



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.34 OF 2013

JACK KAGUU GITHAE.....APPLICANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST RESPONDENT

JOHN PATRICK MACHIRA.....2ND RESPONDENT

AMY WAIRIMU GITHAE.....3RD RESPONDENT

RULING

1. This is a ruling on application dated **28th February 2019** filed by the plaintiff herein. It seeks to compel the 1st defendant to produce for inspection certified copies of loan account bank statements and current account bank statements for the effective period running from 1992 to 18th December 2008 together with copy of legal charge over title number Nyandarua /Karati/151 tendered as security for loan facility advance by the first defendant to the plaintiff.
2. The applicant further seeks an order to strike out the 1st defendants defence in the event that it fails to comply with the order sought above within 14 days. Grounds on the face of the application is that the 1st defendant's equitable right of redemption had crystallized by the time the 1st defendant elected to realize the security over the said title.
3. Further that it is the plaintiff's case that the 1st defendant did not avail the plaintiff statements when the loan facility was in existence. The applicant averred that he does not have access to the charge as it was destroyed during the 1992 tribal skirmishes; that the said documents are necessary for proper determination of issues in dispute between the parties.
4. The applicant averred that he has on several occasions asked for the documents and even served the 1st defendant to produce dated 25th May 2016 but failed to comply rendering the intended inspection futile; that the 1st defendant has been dilatory, indolent procrastinating and uncaring in complying with mandatory requirement to produce the documents and failed to attend court when the matter came up for mention to confirm compliance. With the court order; that the purpose of pretrial discovery is to level the litigation playing field, expedite hearing and reduce costs and allow parties to gauge the case they will face at trial.
5. The applicant urged the court to direct the 1st defendant to produce the documents within 14 days' failure which their defence be struck out; that the application is made in good faith and the 1st defendant will not suffer any prejudice by availing the documents.
6. The applicant in the supporting affidavit restated the grounds captured above.
7. In response to the application herein, the 3rd defendant filed grounds of the opposition dated 23rd May 2019 stating that the application is an abuse of court process; that it is an afterthought, raising issues that should have been raised at pretrial stage.
8. In response the 1st defendant filed replying affidavit dated 9th May 2019 sworn by **Lynette Ambenge** Credit Manager in 1st defendant's Navasha branch. She averred that the plaintiff's application is frivolous, vexatious and an abuse of court process, devoid of merit, incompetent and ought to be dismissed.
9. She further averred that as admitted by the applicant, the 1st defendant advanced her loan facility of kshs. 750,000 which was secured by suit property title number Nyandarua/Karati/151 and that the charge was legally executed by the applicant; and that from the onset, the applicant neither serviced the loan and/or honored any proposals but instead engaged the 1st respondent in a game of deceit, pleas and negotiations which were never honored.

10. She further averred that the applicant's right of equity of redemption was extinguished at the time the property was sold and the application together with the suit are hopeless. And an attempt in futility.

11. She averred that the 1st defendant had tried all within its power to assist the applicant meet his part of the terms of the loan facility in vain including extending repayment period and restructuring the loan; that at no time did the plaintiff demand to be supplied with the documents save after inception of this suit and that the plaintiff was aware of the procedure to get the documents; that it has taken the plaintiff 8 years since the property was sold to demand for the documents hence an afterthought given that all the notices were served before public auction; thus provision of documents and account statements serve as a fishing expedition.

12. He further averred that no justifiable reason has been provided by the applicant on the necessity of the information and the only available remedy on part of the plaintiff after public auction is that of damages.

13. He averred that without prejudice to the above averments, the 1st defendant has only managed to access statement of the said account for the period starting 14th May 2006 up to 17th October 2008 but statements running from 1992 to the year 2005 cannot be traced and attached statements from 14th May 2006 to 17th October 2008. She averred that no order was made in the year 2018 as alleged by the applicant in paragraph 9 of the supporting affidavit; that the applicant has approached equity with unclean hands full of laches by failing to disclose material facts.

14. She averred that there is no dispute as to existence of the legal charge or alteration of the loan due; that discovery should be limited to matters in contention and relevance that can be tested by pleading or particulars which the applicant has not demonstrated and thus discoveries would be an exercise in futility and a waste of time and resources; that court can only strike out pleadings where there is no semblance of cause of action or defence and urged court to dismiss the application as it is intended to delay timely disposal of this suit.

15. The applicant filed a further affidavit dated 30th May 2019. He averred that it is not factual that the 1st defendant does not have the charge it created over the suit property herein; that to the contrary the 1st defendant has been able to trace correspondences that date back to 1995 but conveniently cannot be able to produce the legal charge and statements for the loan account number [...] that commence from the date of loan disbursement to 14/1/2006.

16. The applicant averred that the 1st defendant is evading scrutiny of the loan account and recalculation of the loan interest; that he has engaged M/S IRAC (Interest Rate Advisory Centre) who will not be able to verify the management of the account without the said information. He attached a copy of a letter dated 24th May 2019 from IRAC).

17. He averred that he was not furnished with periodic bank statements or letters advising him on any change of loan interest.

SUBMISSIONS BY APPLICANT

18. The applicants advocate started by summarizing facts of the case and submitted that this matter revolves around the manner in which the 1st defendant purported to exercise its equitable right of redemption over the suit property title number Nyandarua/Karati/151 which the plaintiff had tendered as security for loan facility advance to him by the 1st defendant and whether the right had actually crystallized by the time the 1st defendant elected to realize the security

19. The plaintiff submitted that all along the first defendant did not avail to him the bank statements during the time the loan facility was in existence which would have shown the loan paid vis a vis the interest; that the information in the said document has high evidential value in ascertaining the actual debt owed by the plaintiff to the 1st defendant; that the documents sought are relevant and essential for proper determination of issues in dispute.

20. The applicant submitted that on several occasions he made requests to be supplied with the documents including visiting the 1st defendant's head office; that the applicant's advocates issued a valid notice to produce on 25th May 2016 but the 1st defendant failed to respond; further that this court issued an order directing the 1st defendant to avail the documents on 9th May 2018 but the 1st defendant failed to respond.

21. The applicant submitted that despite saying they are not able to trace the documents, they were able to trace correspondences dating back to 1995 but conveniently failed to produce bank statement from date of disbursement up to 14th January, 2016, from 31st March 2008 to June 2008 and from 17th October 2008 to closure of account.

22. The applicants restated reasons for seeking the statements and legal charge and cited the case of **V. R. Mandevia vs The Standard Bank of South Africa [194]21 page 3** where the court held that inspection will be ordered if the document sought to be inspected would assist the party requesting for inspection, whether or not the applicant was a party to the document and whether or not the contents had been communicated to him.

23. The applicant submitted that he has met the prerequisites for granting of an order for inspection by demonstrating as follows: -

(a) Issued valid notice under rule 15 of order 10 of CPR,

(b) party served has omitted to give notice of inspection or has objected to give notice of inspection as provided in Order Rule 16 and 17(1) of CPR,

(b) by affidavit that he is entitled to inspect and documents are in possession of the 1st defendant.

SUBMISSIONS BY 1ST DEFENDANT

24. The 1st defendant restated the averments of the applicant and 1st defendants including arguments of each party as captured above. As captured above, the 1st defendant's advocate submitted that the 1st defendants tried to trace the requested charge document at its security documentation department without success with the bank statements during the subsistence of the loan.

25. He further submitted that the application for disclosure of information sought by the plaintiff cannot be made under constitutional provisions on access to information under **article 35 of the constitutional** by under statutory provisions and regulations governing the operations of 1st defendant.

26. The 1st defendant submitted that discovery should solely be limited to matters in contention and relevance that can only be gauged or tested by the pleadings or particulars which the plaintiff has not demonstrated and thus discoveries will be a process in futility and waste of court time and resources.

27. The 1st defendant submitted that once a property has been sold in public auction by charge exercising its statutory power of sale, the equity of redemption of the chargor and duties and obligations arising from the charge are extinguished; and as provided in **Section 77(3) (4)** and as held in the case of **Downhill Limited Vs Harith Ali El-Busaidy & Another [2000] eKLR** that the only remedy against the mortgagee (Bank) is damages and not entitled to any other remedy; that upon the transfer, the interest of the chargor shall pass to and vest in the transferee and is discharged from all liability on account of the charge or on account of any other encumbrance to which the charge has priority.

28. The 1st defendant submitted that it is not opposed to discovery and has provided statements from 2006 to 2008 substantially complying with statements sought; further that **article 35 of constitution** is not panacea for all procedural defect and plaintiff's poor record keeping and cannot be used to cure transactional defects by plaintiffs negligence in seeking and keeping his personal records; further that plaintiff has not demonstrated that he has not been able to obtain the charged from the Ministry of Land nor given reasons why the same is needed after 26 years.

29. The 1st defendant further submitted that the onus is on the applicant to prove that the 1st defendant is in possession of the documents and relevance of the documents to issues in contention.

30. As to whether 1st defendant's defence should be struck out for failure to produce the documents, the 1st defendant submitted that equity aids the vigilant and whoever comes to equity should come with clean hands; that prayer to strike 1st defendant's defence is unwarranted since the grounds for striking out are set out in the Civil Procedure Rules and non-production of documents does not fit in the criteria and under **article 50 of the constitution** every person has a right to fair hearing and that a party cannot be compelled to produce what it doesn't have.

SUBMISSIONS BY 2ND DEFENDANT

31. The second defendant joined hand with the 1st defendant in opposing the application. She averred that despite the plaintiff/applicant knowledge of the sale he went into a stupor for 5 years before waking up to file this suit on 23rd April 2013 seeking to restrain the 1st defendant from transferring the suit land; that by the time injunction application was filed, the suit land had been sold and transferred to the 2nd defendant on 27th May 2010 and had already been subdivided into 5 portions each with separate title subdivision having taken place on 11th August 2011; that application was dismissed by **Justice Emukule** on 3rd October 2014; and the applicant filed this application on 28th February 2019 after a period of 5 years.

32. 2nd defendant submitted that the applicants does not need to discover documents but his intention is to delay this suit knowing that he has hopeless case; that this suit is already 7 years old and yet no progress has been made on hearing; that in injunction application, applicant said he had *prima facie* case and should not argue that he needs documents to improve his case; that the application has come too late in the day; that the 1st defendant has substantially complied with order for discovery and the plaintiff's application should be dismissed.

33. She cited the case of **ABN Amro Bank N.Vvs Kenya Pipeline Company Limited [2019] eKLR** where the Court of Appeal held that the court may order discovery of documents on application being made where those documents are related to the suit before it and the purpose of discovery is to ensure that all documents or information necessary for the just determination of the suit are made available to all parties as to the court.

ANALYSIS AND DETERMINATION

34. The applicant seeks bank statements and legal charge in respect to loan facility advanced to him. The 1st respondent indicate that the charge and bank statements from 1992 to the year 2005 are not available but has attached to the affidavits documents statements available after the year 2005.

35. No clear explanation has been given as to why they are not available. 1st defendant/1st Respondent is a bank and in my view, documents in the bank are expected to be safe, secure and available. Even though the applicant may not have requested for the documents before the auction of the property herein, and he thinks it will aid his case, they should be availed. It will be for the court to make determination in respect to the documents.

36. No clear explanation has been given on difficulty in availing the documents and even if the bank is of the view that they will not serve any purpose at this stage, the applicant should not be denied access to the documents.

37. **FINAL ORDERS**

1. **The legal charge and bank statements not attached to replying affidavit be supplied to the applicant.**
2. **Compliance of order 1 above within 14 days.**
3. **Costs to abide by the outcome of this matter.**

Judgment dated, signed and delivered via zoom at Nakuru This 25th day of February 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer - Court Assistant

No appearance for the plaintiff

Mr. Cheruiyot counsel for the 1st Respondent

Mr. Kimondo counsel for the 2nd Respondent

Mr. Gitau counsel for the 3rd Respondent