The Court of Appeal went further and explained the rationale for Order 4 Rule 1(4) as follows:

> " It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

36 Thus, in *Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another* [2015] eKLR, the Court of Appeal was explicit that more often than not, it suffices for the deponent to simply state that he/she "was duly authorized"; whereupon the burden of proof would shift to those asserting otherwise to prove their assertions. In this case, had Lameck Oluoch made such an averment in his Verifying Affidavit, it would have been the responsibility of the defendants to prove otherwise.

37. And, because of the alleged lack of authority, the defendants posited that there was misrepresentation or material non-disclosure on the part of Lameck Oluoch. This therefore comprised an additional ground for their application for the setting aside of the orders of 12th August 2021. In the light of my findings herein above, it would follow that even that ground is untenable. In the result therefore, I find no merit in the 2nd application. The same is hereby dismissed with costs.

38 Turning now to the 1st application, which was filed by the plaintiff contemporaneously with the Plaint, I note that prayers 1 and 3 thereof are spent. What remains for consideration is whether the plaintiff is entitled to the other prayers, namely:

> Prayer 4: An order compelling the 2nd respondent to release to the plaintiff the loan security documents pending the hearing and determination of this suit;

Prayer 5: In the alternative, an order compelling the 2nd defendant to deposit the aforesaid loan security documents in court pending the hearing and determination of the suit;

Prayer 6: Such orders as the Court may deem fit and just to grant in the circumstances of this case.

39 The background facts upon which the 1st application was premised are largely not in dispute. There is no dispute that the plaintiff lent the 1st defendant an amount of Kshs. 14,000,000/= on the terms and conditions set out in the Loan and Collateral Agreement dated 10th January 2020; which was varied vide the Collateral Supplementary Agreement dated 15th June 2020. The parties are in agreement that the loan was payable within 3 months at an interest rate of 30% per month; and that by the Supplementary Agreement, the repayment period was extended for a further 90 days effective from 10th April 2020; and was therefore to expire on 11th July 2020.

40 The plaintiff's cause of action is that the 1st defendant defaulted in repaying the loan within the agreed timelines; such that out of the total principal amount of Kshs. 14,000,000/= and the interest amount of Kshs. 26,600,000 as at August 2021, the 1st defendant had only paid Kshs. 11,000,000/= leaving a balance of Kshs. 29,600,000/= which is still due and outstanding. It was further the contention of the plaintiff that, in spite of demand, the 1st defendant had refused or failed to pay up; and therefore that its right to seize and sell the pledged property had crystalized.

41 In response to that application, the 1st defendant's Managing Director, Kennedy Mwangi, filed a Replying Affidavit on 17th September 2021, on behalf of the 1st defendant. Other than the assertions about lack of authority, which I have already dealt with, he averred that the 1st defendant is not the legal and/or registered owner of the property known as Title No. 3453/III/MN; and therefore that the plaintiff was all along aware the said property belongs to him. He averred that the 1st defendant is a separate legal entity; and in so far as he signed the Loan and Collateral Agreement as a director of the 1st defendant and not as a guarantor, he is under no obligation to answer for the 1st defendant's obligations. To that end, Mr. Mwangi averred that the plaintiff cannot seize the aforesaid property to recover any amounts owing from the 1st defendant.

42 Mr. Mwangi further explained that, at the material time, the 1st defendant was desperately in need of the loan so as to discharge its obligation under a contract given to it by the Kenya Airports Authority for the rehabilitation of passenger boarding bridges; and that the plaintiff took advantage of the 1st defendant's desperation and made it execute an unconscionable agreement that entailed an illegal interest rate of 30% per month with a repayment period of 3 months. Mr. Mwangi therefore conceded that the 1st defendant was unable to repay the loan with interest within the stipulated time because of delays attributable to the Covid-19 situation in the country.

43 Nevertheless, a substantial sum amounting to Kshs. 11,000,000/= was paid by the 1st defendant; as confirmed by the plaintiff, leaving a balance of Kshs. 3,000,000/=. According to Mr. Mwangi, the plaintiff has made it impossible for the 1st defendant to fully settle the debt due to the high interest rates it continues to charge on the loan. Thus, at paragraph 16 of his Replying Affidavit, Mr. Mwangi averred that:

> "...the said interest rate is so high charged that is oppressive sic, illegal, unconscionable, and unreasonable hence this Honourable court ought to intervene so as to declare it unenforceable otherwise the Plaintiff will unjustly enrich itself."

44 On his part, the 2nd defendant filed Grounds of Opposition to the 1st application, contending that:

a The 2nd defendant is a mere custodian of the documents referred to by the plaintiff as security documents in respect of Title Number 3453/III/MN;

b The title deed for the aforesaid property is registered in the name of Kennedy Mwangi who released it to the 2nd defendant;

c The said Kennedy Mwangi was not a party in the Loan and Collateral Agreement and Supplementary Agreement dated 10th January 2020 and 15th June 2020, respectively;

d The 2nd defendant can only act under the instructions of the said Kennedy Mwangi in regard to release of the said documents to the plaintiff;

e Further and in the alternative, the said agreements are silent on the 2nd defendant's role in the event of default by the 1st defendant under the said agreements;

f The said application is thus frivolous, fatally defective, vexatious and ought to be dismissed with costs.

45 In addition to the Grounds of Opposition, the 2nd defendant filed a Replying Affidavit on 12th October 2021 reiterating his assertions. He averred that releasing the security documents to the plaintiff or anyone else before the full determination of the suit would expose him to civil liability and can only result in a multiplicity of suits against him. He therefore offered to execute an undertaking that he will keep the documents in safe custody pending further orders of the Court.

46 In a Supplementary Affidavit sworn on 18th February 2022 by Kennedy Mwangi, the 1st defendant introduced a document marked Annexure "KM-1A" to prove that the balance of the principal sum of Kshs. 3,000,000/= has since been paid to the plaintiff; and therefore that, other than the disputed sums comprising interest, the principal amount of the loan has been fully repaid.

47 Having given consideration to the 1st application, which is principally against the 2nd defendant; and having taken into account the averments by the 2nd defendant, particularly the averment at paragraph 3 of the 2nd defendant's Replying Affidavit sworn on 12th October 2021, it is hereby ordered that, further to the orders issued on 12th August 2021, orders be and are hereby issued in terms of Prayer 5 for compliance by the 2nd defendant within 14 days from the date hereof, pending the hearing and determination of the suit. Costs of the 1st application shall be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF APRIL 2022.

.....

OLGA SEWE

JUDGE