



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 311 OF 2015**

**JAVAID IQBAL KHAN.....1<sup>ST</sup> PLAINTIFF**  
**MANIZA SHARIF JAVAID IQBAL.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS -**

**IQBAL TRANSPORTERS LIMITED.....1<sup>ST</sup> DEFENDANT**  
**BANK OF BARODA (K) LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs have asked the court to issue a Redemption Order under Section 85 of the Land Act, allowing the plaintiffs to pay to the Defendant Kshs. 12 million in full and final settlement of the amount secured by the Charge over Maisonnete No. 6 on **L.R. No. 1870/V1/52**.
2. Secondly, the plaintiffs seek an order that Accounts be taken under Order 20 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, as a preliminary question triable before the full trial.
3. Thirdly, the plaintiffs ask the court to forthwith determine and settle the question;  
  
**“How much does the plaintiff have to pay the Defendant before the said Defendant discharges the charge over maisonnete No. 6 on L.R. No. 1870/V1/52?”**
4. The fourth order sought by the plaintiff was that proper accounts be taken and furnished by the Defendant.
5. Finally, the plaintiffs asked for a Conservatory Order under Sections 103 (3) and 104 of the Land Act, to restrain the Defendant from proceeding with the intended auction, until the adjudication and resolution of the matters raised in the plaint.
6. When canvassing the application, the plaintiffs first made submissions on prayer 4, which comprised the question about how much money has to be paid to the Defendant, to discharge the charge.
7. The Charge Instrument is between **JAVAID IQBAL KHAN** (*the 1<sup>st</sup> plaintiff*) and **BANK of BARODA (K) LIMITED** (*the 2<sup>nd</sup> defendant*), as the primary parties. The 1<sup>st</sup> plaintiff offered the charged property to the 2<sup>nd</sup> defendant as security for the financial accommodation which the bank

accorded to **IQBAL TRANSPORTERS LIMITED** (the 1<sup>st</sup> defendant).

8. Both primary parties share the view that clause 2.2 (ii) of the charge spells out the scope of the security. That clause provides as follows;

**“The total monies for which this Charge constitutes security shall not at any time exceed the sum of Kenya Shillings Twelve Million (Kshs. 12,000,000/-) (hereinafter called “the charge debt”) together with interest at the rate (s) aforesaid from the time of the Charge Debt becoming payable until Actual Payment thereof and PROVIDED ALSO that the security hereby constituted shall be a continuing security for the payment of the Charge Debt or so much thereof as may from time to time be outstanding notwithstanding any settlement of account or other matter or thing whatsoever and shall not prejudice or affect any agreement which may have been made with the Bank prior to the execution hereof relating to any security which the Bank may now or at any time hereafter hold in respect of the Charge Debt or any part thereof”.**

9. As the plaintiffs said, the wording of the charge and the intention of the parties are clear, unambiguous and self-explanatory.

10. The bank is of the same view. Therefore, there is no dispute over which the court needs to make a determination.

11. The plaintiffs pointed out that on 8<sup>th</sup> October 2012, the bank demanded for the payment of Kshs. 12 million, with further interest from 8<sup>th</sup> October 2012. The bank described the sum demanded as the sum secured by the charge.

12. Once again, the bank is in agreement with the plaintiffs concerning the date when a demand was made for the payment of the money payable under the charge.

13. Therefore, there is nothing in that respect that requires the court’s determination.

14. According to the plaintiffs, they did offer to pay Kshs. 12 Million, in full and final settlement of the debt guaranteed. The said offer was sent by way of a letter dated 21<sup>st</sup> September 2015.

15. When the bank rejected the plaintiffs’ said offer, the plaintiff concluded that there was a stalemate, because they wished to redeem the charged property but the bank refused to discharge the property. In the circumstances, the plaintiffs complained that the bank was exploiting its superior position in the relationship, by being hell-bent to dispose of the charged property.

16. In answer to that assertion the bank has a simple answer; the plaintiffs need just comply with the unambiguous, self-explanatory and clear provisions of clause 2.2 (ii) of the Charge.

17. On a *prima facie* basis, the offer by the plaintiffs to pay Kshs. 12,000,000/- only is not in accordance with the terms of the charge.

18. Clause 2.2 (ii) of the Charge made express reference to Kshs. 12,000,000/- together with interest.

19. Therefore, when the bank insisted that the plaintiffs make payment of the sum of Kshs. 12,000,000/-, together with interest calculated from 8<sup>th</sup> October 2012, the bank cannot be said to have been exploiting its superior position.

20. The plaintiffs do not need an order of the court to have the security discharged. The only thing that the plaintiffs need to do is to make payment to the bank.

21. Upon making payment of all the money secured by the charge, the plaintiffs will be entitled to the

discharge of the charge: That is my understanding of Section 85 of the Land Act.

22. The debt owed by the borrower may be much more than what the plaintiffs secured. The dispute about the whole debt is, is the subject matter of the case **IQBAL TRANSPORTERS LIMITED Vs BANK OF BARODA LTD Hccc No. 892 of 2010.**

23. The bank had informed this court that on 12<sup>th</sup> June 2015, Ogola J. dismissed the application by Iqbal Transporters Limited for an Injunction to restrain the bank from realizing the suit property. A copy of the Ruling delivered by Ogola J. was produced by the plaintiffs, and it confirms that the learned Judge had held, on a prima facie basis, that Iqbal Transporters Limited was indebted to the bank.

24. I agree with the decision of Gikonyo J. in **RAJNIKANTHETSHI SHAH Vs HABIB BANK A.G. ZURICH Hccc No. 246 of 2011**, when he said;

**“...more trouble arises where the guaranteed sum is of a specific sum and the principal debt is for a larger sum. In such a situation, the law is that, unless otherwise provided, where a guarantee limits the guarantor’s liability to a fixed sum, the guarantors will be liable to the extent of the guarantee only and not to the entire debt as the principal debtor”.**

25. I do not understand the plaintiffs to be asserting that the bank has demanded that they settle the entire debt of the principal debtor.

26. The bank has at all times asked the plaintiffs to pay Kshs. 12,000,000/-, together with interest from 8<sup>th</sup> October 2012. That situation is comparable to that in **R. SHAH Vs HABIB BANK A.G. ZURICH Hccc No. 246 of 2011**, in which Gikonyo J said;

**“In the case before me, the guarantee was given in form of a legal charge and was for a fixed amount of money of Kshs. 5,000,000/- together with interest. As such, whether the chargor is a guarantor or both guarantor and principal debtor, his liability is to the sum fixed in the charge”.**

27. If the guarantor pays to the bank the sum of Kshs. 12,000,000/- together with interest from 8<sup>th</sup> October 2012, the bank would be obliged to discharge the charge. By insisting that that sum be paid by the guarantor, the bank was not clogging the equity of redemption.

28. The plaintiffs also sought orders to compel the bank to render true, proper and accurate Accounts to them.

29. The bank’s answer is that the plaintiffs already had the Statements of the principal debtor’s bank account. Indeed, copies of the said statements of account were exhibited by the plaintiffs.

30. It is true that the plaintiffs have the Statements of the principal debtor’s bank account. The said statements give the particulars of the indebtedness of the principal debtor.

31. However, as I have already held, the guarantor is not liable to settle the entire debt owed by the principal debtor. He is only required to pay Kshs. 12,000,000/- together with interest thereon. In the circumstances, I deem it to be a fair request from the guarantor, that the bank should provide him with a statement which reflects the exact balances being claimed by the bank, from the guarantor.

32. The plaintiffs submitted that the payments made in repayment of the facility exceed the amount secured by the charge.

33. Whether or not the principal debtor had repaid more than Kshs. 12,000,000/- plus interest on that sum, that would not discharge the charge, provided that the principal debt was still outstanding in part. That is because the payments made by the principal debtor are not applied, first, towards the sum secured by charge.

34. The Charge Instrument expressly provides that it constitutes a continuing security, notwithstanding any settlements, provided that the principal debt had not yet been cleared in full.

35. Finally, I find that the prayer for a conservatory order is a repeat of an application for an interim injunction. As the court had already rejected the application for an interlocutory injunction pending the hearing and determination of the suit, I reiterate my said rejection of the prayer for a conservatory order.

36. In the result, the application dated 7<sup>th</sup> March 2016 is rejected. By so declaring, I have not lost sight of my earlier observation about the desirability of the bank providing an statement to the guarantor, to show how the sum of Kshs. 12,000,000/- had grown from 8<sup>th</sup> October 2012.

37. As a mark of transparency, the bank should provide the guarantor with the statement of account.

38. However, I wish to make it clear that the court is not making an order for the learned Deputy Registrar to take accounts pursuant to Order 20 Rule 1 of the Civil Procedure Rules.

39. The plaintiffs have not made out a case which could warrant the taking of accounts. Indeed, the plaintiffs' case appeared all along to be, that they were entitled to a discharge of charge upon payment of Kshs. 12,000,000/- only.

40. If that be the case, there would be no basis, in law, to warrant an order for the taking of accounts.

41. It is therefore reiterated that the application dated 7<sup>th</sup> March 2016 is dismissed in its entirety. The applicants will pay to the 2<sup>nd</sup> defendant, the costs of the application.

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>th</sup> day of September 2016.**

**FRED A. OCHIENG**

**JUDGE**

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

King'ara & Mirie for the 1<sup>st</sup> Plaintiff

King'ara & Mirie for the 2<sup>nd</sup> Plaintiff

No appearance for the 1<sup>st</sup> Defendant

Fraser for the 2<sup>nd</sup> Defendant

Collins Odhiambo – Court clerk.