



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC. NO. E. 003 OF 2019**

**SHENG SHUANG QUARRY LIMITED.....APPLICANT**

**-VERSUS-**

**NIC BANK LIMITED.....RESPONDENT**

**RULING**

The Applicant filed a Notice of Motion application dated 6<sup>th</sup> March 2019 brought under the provision of **Article 35 (1)(b)** of the Constitution of Kenya, 2010, **Section 106 (1)(b)** of the **Land Act, No. 6 of 2012**, **Section 3A** of the Civil Procedure Act and **Order 51 Rule 1 of the Civil Procedure Rules, 2010**.

The Applicant is seeking orders:-

**1. That, the Honourable Court be Pleas'd to issue a mandatory injunction compelling the Respondent by itself, its agents servants and/or employees to supply, release and/or deliver to the Applicant and/or its agents, servants and/or employees the following charge, debenture, guarantee and related documents:-**

- a) Certified copies of statements of loan account(s) since opening to-date;**
- b) Certified copies of statements of hire purchase account(s) since opening to-date;**
- c) Certified copies of statements of current account since opening to-date;**
- d) Copy of duly registered charge on L. R. No. 28617(I.R129519);**
- e) A copy of duly registered debenture;**
- f) Certified copies of hire purchase agreements;**
- g) A copy of duly registered personal guarantee of directors;**
- h) A copy of resolution(s) of Board of Directors authorizing borrowing**
- i) Certified copies of inventory of machines and equipment on site when entry and possession was done in June 2018**
- j) Certified copies of an inventory of all spare parts contained in containers on site when entry and possession was done in 2018**
- k) Certified copies of an inventory of the materials and/or by products on site when entry and possession was done in 2018**
- l) Certified copies of statements of account of all machinery, equipment and vehicles sold todate**
- m) Certified copies of sale agreements of machinery, equipment and vehicles**

*n) Certified copies of sale agreements of machinery equipment and vehicles*

*o) Certified copies of statement of account of equipment, machinery, spare parts and materials on site sold since entering and taking possession in June 2018*

*p) Any other documents in the custody of the Respondent in relation to the charge, personal guarantee of directors, hire purchase agreements and debenture(s) created between the Applicant and Respondent in their contractual relationship as banker and customer.*

The Application is based on the following grounds;

- 1. On 27<sup>th</sup> February 2019, the Applicant made a demand to the Respondent to be supplied with duly registered copies of the charge, debenture, hire purchase agreements and personal guarantee and other documents relating to a charge of the Applicant's property known as L.R No. 28617 (I.R 129519);*
- 2. The Respondent entered into the charged property in June 2018 and, than running the quarry business instead dismantled the machinery and sold the equipment and spare parts. It is still in occupation without carrying out any business at all;*
- 3. The Respondent repossessed motor vehicles and machinery equipments in the years 2017- 2018 and sold them but has never given any account at all to-date;*
- 4. The Applicant has been servicing the loan and hire purchase accounts up to the time it was running the quarry business before the said entry by the Respondent and now the Respondent is demanding a sum of more than Ksh 200 million;*
- 5. The Applicant is desirous in obtaining the said documents to ascertain the manner in which the loan and hire purchase accounts have been run by the Respondent;*
- 6. The Applicant is apprehensive that the Respondent has hatched a scheme to realize the security under the guise of the alleged rights created in the charge and debenture documents;*
- 7. The Applicant is entitled to be supplied with the said document as a matter of contractual and constitutional rights.*

The Applicant in supporting affidavit stated that they charged suit property LR 28717 (IR 129519) to secure loan and hire purchase facilities from the Respondent. The supplemental 1<sup>st</sup> legal charge was created over the said facility for Ksh 247.4million.

The Applicant's assets created, the debenture for Ksh 274.4 million. The directors provided joint and several guarantees for Ksh 283 million. All these securities, charges and guarantees were to facilitate the Applicant to operate a quarry on the charged property. The Applicant serviced the loan and hire purchase accounts except in 2017-2018 due to bad weather and rainy season.

The Respondent repossessed the motor vehicles and machinery and forcefully entered and took possession of the charged property contrary to **Section 94 of the Lands Act**.

The Respondent opposed the application vide a Replying Affidavit dated 12<sup>th</sup> March 2019, sworn by **Stephen Ateya**, Senior Legal Manager at the Defendant/Respondent. He averred that the Application is unmerited and unwarranted to the extent that the Respondent has always been ready and willing to provide such documents as and which they are required by the Applicant in relation to its accounts with the Respondent.

That the Application is premature to the extent that the Respondent has not yet sought to exercise its statutory power of sale; the provisions of **section 106 (1) (b)** of the **Land Act 2012**, on which the Application is premised upon, are therefore inapplicable.

That the value of the property known as **L.R. No. 28617 I.R No. 129519(the suit property)** is irrelevant to the orders sought in the application. Without prejudice, such value was on the premise that the quarry business on that suit property is fully operational.

He stated that it was illogical that copies of the security documents were never handed over to the Applicant, as alleged at **paragraph 9** of the Supporting Affidavit. If this position were so, which is/was denied, the Applicant would have demanded for such documents then rather than now.

In further response to **paragraph 9** of the supporting affidavit, the Respondent has always been ready and willing to facilitate and provide the Applicant with any information as relates to its account. As a matter of fact, the Applicant had on 7<sup>th</sup> February 2019 through its previous advocates, Glasctrose, sought that it be provided with certain information regarding its account. The Respondent, through its advocates, duly responded to this request by letter dated 20<sup>th</sup> February 2019 hereto annexed **SA-1**

That he was aware that part of the security placed by the Applicant towards the facility offered by the Respondent were a number of motor vehicles, equipment and machinery. He was further aware that these were repossessed by the Respondent and sold upon the Applicant being in default of its contractual obligations to service its loan, in each instance upon prior notice being issued to the Applicant, hereto annexed as **SA- 2**

Contrary to the assertions at **paragraph 13** of the supporting Affidavit, the Respondent has always been ready and willing to supply the Applicant with its various loan account statements upon request. To this end, the Respondent was not aware of any request for account statements made by the Applicant and this is denied by the Respondent and puts the Applicant to strict proof of its allegations.

In response to **paragraph 14** of the supporting Affidavit, the Applicant has always had opportunity to contact the Respondent in order to query entries in his statements for the various loan accounts. The Applicant may not premise its Application on this argument when it has never utilized the opportunity afforded to it by the Respondent.

In response to **paragraph 15 and 16** of the supporting affidavit, he was aware that the Respondent sometime in June 2018 entered the suit property and carted away various goods that had been offered as security for the Applicant's facility with the Respondent. These goods were later sold and the proceeds from such sales properly accounted to the Applicant.

In response to the allegation at **paragraph 18** of the supporting affidavit, the Applicant sought to be supplied with voluminous documents in relation to its account within the unreasonably short period of 2 days. In any case, the Respondent was collating these documents from its record when it was served with court papers in this suit.

That as a matter of good faith and in order to avoid any contentious litigation, the Respondent addressed a letter to the Applicant's advocates dated 12<sup>th</sup> March 2019 in which all the documents sought were provided. Particularly the Respondent provided the Applicant with:-

**a) Hire purchase Agreement in respect of the motor vehicles KHMA 719C, KCC 575R, KCB 413K, KHMA 730F, KHMA 932F, KCB 884A and KCC 645S;**

**b) Various loan account statements, hereto annexed as SA-3**

Considering that the information sought of the Respondent has been provided notwithstanding the Application being premature and unmerited, he believes that the Application has now been overtaken by events. To this end, the Respondent is entitled to be awarded the costs of the Application.

#### **DETERMINATION**

**The Court considered the application and submissions made by Counsel for both parties;**

**Article 35 COK 2010 provides;**

***(1) Every citizen has the right of access to—***

***(a) information held by the State; and***

***(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.***

***(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.***

***(3) The State shall publish and publicise any important information affecting the nation.***

In compliance with the Applicant's constitutional right the Defendant provided documents that were/are in their possession as and when the Applicant officially requested for the same. The Defendant vide letter of 7<sup>th</sup> February 2019 requested for information which by their letter of 20<sup>th</sup> February 2019 annexed as – SA-1 provided the relevant information.

The Defendant wrote to the Applicant's lawyer vide letter of 12<sup>th</sup> March 2019 and enclosed hire purchase Agreements of Motor vehicles and various loan accounts annexed as- SA-3

On 13<sup>th</sup> March 2019 before the instant application was filed, this Court mandated the parties to avail and exchange documents and reconciliation of accounts on condition no more affidavits would be filed.

The Defendant by the Replying Affidavit filed and served Hire Purchase Agreements and Statements of Accounts as requested.

The Applicant filed documents related to the facilities provided by the bank and the correspondence a letter of 27<sup>th</sup> February 2019 requesting documents. The Court notes, the Applicant filed the application 9 days later.

The Application for access to information is a standalone application with no suit filed by filing the plaint, petition or originating summons. There is no suit for hearing and determination but an application to pursue request and availability of documents. From the documents provided and order(s) of this Court, the application is spent, relevant document have been filed in Court and upon request have been availed to the Plaintiff/Applicant.

This Court is also of the view that the Applicant can/may not seek documents for the Respondent that would be in possession of the Applicant e.g A copy of Resolution(s) of the Applicant's Company Board of Directors authorizing borrowing. Surely, the resolution(s) if any

are from the Applicant Company and released to the Respondent while retaining the original with the Company.

c) Secondly, the Applicant is unreasonable in demanding provision of certified copies of an inventory of the materials and/or by products on site when entry and possession was done in 2018 and any other documents in the custody of the Respondent in relation to the charge, personal guarantee of directors, hire purchase agreements and debenture(s) created between the Applicant and Respondent in their contractual relationship as banker and customer. These are not specific itemised documents and hence the Defendant will be required to comply with access to information disclosure of documents that are limitless and never ending. There are inventories sought on machinery, equipment, spare parts during entry and procured in June 2018 which is specific and sufficient. Any other Inventory of materials/by products not specified is a fishing exhibition.

The Constitution protects every person, a party can only provide and avail specific documents in their salvaged possession or should be in possession of the party. A generalised list of provision of documents is an unreasonable and unconscionable duty on the Defendant. Therefore, the Applicant's list as provided shall be complied with by the Defendant in discovery of substantive application or suit save for item **(h) (k) & (p)** of the list due to reasons indicated above.

Finally, the Applicant's application is already substantively complied with in compliance with the Applicant's constitutional right under **Article 35 (1) COK 2010**, therefore since there is no suit herein, the application is compromised and implemented. The Defendant shall provide the remainder of documents listed save for those waived by the Court on the reasons provided above within a substantive application or suit under provisions of Civil Procedure Rules Order 11 Civil Procedure Rules 2010 or vide Notice to Produce.

In ***Rafiki Microfinance Bank Ltd vs Zenith Pharmaceuticals Ltd Misc 607 of 2014*** it was held that documents and relevant information sought in terms of executed letters and loan application forms shall be delivered to the Applicant within 14 days of the court's Ruling. However, the same Court found that the Plaintiff could not produce Account opening documents as requested, as banking practice does not require account-opening documents to be availed.

The Court considered the following excerpts;

**a) Halsbury Laws of England Vol 13 para 38;**

*“Discovery will not be ordered in respect of irrelevant allegations in the pleadings, which even if substantiated could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to fish for witnesses or for a new case, that is to enable him a new case.....”*

**b) *Oracle Productions Ltd vs Decapture Ltd & 3 Others [2014] eKLR***

*“Pre trial discovery is so central to litigation that the entire Order 11 of Civil Procedure Rules 2010 has substantially devoted to it, including sanctions for non-compliance. Orders 4 & 7 now require parties to file and serve documentary evidence with their pleadings. Order 14 empowers the Court to order production, impounding and return of documents.....Discovery should be limited solely to matters in contention. Relevance can only be gauged or tested by pleadings or particulars provided.”*

**DISPOSITION**

Since the substantive suit is not filed or herein, the parties shall comply with exchange of the documents in the Pre-Trial /Case Management Process provided by Order 11 Civil Procedure Rules 2010 or better still if during hearing and determination of an application by filing Notice to Produce to the Defendant to avail in Court the relevant documents in the substantive suit.

Each party to bear own costs.

DELIVERED, DATED & SIGNED IN OPEN COURT ON 25<sup>th</sup> NOVEMBER 2019.

M.W.MUIGAI

JUDGE

**IN THE PRESENCE OF;**

MR.MANYARA FOR THE APPLICANT

MR. DEYA HOLDING BRIEF MR. KUYO FOR THE RESPONDENT

COURT ASSISTANT- FRED