



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 14 OF 2018**

1. OSMAN TAHIR SHEIKH SAID

2. AMINA TAHIR SHEIKH SAID

3. SAID AHMED TAHIR SHEIKH SAID (*All three suing as the executors of the will of the*

*late Tahir Sheikh Said Ahmed*)

4. ISHA TAHIR SHEIKH SAID

5. T.S.S TRANSPORTERS LTD.....PLAINTIFFS

=VERSUS=

IMPERIAL BANK LTD (IN RECEIVERSHIP).....DEFENDANT

**RULING.**

1) On 24/6/2019 the Plaintiffs filed an amended Notice of Motion application dated 29/4/2019 which is the subject of this ruling. By the application the Plaintiffs sought for the following orders;

**a) Spent**

**b) There be a temporary injunction pending inter-parties hearing and determination of this suit restraining the Defendant, its Servants, agents or employees from instructing auctioneers to sell advertising for sale, selling by public auction or private, leasing or in any other way interfering with the Plaintiffs' quiet possession of LR No. 532 Section v mainland North registered in the name of Tahir Sheikh Said Ahmed.**

**c) The Defendants be compelled to release to the Plaintiffs details and documents evidencing the borrowing by Tahir Sheikh Said Ahmed (deceased) and the repayments made on the facility and such details to include but not be limited to the following;**

1. The letter of offer, if any, issued to Tahir Sheikh Said Transporters Ltd for the loan advanced.
2. The resolutions by Tahir Sheikh Said Transporters Ltd for the borrowing.
3. The guarantees by Tahir Sheikh Said Ahmed (deceased) and/or by Tahir Sheikh Said Transporters Ltd in support of the borrowing.
4. The documents used to secure the borrowing including the charge or charges executed by Tahir Sheikh (deceased) Said if any.
5. Evidence of the disbursement of the funds allegedly borrowed by Tahir Sheikh Said Transporters Ltd.
6. Statement of account from the inception of the alleged loan, indicating the default in repayment of the facility, if

any, by **Tahir Sheikh Said Transporters Ltd.**

- 2) The Application is premised on the grounds on its face and further supported by an affidavit sworn by **Amina Tahir Sheikh Said**, sworn on 29<sup>th</sup> April, 2019.
- 3) The Plaintiff's case is that, after the demise of the Tahir Sheikh Said, they learnt through their brother in-law that the defendant bank was threatening to sell the suit property being L.R. No. 532 Section V Mainland North on basis of a loan taken by Tahir Sheikh Said Transporters Ltd but the 1<sup>st</sup> to the 3<sup>rd</sup> Plaintiffs were not given details of that loan. Despite numerous inquiries the Defendant rejected to divulge any information concerning the charge over the suit property. They were then caught by surprise to see a forty day notice sent to their brother-in-law wherein the Defendant purported to be intending to sell the suit property on a public auction or private treaty.
- 4) The Defendant completely failed to disclose the terms of the suit property. It is averred that the three months statutory notice as provided for under Section 90(1) & (2) and a forty days' notice to sell as provided for under Section 96 (2) of the Land Act, 2012 were not complied with. According to the Plaintiffs, the notices alleged to have been issued on 21<sup>st</sup> July, 2017 and 8<sup>th</sup> January, 2018 were issued to a deceased person and are null ab initio and cannot found the exercise of a statutory power of sale even assuming the loan was lawfully advanced.
- 5) That the Plaintiffs never knew of any charge over the suit property and upon search on they found a charge dated 18<sup>th</sup> December, 2014 for Kshs.300,000,000/= was registered over the suit property and was impossible to verify the legitimacy of the demands made by the Defendant. Vide a replying affidavit sworn by David Kiptoo on 23/7/2018 on behalf of the Defendant, the Plaintiffs aver to have noticed that the purported financial facilities were obtained through negligence, fraud and forgery perpetrated by the Defendant and/or in collusion with undisclosed third parties. The particulars of fraud were pleaded as the Defendant allowing the current account operated by TSS Transporters to be overdrawn to a tune of Kshs.50,911,823.58 as at 31/10/2014. That the defendant indicated there was a pre-existing hire purchase facility with a balance of Kshs.153,151,608.34 among other grounds of frauds explicated on ground 13 on face of the application including allegations on forgery of signatures.
- 6) It is the Plaintiffs' further case that the lawful amounts owed to the Defendant can only be settled if the issues raised herein are resolved. If the injunctive orders are not granted and the suit property sold, the Plaintiffs will suffer irreparable loss for having not been granted the opportunity to redeem the suit property.
- 7) On 27<sup>th</sup> November, 2019 the court directed the Respondent to file a response to the amended Notice of Motion application dated 29/4/2019 but none was filed. Nonetheless, vide a replying affidavit sworn on 23<sup>rd</sup> July 2018 by its Assistant Manager on Risk and Resolution Department, the Bank was opposed to the application. It was averred therein that there has existed bank-customer relationship between the bank and the 5<sup>th</sup> Plaintiff. The bank then offered a hire purchase contract reference number to the 5<sup>th</sup> Plaintiff for overdraft facilities. In a meeting of members of the board of the 5<sup>th</sup> Plaintiff held on 10.10.2014, the company passed a resolution in respect of the facilities which constitute to the subject matter of the suit. The 2<sup>nd</sup> Plaintiff, Amina Tahir Sheikh Said, was one of the board of members. The bank, vide its letter of offer dated 10.10.2014 agreed to make available to the 5<sup>th</sup> Plaintiff financial advances aggregating to the sum of Kshs.300,000,000/= with an overdraft facility of Kshs.15,000,000/= and Kshs.285,000,000/= term loan. As security thereof, the 5<sup>th</sup> Defendant and the bank executed a charge over the suit property L.R Number 532 for Kshs.300,000,000/= and a joint & several personal guarantee and indemnity in favour of the bank was executed by Tahir Sheikh Said Ahmed, Isha Tahir Sheikh Said, Nurein Tahir Sheikh Said, Osman Tahir Sheikh Said and Tauhida Tahir Sheikh Said by which they guaranteed the repayment of the principal loan or its equivalent as at the date of payment with interest, commission, all costs, charges and expenses.
- 8) However, the borrower totally defaulted on the obligations to repay the bank and ceased making scheduled monthly payments as early as November, 2014. As a result, and in an effort to resolve the matter, a meeting was held on 7/11/2016 between the bank and the borrowers (5<sup>th</sup> Plaintiff) officers including Omar Said, Sabir Said and Mahboob Sayani culminating in the borrower writing a letter dated 8/11/2016 wherein the bank's existing facilities were admitted and structure for flexible repayments scheduled. The charger, however, continued to default and the bank issued a letter of demand for repayment on 17/02/2017. Arising from the continued default, the bank then served a statutory notice by postage to the chargor's personal representatives by a letter dated 21.07.2017. Subsequently, on 08/01/2018 the bank served the requisite 40 days redemption notice. As at 08/01/2018, it is averred that the amount claimed stood at Kshs.550,721,689.82 and still continues to accrue interest as covenanted until payment in full.
- 9) It was averred that the Plaintiff cannot claim not to be aware of how the charge was reached, since some of the Plaintiffs were among board members who passed the resolution to borrowing the facilities and duly executed the charge and personal guarantee of repayment. The allegation that the charge was created unlawfully, illegally and without consideration is therefore spurious and lacks merit.
- 10) It was further averred that due to the fact that the bank is under receivership its operating system was yet to be fully updated as at 28.02.2018 and could not produce before court the current accounts of statements. However, it was stated that the bank could avail the statements once its accounts are upgraded.
- 11) By consent of the parties, the court directed that the application be disposed of by written submissions. Needless to say, advocates for both parties filed submissions with respect to the instant application which are as follows.

#### **Plaintiffs' Submissions**

12) The Plaintiff relied on the principles set out in the case of **Geilla –vs- Cassman Brown** to establish the issues for determination which are as follows:

a) *Whether the Plaintiff has a prima facie case with probability of success.*

b) Whether irreparable injury will be suffered if an injunction is not issued, and

c) the balance of convenience in favour of granting the injunction

13) On whether the Plaintiff has established a prima facie case, the Plaintiffs submitted that they have established instances where the Defendant engaged in fraud and forgery in advancing the loan and creating the charge. It is alleged that the figures claimed are fictitious and were cooked up in collusion with third parties. Because the loans were advanced fraudulently, the Defendant bank is unable to provide statements of accounts against the finding of the court in the case of **Margaret Njeri Muiruri-vs-Bank of Baroda (Kenya) Ltd [2014] eKLR**, where the court held that a bank is obligated to provide accounts that are clear and the true representation of all charges, commissions and rates that were loaded onto the accounts, as well as showing the number of times the appellant was making repayments to offset the debt.

14) On the second ground for establishing a prima facie case, it is submitted that the 4<sup>th</sup> Plaintiff who is the spouse of the late Tahir Sheikh Said had not consented to the creation of the charge. A prior consent of hers was not obtained and the signature on the charge purported to be hers was forged. This line of argument is buttressed by excerpts from the cases of **Geoffery Kinuthia Mungai & another-vs-Progressive Credit Limited [2018] eKLR** and **Stella Nyakio Nguji-vs-Wilberforce Njenga Ndonga & 7 others [2015] eKLR**.

15) The third issue submitted on is on the argument that there was no valid statutory notice issued to the Plaintiffs. They contend that addressing a statutory notice to a demised chargor does not amount to valid service within the meaning of the Land Act. The court held in the affirmative in the cases of **Edward Karanja Ragui-vs-Barclays Bank of Kenya Ltd [2002] eKLR** and **Josephine Njoki Mwangi-vs-Housing Finance Corporation of Kenya Limited [2008] eKLR**.

16) On the above grounds, the Plaintiffs submit that they have demonstrated a prima facie case with a probability of success in line with the case of **Mrao Limited-vs-First American Bank Ltd & 2 others [2003] eKLR**.

17) Turning on the second issue of whether the Plaintiffs have demonstrated irreparable injury will be suffered if the injunctive orders are not issued. It is argued that the bank's statutory power of sale is dubious and further that the bank is on the brink of infringing the Plaintiff's right under Sections 90 & 96 of the Land Act, 2012 as well as Section 93 of the Land Registration Act, 2012. The bank is further said to lack the ability to pay the money back in case the case succeeds for the fact that it is under receivership and its financial muscles are unpredictable. Lastly, it is argued that even damages will not be appropriate for a loss occasioned by a clear breach of the law. Reliance is placed in the cases of Thomson Smith Aikman, **Alan Malloy & others-vs-Muchoki & others [1982] eKLR** and the **Geoffery Kinuthia Mungai Case (supra)**.

18) Lastly, on balance of convenience, it was submitted that the suit property remains charged to the bank and if it succeeds in the case, then it can proceed and sell the property but no such right can be guaranteed to the Plaintiffs. The court therefore should be inclined to granting an injunction in favour of the Plaintiffs.

### **Defendant's Submissions**

19) The Defendant submitted that on grant of interlocutory injunctions as sought by the Plaintiffs, the court should be guided by the principles set out in the case of **Geilla-vs-Cassman Brown (1973) E.A 358**. The court should therefore weigh the Plaintiff's Notice of Motion application against the three-pronged test set out in the case of **Geilla-vs-Cassman** case (supra).

20) Whether the Plaintiffs have demonstrated a prima facie case, it is submitted that the Plaintiff's allegations that they had no knowledge of the existence of the bank's charge over the suit property as security for the facilities or that they did not receive any statutory notices informing them of the default is only calculated to mislead the court for the reasons that;

(a) the bank-customer relationship as alleged is not disputed. The borrower is the 5<sup>th</sup> Plaintiff and the 2<sup>nd</sup> Plaintiff deliberately withheld from stating to the court that he is a director of the 5<sup>th</sup> Defendant.

(b) The 5<sup>th</sup> Plaintiff Company is a family owned company and allegations that the charge was not known to the plaintiffs is a frivolous and dishonest claim.

(c) The loan facilities were secured by the chargor and the borrower's two directors and when the borrower defaulted in payment, the bank in compliance with Sections 90 and 94 of the Land Act, 2012, served requisite notices on both the borrower and the chargor by registered mail sent to the borrower's last known address of service. It is argued that the required mode of service was complied with and Certificate of postage annexed as proof thereof. For those reasons the Plaintiff failed to establish a prima facie case and reliance is placed on the case of **Moses Kibiego Yator-vs-Eco Bank Kenya Limited [2014] eKLR**.

(21) On whether the Plaintiffs will suffer irreparable loss the Defendant disagrees. It is submitted that the suit property is quantifiable in monetary terms and damages would adequately be appropriate should the case succeed.

(22) Lastly, on balance of convenience, it is argued that the same tilts in favor of the Defendant to realize the security in order to recover the substantial amount owed to her by the borrower and the chargor. In the alternative, if the injunctive orders are issued, then the bank will be prejudiced since it operates on its customer's funds and the customers will suffer unduly since they are not party to this suit. The Defendant therefore urges the Court to dismiss the application as it lacks both legal and factual merit.

### **Analysis and Determination**

(23) I have considered the application and the response thereto. I have also taken into account the detailed submissions placed before me by the Learned Advocates for the parties. The dispute here is one straight forward one seeking the determination whether or not the court should grant to the plaintiffs an injunction pending the determination of the suit.

(24) The circumstances warranting the grant of an interlocutory injunction were long enunciated in the celebrated case of **Giella –vs- Cassman Brown & Company Ltd(1973)EA 358**, where the Court stated that:-

***“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”***

(25) As to what constitutes a prima facie case, the Court of Appeal stated in the case of **Mrao –vs- First American Bank of Kenya Ltd & 2 Others(2003) KLR 125**, that it is one which:-

***“includes but is not confined to a “genuine and arguable case.” It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

(26) The crux of the Plaintiffs’ case as I understand it, is that the Plaintiff’s had no knowledge of any charge by the Defendant over the suit property and the charge alleged was procured by fraud. That the 4<sup>th</sup> Plaintiff was the spouse of the late Tahir Sheikh Said and she never gave spousal consent to any charge being created over the suit property and lastly, the Plaintiff’s to date have not been served with Statutory Notices by the Defendant as required by the law. The upshot of their submissions is that the Defendant bank should be restrained from exercising the power of sale arising out of the defective charges until the suit is heard and determined.

(27) That being the case, the foundation of the suit before me is an alleged fraud and forgery regarding the creation of the securities the defendant intends to enforce. While the Defendant submits that the charge was consented to and duly executed by the chargor and the 5<sup>th</sup> Plaintiff’s board of members, the court cannot freely and consciously shut its eyes and choose to ignore an allegation leading to prospects that securities purposed to secure the very colossal sum of money subject of the suit may be tainted with impropriety. In the case of **Juja Coffee Exporters Limited & another v N.I.C. Bank Limited & another [2020] eKLR** this court observed that;

***‘... the primary purpose of any judicial system to be designed to ensure fidelity to the law by enforcing the rule of the law. Where the allegation is that the law is being affronted, it must interest the court to do its mandate-investigate and render a judicious determination. In this matter, if I was to strike out the matter on account of the position taken by the defendant, I would leave the dispute undetermined and the allegation of fraud uninvestigated. Such an approach would depict a failure on the mandate upon the court.***

(27) Further in the case of **Robert M Muga vs Muchangi Kiunga [2007] eKLR** the court of appeal was emphatic that fraud vitiates all including court proceedings and that where such is pleaded, the defendant cannot be heard to mount that the suit is a frivolous one focused to vexing its right to exercise the power of sale.

(28) On the merits, and with regard to the above cited authorities, I find that the plaintiffs’ suit presents a prima facie case, but that must not assume the place of trial. This court should avail the opportunity to investigate if the plaintiffs’ or indeed any of them did participate in the creation of the securities. That is a matter that goes to the propriety and legality of the same securities which cannot be glossed over. Before this issue is addressed, it is only reasonable that the intended sale be stopped. On the basis that the legality of the charges grounding the statutory power of sale has been brought to challenge, a temporary injunction to restrain the sale of the suit be and is hereby granted property being LR No. 532 Section vs Mainland North pending the determination of the suit but on terms that the plaintiffs move expeditiously to have the suit heard.

(29) As for the prayer for supply of the documents, I consider that to be a facilitating order that would obviate prospects of other interlocutory application. The Defendant averred that it could not present the statements of account earlier on grounds that its system had not been updated. Well, I believe now it is updated and the statements can be availed. I adopt the words of the court of appeal in the case of **Barclays bank of Kenya ltd vs Christopher Kenyariri** and say that on the fact of this case, justice requires that the plaintiffs should be put in possession of all the documents in possession of the defendant and connected with the creation of the legal charges and the and the account on such facility. That be done within 30 days from today.

(30) In the end, I do allow the plaintiffs’ application in terms of prayers 2 and 3 and direct that costs be in the cause of the main suit.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 28<sup>th</sup> day of May, 2020.**

**D. O CHEPKWONY**

**JUDGE**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15<sup>th</sup> March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in

open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes