



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 23 OF 2017**

**CHARLES KINYANJUI MWAURA.....1<sup>ST</sup> PLAINTIFF**

**KAGUANJAI BUILDERS.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**PARAMOUNT UNIVERSAL BANK LTD.....1<sup>ST</sup> DEFENDANT**

**SOUND EQUIPMENT LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By an application dated 19<sup>th</sup> January 2017, the plaintiffs sought an interlocutory injunction to restrain the 1<sup>st</sup> defendant from selling-off the suit property, **L.R. No.NAIROBI/BLOCK 90/589 LORESHO**.
2. It is common ground that the 1<sup>st</sup> plaintiff, **CHARLES KINYANJUI MWAURA**, borrowed a loan of Kshs. 20,000,000/- from the 1<sup>st</sup> defendant, **PARAMOUNT UNIVERSAL BANK LIMITED**.
3. Charles acknowledged that the said loan facility was repayable within 24 months, through the remittance of monthly instalments of Kshs. 988,900/-.
4. According to the bank, the 1<sup>st</sup> plaintiff defaulted, resulting in the issuance of statutory notices to Charles, informing him of the bank's intention to sell the suit property.
5. It is further common ground that the 2<sup>nd</sup> plaintiff, **KAGUANJAI BUILDERS LIMITED** entered into 2 separate contracts with the 2<sup>nd</sup> defendant, **SOUND EQUIPMENT LIMITED**. Pursuant to those 2 contracts, **KAGUANJAI** was to undertake construction works for a Housing Project on **L.R. No. 209/12184, LOWER KABETE**.
6. It is the plaintiffs' case that Sound Equipment Limited was supposed to remit payment to Kaguanjai's bank account at Paramount Universal Bank, and that the bank was then expected to transfer the credits to the account of Charles Kinyanjui Mwaura, to service the loan.
7. Charles blames the bank for failing to provide him with a complete statement of account, which could demonstrate the funds which Sound Equipment Limited had remitted to the account of Kaguanjai Builders Limited.

8. It is the case of Kaguanjai Builders that Sound Equipment owed it the following amounts of money;

a) *Retention sums plus VAT at 16%.....Kshs 5,396,656.40*

b) *Amount due upon verbal repudiation of the contract      Kshs.15,375,167*

c) *Damages for loss due to repudiation for 10 Houses      Kshs. 78,223,609.24.*

9. In a nutshell, Sound Equipment is said to owe Kaguanjai much more than the loan which is outstanding from Charles K. Mwaura to Paramount Universal Bank.

10. Notwithstanding that situation, the bank served Charles with statutory notices, indicating the bank's intention to sell the charged property by public auction.

11. The reason why Charles has brought together the issues concerning the loan he borrowed, and the payments allegedly due from Sound Equipment to Kaguanjai Builders is that the relationship between the 2 defendants, and the loan which Charles borrowed from the bank are so inter-twined that they cannot be delinked.

12. After this suit was filed, the defendants are alleged to have paid Kshs. 4.9 million, less taxes, which left payment of Kshs. 4.7 million.

13. It is the understanding of the plaintiffs that the payment of that amount of money constituted an admission by the defendants, that they owed the plaintiffs money.

14. Therefore, the plaintiffs insist that the defendants did not have any reason for serving them with statutory notices of sale, at a time when the defendants were aware that they owed money to the plaintiffs.

15. However, as set out earlier herein, the amounts actually being claimed by the plaintiff are much more than the payments which the defendants had made.

16. When canvassing the application, Mr.K'Opere advocate stated that the sums owed to his clients exceeded Kshs. 23 million. Presumably, that figure was arrived at by deducting from the sums which the plaintiff is claiming, the sums claimed by the bank.

17. If the suit property was sold when the plaintiffs' claim far outstripped the loan balance claimed by the plaintiffs, it is the considered opinion of the plaintiffs that they would suffer irreparable loss.

18. When answering to the application, Mr. Nyaanga advocate submitted that because there had been a default in the repayment of the loan, and as the bank had already given statutory notices, there would be no justification for stopping the sale.

19. In my considered view, the terms of the legal charge were explicit. They created a contract between the bank and the borrower, Charles Kinyanjui Mwaura.

20. There were only two parties to that contract, namely the lender and the borrower. The said borrower provided a security for the loan which he got from the bank.

21. The charge instrument did not incorporate any other parties to it, nor did it make the contract conditional upon any arrangements which were not embodied within it.

22. I find nothing either in the charge or in the two contracts between Kaguanjai Builders Limited and Sound Equipment Limited, which links those two separate entities and the sets of contracts that each pair signed.

23. It would appear that the only common factors between, on the one hand, the legal charge, and on other

hand, the building contracts, appears to be the director of Kaguanjai Builders Limited (*Charles Mwaura*) and the director of Sound Equipment Limited (*Milton Njoroge*).

24. A contract between the bank (*as lender*) and Charles (*as borrower*) cannot, in law be the subject of contracts between two other separate and distinct legal persons, namely Kaguanji Builders Limited and Sound Equipment Limited unless all the four (4) parties expressly specified so.

25. In this case, the parties to each of the separate contracts, signed only those specific contracts, without reference to any other contracts.

26. In law, documents speak for themselves. The courts will interpret the terms of a contract in accordance with the contents embodied within it.

27. Any person who may wish to import into a written contract, other informal provisions has a steep legal slope to surmount. In this case, I find that the plaintiffs have failed to demonstrate how some alleged informal discussions between the directors of Kaguanjai Builders and Sound Equipment could have varied the terms of the written contracts to which both of them were not party.

28. I also find that the sums claimed by the bank, in respect to the loan are clearly spelt out in the statements of account.

29. I so find because the bank and the borrower know the exact sum which the borrower received as a loan.

30. Both parties know how much has been repaid.

31. The bank then gave notices to the borrower, providing particulars of the amounts in arrears, as well as the outstanding balances.

32. The borrower did not dispute any of the said sums, and therefore it may be safely concluded that no dispute arises in that respect.

33. On the other hand, the sums claimed by Kaguanjai Builders are made up of calculations done by the claimant, when it was computing sums which it believes that would constitute appropriate and adequate compensation from Sound Equipment Limited.

34. In that regard, Sound Equipment has asserted that the dispute between the parties ought to be referred to arbitration.

35. The request that the dispute be resolved through arbitration is based on the terms of the contracts between the parties.

36. Of course, the plaintiffs contend that there was no dispute on liability, because the defendants have allegedly admitted liability.

37. The admission is said to be made out from the conduct of the defendants, when they made payments to the plaintiffs, after this suit was filed.

38. The reasoning by the plaintiffs suggests that both defendants owed to the plaintiffs some payments, and that that is why the defendants were remitting payments.

39. However, the plaintiffs have not shown how the bank, which had loaned money to Charles, had ended up owing Charles and Kaguanjai Builders, yet Charles concedes that he was in default.

40. Mr. K'Opere advocate told the court that a director of Sound Equipment Limited, who is also the Chairman of Paramount Universal Bank Limited, had given an undertaking to make payments on behalf

of the borrower.

41. However, when the court asked for the said undertaking, counsel said that there had been no formal undertaking. In effect, if there had been any undertaking, it was informal and unwritten.

42. On a prima facie basis I find that the alleged informal undertaking by a director of Sound Equipment Limited cannot have varied the written and registered legal charge. In any event, the director of Sound Equipment Limited was not a party to the legal charge: He could not vary it.

43. In the final analysis, I find that the plaintiffs have failed to establish any *prima facie* case with a probability of success.

44. I further find that there appears to be a misjoinder of two sets of parties, who had signed separate and distinct contracts.

45. In respect to the contracts between Kaguanjai Builders Limited and Sound Equipment Limited, there is an express provision that disputes be resolved through arbitration.

46. Meanwhile, as between Charles and the Bank, the legal charge does not contain any arbitration clause.

47. The said difference, in the mode of resolving such disputes as may arise from the separate contracts, is another reason why it is difficult to combine the contracts in one case.

48. In conclusion, I find no merit in the plaintiffs' application dated 19<sup>th</sup> January 2017. It is therefore dismissed, with costs to the defendants.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> day of July 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

*K' Opere for the 1<sup>st</sup> Plaintiff*

*K' Opere for the 2<sup>nd</sup> Plaintiff*

*Nyaanga for the 1<sup>st</sup> Defendant*

*Nyaanga for the 2<sup>nd</sup> Defendant*

*Collins Odhiambo – Court clerk.*