



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 236 OF 2015
FORMERLY ELC 284 OF 2015 MILIMANI
FORMERLY ELC 140 OF 2015 (MACHAKOS)

ELSEK & ELSEK (K) LIMITED ::::::::::: PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD. ::::::: DEFENDANT/RESPONDENT

R U L I N G

1. By a **Notice of Motion** application dated **10th May 2015**, the Plaintiff sought a number of orders for injunction. The Motion was filed simultaneously with the Plaint, List and Bundle of Documents, the Witness Statement and other documents. The orders sought are a restraining injunction against the sale of the suit premises pending the hearing and determination of the suit and application, a mandatory injunction compelling the Defendant to release Kshs.8,000,000.00/=, a direction that the Defendant do release the original title to facilitate the sale and transfer of houses built on the suit premises with the proceeds of sale going directly to the Defendant, an order compelling the Defendant to release to the Plaintiff all statements of account together with those of the credit card and all interest thereon claimed on the unauthorised expenditure on that card. The Plaintiff also seeks costs in that application.
2. The application is filed under the quoted Sections of the law and is also premised on the Constitution of Kenya.
3. The application is premised on several grounds set out therein, and is supported by affidavit sworn by **Osman Erdinc Elsek** on **11th May 2015**. The affidavit has several annexures in support of the application. The application is supported by a further affidavit sworn by **Deniz Elsek** on **4th June 2015**.
4. The history of the application is as per the Plaint filed herein on 12th May 2015, which alleges serious issues of breach by the Defendant of Charges dated 23rd September 2013 and Further Charge dated 10th December 2013. Among the alleged breaches are:-
 - a. **That the Charges did not create statutory power of sale in favour of the Defendant Chargor.**
 - b. **That the amount secured by Charges of Kshs.48,000,000/= was not released by the Defendant**

- c. **That the amount secured by the Charge was for the construction of the houses in the suit premises for sale.**
 - d. **That the Defendants unlawfully and illegally varied the terms of the Charge and Further Charge.**
 - e. **That the interest charged is illegal or amounts to unlawful variation.**
 - f. **Whether the Defendant has undervalued the suit premises.**
 - g. **Whether the advertisement contains an accurate description of the suit premises.**
 - h. **The amount due to the Defendant under the Charge and Further Charge**
 - i. **Whether the Defendant has fettered the Plaintiff's right to redeem the suit property.**
5. The application is opposed vide a replying affidavit of **John Oringo** who deponed that the Defendant's letter of offer dated 21st November 2013 was accepted by the Plaintiff and under which the sum of Kshs.20,000,000/= was advanced as a temporary overdraft facility repayable by 31st May 2014. Further the deponent stated that the Defendant's offer dated 3rd September 2013 was for Kshs.15,000,000/= which the Defendant agreed to advance to the Plaintiff as an overdraft facility repayable on demand.
 6. The Respondent deponed that the Plaintiff through its directors executed a Legal charge for Kshs 28,000,000 over the plaintiff's property registered as Title No. KAJIADO/KISAJU/7947. Pursuant to the additional overdraft facilities aforesaid a Further Charge on the said property was registered in favour of the Defendant to secure the said advanced sum. **(The deponent annexed "JO-3" and "JO-3" being copies of the said Further Charge instrument).**
 7. The aforementioned Charge instruments were duly registered against the suit property, as per annexure **"JO-4"** which is the Title document evidencing registration of the instruments in favour of the defendant bank in the encumbrance section.
 8. Further as additional security the plaintiff's directors executed a Deed of Guarantee and Indemnity for the advanced amount dated 12th February, 2013 and 12th September, 2013 respectively where they guaranteed to repay on demand any monies remaining due and payable from the plaintiff to the defendant. **(Annexure "JO-5" is a copy of the Deed of Guarantee and indemnity documents).**
 9. The Respondent's case is that the Plaintiff and its directors were all along aware that the overdraft facilities advanced to the Plaintiff were repayable within the period agreed upon and in default the Defendant would be at liberty to realize its securities. The Respondent's case is that the agreements to lend against the said securities were independent and distinct from the Plaintiff's construction projects of the housing units which project was not mentioned in any way in the aforesaid instruments. The Respondent's case is that at no time was it a condition that the repayment of the overdraft facility was to be pegged on the completion and sale of the houses. The Charge document contained clear terms of the grant of the overdraft facilities as set out in the letters of offer and the rights and obligations of the parties were clearly spelt out including the events of default hence the plaintiff cannot plead ignorance of the law. The Respondent's case is that the Charge instrument under Clause 7, 8 and 9 clearly stipulates events of default by the chargor, chargee's remedies and the exercise of the statutory power of sale by the chargee bank.
 10. The Respondent's case is that the Plaintiff cannot purport that it did not derive the full benefits of the Charge and Further Charge documents since the facilities were duly disbursed in terms set out in the letter of offer. Further it is clearly evident from the plaintiff's letter dated 27th February, 2014 tendered as exhibit **"OOE6"** that the plaintiff was seeking an additional overdraft facilities to the tune of Kshs 8,000,000 and not the release of Kshs 8,000,000 as alleged.

The Respondent submitted that the Defendant Bank allowed the Plaintiff to access the overdraft facility as per the agreed terms but the plaintiff's repayments became irregular and the same fell into arrears, and that the Plaintiff is heavily indebted to the Defendant due to default in the loan repayment obligations and the account is in huge arrears to the tune of Kshs.48,389,189.43 as at 30th April, 2015. This default caused the Plaintiff's account to be referred to the Bank's Debt Recovery unit for recovery of the outstanding amount from the borrower.

11. The Respondent submitted that attempts to recover the money due from the Plaintiff has not

succeeded. Due to failure by the Plaintiffs to regularise their account the defendant issued the requisite ninety (90) days statutory notice to the borrower notifying them of the default and the bank's intention to sell the charged property in recovery of the outstanding amount, this did not elicit any response and the bank proceeded to take steps lawfully required to realise the security.

12. Parties filed written submissions which I have considered. I raise the following issue for consideration:-

1. ***Whether the Charge and Further Charge above said are defective to deny the Defendant a chance to exercise its right to sale.***

13. This issue is important since it appears that the Plaintiff seeks to invalidate the Charge and save its property from sale. From the word go, however, it is to be noted that the said Charge has been acted upon on the basis of its terms whether express or implied, and this court will not be able to write or imply new terms into the said Charges, at least not at this stage. To invalidate the Charges, all the parties must be given a chance in a full hearing of the suit to give evidence as to why the court should ignore or disregard the express provisions of a Charge. I therefore find that a determination of the following issues required inter-partes hearing.

- ***Whether or not the said Charges created statutory power of sale in favour of the Defendant.***
- ***Reasons as to why the entire amount of Kshs.48,000,000/= secured under the Charges was not released.***
- ***Whether the amounts secured by the Charges was for the construction of the houses in the suit premises for sale.***

I have noted that in the letter of offer dated 3rd September 2013 the purpose for the loan is to provide working capital, while in the letter of offer dated 21st November 2013 the purpose of the loan is to complete construction of houses for sale in Kisaju Area. However, regardless of the purpose for the loan the same were to be repaid within a specified period, and the Plaintiff did not do this.

- ***Whether or not the Defendants unlawfully and illegally varied the terms of the Charge and Further Charge.***
- ***Whether or not the interest charged is illegal or amounts to unlawful variation.***
- ***Whether the Defendant has undervalued the premises.***
- ***What amount is due to the Defendant under the Charge and Further Charge.***
- ***Whether the defendant has fettered the Plaintiff's right to redeem his property.***

14. It is clear to me that to answer all the above issues, a full hearing of the matter will have to take place. It is also clear to me that the Plaintiff has defaulted in the repayment terms, and is clutching onto these court proceedings to save its property. That is fine, as the Plaintiff's right to property is secured under the Constitution. In my view prayers (d) and (e) of the application are mandatory in nature, and without cogent evidence, cannot be sustained at this stage. This leaves me with only prayers (c) and (f) of the application.

15. Prayer (f) of the application seeks orders compelling the Defendant to release to the Plaintiff all the statements of various accounts together with a statement showing the credit card account from the date of loss of the credit card and all interest thereon claimed on unauthorised expenditure on that card. During the hearing of this application, Mr. Bundotich for the Respondent submitted that the statements of account regarding two accounts had been rendered but that they were still working on the card accounts. I therefore allow this prayer.

16. Regarding prayer number (c) which is seeking injunction to be issued restraining the Defendant from selling the suit property, my finding is that the Defendant has not breached any terms of the Charges and is entitled to exercise its statutory power of sale upon default by the Plaintiff. However, the Plaintiff is constitutionally entitled to protection of his property. An allegation that the Defendant intends to sell the property at gross under value is a serious concern for this court. According to Prestige Valuers Management Limited, the Valuer appointed by the Defendant, the market value of the suit premises is Kshs.125,000,000/= and the forced sale value is Kshs.93,7450,000/=. Yet according to Metrocosmo Limited, the Valuer appointed by the Plaintiff

the market value of the suit property is Kshs.204,000,000/=, and the forced sale value is Kshs.153,000,000/=. It is to be noted that both Valuers are in the panel of Valuers of the Defendant. The differences are significant. A difference of Kshs.79,000,000/= is another whole suit. It would therefore not be proper to allow the sale to proceed with the current valuation reports. I order and direct the parties to agree on one Valuer to value the suit property for sale. If the parties are unable to agree, the court will do that on their behalf.

17.The upshot of the foregoing is that the Defendant and or its agents howsoever described are herewith stopped by an injunction order of this court from selling off or in any way disposing off the suit property until a new valuation report prepared by an agreed Valuer is prepared.

18.However, the Defendant shall not have to issue any further statutory notices.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 23RD DAY OF OCTOBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Masarim holding brief for Kinwya for the Plaintiff/Applicant

M/s Mathenge for the Defendant/Respondent

Teresia – Court Clerk