



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 98 OF 2014

DOLPHIN TRANSPORTERS LIMITED.....PLAINTIFF

VERSUS -

BANK OF INDIA LIMITED.....1ST DEFENDANT

And by way of counterclaim by the first defendant

BINAI JAYANTILAL SHAH.....2ND DEFENDANT

BAADAL CHANDRAKANT SHAH.....3RD DEFENDANT

PRAVIN KANJI VEKARIA.....4TH DEFENDANT

KANJI KARSAN VEKARIA.....5TH DEFENDANT

RULING

1. The application dated 17th April 2015 seeks an order for the immediate discharge of the Charge registered in favour of the 1st Defendant, the **BANK of INDIA**. It is premised on the contention of the plaintiff, **DOLPHIN TRANSPORTERS LIMITED**, that the loan facility which had been secured by the charge, had been paid in full.
2. According to the plaintiff, the security had been in respect to a sum not exceeding Kshs. 4,500,000/- which the Bank had advanced to the plaintiff.
3. It is the plaintiff's case that it had repaid the facility in full. Nonetheless, the Bank had refused to discharge the charge.
4. The contention of the bank was that the plaintiff still owed some money to the bank, and that the said outstanding sums were secured by the Charge over the suit property, L.R. No. 209/118/81, which is situated at a *cul-de-sac* off Gala Lane, Ngara West Estate in Nairobi.
5. The suit property is duly registered in the names of **KANJI KARSAN VEKARIA** and **DHANJI RATNA MANJI**.
6. It is the plaintiff's further case that as at 10th March 2009, the account had a debit balance of Kshs.

874,945/75.

7. Having made payments into that account, the balance, as at 25th March 2009, was a credit of Kshs. 5,054/25. Therefore, the plaintiff expected the bank to prepare a Discharge of Charge.

8. Instead of discharging the Charge, the bank notified the plaintiff, on 27th May 2009, that it owed the sum of Kshs. 2,190,899.05. It is the plaintiff's case that by seeking to recover that sum from it, the bank had clogged or had fettered its equity of redemption.

9. It was for that reason that the plaintiff filed this case seeking, *inter alia*, a declaration that it was unlawful and unconscionable for the bank to debit to the plaintiff's account, the sum of Kshs. 2,190,899.05.

10. The plaintiff therefore indicated, in the plaint, that it would be seeking, *inter alia*,

“An order directing the Defendant, respectively to render true and full accounts to the plaintiff”.

11. Other reliefs claimed in the plaint included Aggravated Damages for negligence and negligent misrepresentation; and a Mandatory injunction to compel the Defendant to discharge the Charge.

12. In its defence, the bank denied ever writing to the plaintiff, to inform it that the bank needed time to enable it discharge the Charge.

13. The bank's case was that the plaintiff still owed it Kshs. 2,187,431.85 as at 28th May 2009. Therefore, the bank's position was that it cannot be expected to discharge the Charge which had secured the debt which was still outstanding.

14. The Defence was filed on 29th April 2011. Thereafter, on 23rd May 2012, the bank filed an application for leave to amend the Defence, so as to enable the Bank file a Counter-claim.

15. On 1st October 2012 Kimondo J. delivered his Ruling on the bank's application. In allowing the bank to amend its Defence, the learned Judge bore in mind the fact that the purpose of an amendment was to identify all the real questions and controversies between the parties, so that they could thereafter be determined at once. The court went on to state as follows;

“The defence and counterclaim, in my view, arise from the same cause of action and as such, by allowing the amendments, would be in effect allowing this court to adjudicate all matters in dispute at one go, instead of parties bringing matters before court in instalments”.

16. Having been granted leave to amend the Defence, the bank did so by, *inter alia*, introducing a Counter-claim against the following 4 defendants;

- a. ***BINAI JAVANTILAL SHAH;***
- b. ***BAADAL CHANDRAKAT SHAH;***
- c. ***PRAVIN KANJI VEKARIA; and***
- d. ***KANJI KARSAN VEKARIA.***

17. The bank's claims against those defendants were based on the various Deeds of Guarantee and Indemnity which the said defendants allegedly executed to secure the financial facilities which the bank advanced to the plaintiff.

18. On the basis of the said Guarantees and Indemnities, the bank claimed Kshs. 3,853,473.71 from the plaintiff and the 4 defendants named above.

19. All the defendants to the Counter-claim have denied liability.

20. Over and above the defences to the Counter-claim, the 2nd defendant issued a Notice to the 4th Defendant, claiming full indemnity.

21. It is within that context that the plaintiff now seeks an order compelling the Discharge of the Charge, because it insists that the financial facility which the bank had advanced to the plaintiff had been paid in full.

22. It is the plaintiff's position that if the bank had not inflated the sums being claimed from the plaintiff, there would be no outstanding payments due from the plaintiff.

23. When it is borne in mind that one of the reliefs being sought in the Plaint is for an order to compel the bank to render true and full accounts to the plaintiff, that presupposes that the plaintiff did not consider as true and full accounts, the information which the bank had already provided.

24. In any event, the plaintiff had not provided the court with the statement of accounts which showed that its account at the bank had a credit balance of Kshs. 5,054/25, as at 25th March 2009.

25. If the court were to order that the Charge be discharged, that would imply that the court was satisfied that the loans and any other financial facility which the bank had accorded to the plaintiff, had been repaid in full. Yet, as I have already indicated, the plaintiff has not provided the court with the statement of accounts to demonstrate that the loans and any other financial facilities had been cleared.

26. It is my finding that the plaintiff has not proved a prima facie case with a probability of success. Therefore, it would not be able to benefit from an interlocutory injunction at this stage.

27. Secondly, the relief being sought is not of an interlocutory nature. It is one of the substantive reliefs sought in the plaint. If it is granted, the security would be discharged, and therefore if the bank was ultimately able to prove its case against the plaintiff, the bank would have been rendered an unsecured creditor.

28. In **KENYA BREWERIES LIMITED & ANOTHER Vs WASHINGTON O. OKEYO, CIVIL APPEAL No. 332 of 2000**, Court of Appeal said that although it is possible, in principle, to grant an interlocutory mandatory injunction, it would not normally be granted unless there were special circumstances. Quoting from **LOCABAIL INTERNATIONAL FINANCE LTD Vs AGROEXPORT & OTHERS [1986] 1 ALL. E.R. 901**, at page 901, the Court of Appeal said;

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than was required for a prohibitory injunction”.

29. In my considered opinion, the plaintiff has not met the threshold for the grant of the mandatory injunction. I so find because this is not a simple case in which the relief sought was of a summary nature, which could be easily remedied if the court were to ultimately find against the plaintiff.

30. The plaintiff has already expressed the desire to put the suit property to other uses, if it is discharged. That would imply that it may be very difficult, if not impossible, to remedy the discharge of charge in the event that the plaintiff's claim against the bank was unsuccessful.

31. In the result, the application dated 17th April 2015 lacks merit. It is therefore dismissed, with costs to the 1st Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of December 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mwangi for Ogutu for the Plaintiff

Ondieki for the 1st Defendant

No appearance for the 2nd Defendant

No appearance for the 3rd Defendant

No appearance for the 4th Defendant

No appearance for the 5th Defendant

Collins Odhiambo – Court clerk.