



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 374 OF 2017

MOHAMMED SHAHID MOUGHAL.....PLAINTIFF

VERSUS

HFC LIMITED.....1ST DEFENDANT

AFRICAN BANKING CORPORATION LTD.....2ND DEFENDANT

GUARANTY TRUST BANK (K) LIMITED.....3RD DEFENDANT

RULING

[1] The Plaintiff's Notice of Motion dated **12 September 2017** was filed herein by the Plaintiff, **Mohammed Shahid Moughal**, under **Section 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 40 Rule 1 and 2** of the **Civil Procedure Rules, 2010**; and the **Bills of Exchange Act, Chapter 27** of the **Laws of Kenya**. He prayed for Orders, inter alia, that the Court be pleased to issue a temporary injunction restraining the 1st, 2nd and 3rd Defendants by themselves, their agents and or servants or any agents appointed by them under their authority, from further interfering attaching, selling, intermeddling, trespassing, entering into the Plaintiff's properties on **LR No. Ngong/9155; 9156** in **Kiserian Township, Kajiado County Plot No. C2** and **Nyali Sub-division No. 2552 Section 1, Mainland North**, pending further orders of the Court and/or until the determination of the application.

[2] The Plaintiff further prayed that the Court be pleased to issue a Declaratory Order for the release of the securities being held by the 2nd Defendant as well as for him to be discharged from any liabilities in respect of the **Promissory Notes Numbers MSM401-MSM404, and MSM406**. His contention was that he had cleared the loans advanced to him by the Defendants, and yet he was being harassed by the agents of the 2nd Defendant. He was apprehensive that the Suit Properties, which had been advertised for sale, would be sold at less than the correct value of **Kshs. 44,000,000/=**.

[3] In his Supporting Affidavit filed with the application, the Plaintiff conceded that he had borrowed a loan for which he charged the Suit Properties as security. He further conceded that as at **17 July 2017**, there was an outstanding balance of **Kshs. 15,332,655.78**; and that he was served with a Notification of Sale of the Suit Property by **Shelfo Auctioneers**. To avert the impending sale, the Plaintiff issued certain Promissory Notes dated **24 July 2017** to the Defendants. He therefore averred that unless the Orders sought are granted, he stands to suffer prejudice in redeeming his properties.

[4] On behalf of the 1st Defendant, a Replying Affidavit sworn by the Legal Officer-Litigation, **Joseph Lule**, was filed herein on **19 September 2017**, confirming that on **10 September 2013**, the Plaintiff applied to the 1st Defendant for a loan facility of **Kshs. 7,770,000/=**; that the application was approved on **6 October 2014** in the sum of **Kshs. 6,660,000/=** on certain terms and conditions; and that the loan was secured by a Charge dated **20 April 2015**. The funds were released to the Plaintiff whereupon the Plaintiff was to make monthly repayments of **Kshs. 105,710/=**. According to the 1st Defendant, the Plaintiff subsequently fell into arrears and defaulted in servicing the loan, such that, as of **23 February 2017**, he was in arrears to the tune of **Kshs. 6,917,849.66**.

[5] The 1st Defendant further averred that since the Plaintiff persisted in his default, it had no option but to serve the Statutory Notice on the Plaintiff in keeping with **Clause 7.2.3.5** of the Charge Instrument. Further notices were served on **25 November 2016**. The Plaintiff was thereby required to settle the outstanding balance of the loan together with interest within three months (see **Annexure "JL5"**). Notwithstanding this and other notices, the Plaintiff was still indebted to the 1st Defendant by **1 December 2016**. Thus, the 40 day notice was served on **8 March 2017** per **Annexure "JL7"**, and it was not until **24 July 2017** that the Plaintiff's Advocate wrote to the 1st Defendant forwarding a Promissory Note in settlement of the loan. According to the 1st Defendant, it promptly rejected and returned the Promissory Note on the basis that it could not vary the terms of the contract, and therefore was invalid from its standpoint. A letter to that effect dated **28 July 2017** was exhibited as **Annexure "JL8"** to the Replying Affidavit.

[6] Thus, the contention of the 1st Defendant was that, as of **22 August 2017**, the Plaintiff's mortgage account was still in arrears to the tune of **Kshs. 7,697,625.17**; and therefore that the Plaintiff had not established a *prima facie* case to warrant the issuance of a temporary injunction as had been sought by him; and that, in any event, he can adequately be compensated in damages. The 1st Defendant averred that since the Plaintiff had admitted breach of his covenant to service the said facility, he should not be allowed to use the Court for the purposes of evading his legal responsibilities.

[7] The 2nd Defendant relied on the Replying Affidavit sworn by its Senior Legal Officer, **Evalyn Gachoki**. The said affidavit was filed herein on **14 September 2017** and it deposed to the fact that on **13 February 2017**, **Security Products Limited** (the Borrower), approached the 2nd Defendant for a loan of **Kshs. 30 million**; whereupon a Legal Charge was created over **LR No. Ngong/Ngong/9156**, which was registered in the name of the Plaintiff, **Mohammed Shahid Moughal**. She further averred that though the initial Letter of Offer was for **Kshs. 11,500,000/=**, the amount was later varied to **Kshs. 30 million** vide the Letter of Offer dated **13 February 2015**. Thereafter on the **28 March 2015**, the Plaintiff signed a Guarantee and Indemnity for **Kshs. 30 million** as a Guarantor to the Borrower as well as a Letter of Instalments, committing the Borrower to paying **Kshs. 279,638/=** per month for a period of 60 months.

[8] It was further the contention of the 2nd Defendant that both the Borrower and the Plaintiff did not fulfill their monthly obligations to it; and therefore, on the **30 January 2017**, the 2nd Respondent issued a demand notice for the payment of **Kshs. 13,965,563.93**; but that the said notice was never heeded by the Plaintiff or the Defendant. Consequently a Statutory Notice was issued to the Plaintiff and the Borrower on **22 March 2017**, which was followed by the 40 days' Notice to Sell and the 45 days' Redemption Notice. Copies of all the documents aforementioned were attached to the 2nd Defendant's Replying Affidavit as **Annexures "EG-1" to "EG-10."**

[9] Thus, it was averred by the 2nd Defendant that, it was upon service of the Redemption Notice on **24 July 2017**, that the Plaintiff instructed his Advocates, **M/s Omwoyo, Momanyi Gichuki & Company Advocates**, to write to the 2nd Defendant forwarding two Promissory Notes Numbers **MSM402** and **MSM403**, which the 2nd Respondent rejected and thereupon demanded the immediate payment of the accrued sum of **Kshs. 15,516,404.78**, which was then due and outstanding as per the Statement of Account annexed as **Annexure "EG-13."** On account of the foregoing, the 2nd Defendant was of the posturing that the Plaintiff suit and the instant application lack merit and ought to be struck out for misjoinder of causes of action.

[10] The 3rd Defendant also opposed the application, and to this end, it relied on the Replying Affidavit sworn on **19 September 2017**, wherein it was averred that, sometime in **June 2013**, the Plaintiff, acting on behalf of **Security Products Limited**, applied to it for certain banking facilities in the sum of **Kshs. 15 million**. That the 3rd Respondent approved the request and granted the bank facilities sought, which facilities were secured by an existing Legal Charge of **Kshs. 4 million** and an existing Further Charge of **Kshs. 11 million** over the property known as **Title Number Ngong/Ngong/9155** registered in the name of the Plaintiff. It was further averred that the facilities were further secured by Deeds of Guarantee and Indemnity duly executed by **Mohammed Fadil Moughal** and the Plaintiff, **Mohammed Shahid Moughal**; and a subsisting Debenture for **Kshs. 20 million** duly executed by the Borrower.

[11] According to the 3rd Defendant, the Borrower declined to repay the facility and had an outstanding balance of **Kshs. 2,698,939.74** as at **22 June 2017**, prompting the 3rd Defendant to send demand notices to the Borrower and the Guarantors. Thereafter on **25 July 2017**, the 3rd Defendant received two letters from **M/s Omwoyo Momanyi Gichuki & Company Advocates** forwarding Promissory Notes on behalf of the Plaintiff for **Kshs. 1,761,009** and **Kshs. 1,003,125**, respectively, promising to pay **Kshs. 10,000/=** monthly on behalf of the Borrower towards the repayment of the loan. It was the contention of the 3rd Defendant that this proposal was contrary to the terms of the Letter of Offer, and that as far as they were concerned, the Borrower and the Plaintiff were in default; and that the outstanding amount stood at **Kshs. 2,820,922.93** as at **25 July 2017**. However, it was yet to serve the requisite Statutory Notices.

[12] I have perused the application and noted the grounds upon which it is premised. I have also perused the Supporting Affidavit, the annexures accompanying it vis-a-vis the averments in the Replying Affidavits filed by each of the three Defendants, the Further Affidavit of the Plaintiff, as well as the written submissions filed herein by Learned Counsel for the parties. What emerges therefrom is that there is no dispute that, on diverse dates in **2012, 2014 and 2015**, the Plaintiff and **Security Products Limited** (the Borrower), applied for certain financial facilities from the Defendants; or that these facilities were granted on terms. It is also manifest that the Plaintiff and the Borrower failed to meet the specific repayment terms that had been agreed on by the parties. Thereupon, the 1st and 2nd Defendants issued the requisite demand and Statutory Notices, evincing their intention to realize the securities.

[13] It is further not in dispute that faced with the foregoing scenario, the Plaintiff instructed his lawyers, the firm of **M/s Omwoyo Momanyi Gichuki & Company Advocates**, to issue certain Promissory Notes to the Defendants, as follows:

[a] Promissory Note No. MSM401 dated 24 July 2017 for **Kshs. 7,691,026/=** was issued in favour of the 1st Respondent.

[b] Promissory Note No. MSM402 for **Kshs. 6,579,598** and Promissory Note No. MSM403 for **Kshs. 8,820,060/=** dated 24 July 2017 were issued in favour of the 2nd Respondent.

[c] Promissory Note No. MSM404 for **Kshs. 1,003,125** and Promissory Note No. MSM 406 for **Kshs. 1,761,009/=** were issued in favour of the 3rd Respondent.

[14] Thus, from the Plaintiff's standpoint, he had discharged his obligation to the Defendants by virtue of **Section 87(1) (2) and (3) of the Bills of Exchange Act, Chapter 27 of the Laws of Kenya**, for which reason the Defendants are under duty to discharge all the securities held by them. The Defendants' argument, however, was that the Promissory Notes were not and could not be a replacement for the clear terms set out in the respective Letters of Offer and the Charge Instruments. The case of **Muturi Njorge & 2 Others vs. Barclays Bank of Kenya Limited [2017] eKLR** was relied on to support this argument.

[15] **Order 40 Rule 1(a)** of the **Civil Procedure Rules** provides for relief in the following terms:

"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

[16] With the admission of the 3rd Defendant that it is yet to issue the requisite Statutory Notices, it can hardly be said that there is any danger to the charged property. Nevertheless, the 1st and 2nd Defendants appear to have gone through the Notice issuance process satisfactorily and copies of the notices are annexed to their Replying Affidavits. Although in his Further Affidavit sworn on **19 September 2017**, the Plaintiff disputed the address used by the 2nd Defendant, there can be no doubt that he was notified of the impending sale and it was on that basis that the Plaintiff issued the Promissory Notes aforementioned. Thus, the only issue for determination, in my view, is whether the Plaintiff has demonstrated a good case to avail himself of the relief of interlocutory injunction as provided for in **Order 40 Rule 1(a)** of the **Civil Procedure Rules** aforementioned.

[17] The touchstone in this regard has been and still is the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**, wherein it was held thus:

"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be 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."

[18] And, as to what amount to a *prima facie* case, the Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123** expressed the view that:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in 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."

[19] In connection with his averment that he discharged his obligation to the Defendants upon issuing them with the Promissory Notes, the Plaintiff relied on **Section 87** of the **Bills of Exchange Act**, which provides that:

(1) Where a note payable on demand has been endorsed, it must be presented for payment within a reasonable time of the endorsement; and if it be not so presented the endorser is discharged.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

[20] Whereas there is no dispute that promissory notes are principally issued to secure the payment of instalments due in commercial transactions, in the instant matter, the facilities were secured by Legal Charges, copies of which have been exhibited herein. There appears to be no consensus that in the event of default, the Defendants would accept promissory notes. Indeed the Defendants rejected the said Promissory Notes, which appear to have been unilaterally contrived as a solution and forwarded at the instance of the Plaintiff. There is therefore no agreement as to the respective installment amounts stated on the Promissory Notes. I would accordingly agree with the viewpoint taken by **Onguto, J.** in **Muturi Njoroge & 2 Others vs. Barclays Bank of Kenya** (*supra*) that:

"...In the absence of any clear, cogent and unequivocal evidence that the Defendant intended to substitute its existing rights with a new agreement, the promissory note should not be taken to mean a substitution and discharge but rather that the Defendant merely obtained additional liquid proof of its claim against the Plaintiffs. The onus was always on the Plaintiffs to lay evidence ... that the Defendant intended to substitute the agreement but the Plaintiffs have failed to do so..."

[21] Thus, the Court is not satisfied that a *prima facie* case has been made out by the Plaintiff in the sense of a demonstration of a right which has been infringed or threatened with infringement as to call for an explanation or a rebuttal by the Defendants. Accordingly, it would be unnecessary to consider whether the Plaintiff stands to suffer irreparable harm or whether the balance of convenience would tilt in his favour. This is because the three conditions laid down in **the Giella Case** are sequential, a point aptly expressed by the Court of Appeal in **Nguruman Limited V. Jan Bonde Nielsen & 2 Others** (*supra*) thus:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

[22] In the result, the Plaintiff's Notice of Motion dated **12 September 2017** fails and is hereby dismissed with costs. The implication therefore is that the Defendants are at liberty to realize their respective securities upon issuance of the full range of notices required under the **Land Act** as well as the **Auctioneers Rules**.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI 22ND DAY OF DECEMBER, 2017

OLGA SEWE

JUDGE