REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND & ENVIRONMENT NO.153 OF 2012

JOHN ONYANGO AKUMU.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT

RULING

1. By an application filed here on 20/12/2012 and dated the same, the plaintiff/Applicant (hereafter the applicant – **JOHN A. OKUMU** – prayed for various orders against the defendant/respondent (hereafter the respondent) – **BARCLAYS BANK OF KENYA LTD.** The application is a Notice of Motion brought under Sections 1A, 1B and 3A of Civil Procedure Act (Cap 21) and order 40 Rules 1,3,4 and 10, and Order 51 Rules 1&3 of Civil Procedure Rules, 2010, and all other enabling provisions of law.
2. Prayers (a) and (b) are spent, having been granted earlier at an Exparte hearing. What is for consideration now are prayers (c) and (d) which are as follows: Prayer (c): pending hearing and determination of this suit, the respondent, by itself, its officers, servants, agents or otherwise howsoever be restrained by temporary injunction from advertising for sale, selling the property known as **L.R. No. KISUMU KASULE/2338** by public auction or otherwise howsoever as advertised or at any other time thereafter and from disposing of, alienating, transferring or interfering with the Applicant's interest in the said property.

Prayer (d); The costs of the application be awarded to Applicant.

3. The application is premised on the grounds that the respondent intends to sell by public auction or otherwise dispose of, alienate, or transfer the applicant's interest in **KISUMU KASULE/2338** (hereafter the suit property); that the respondent's statutory power of sale under the charge on suit property has not arisen and, does not arise at all by reason of failure of consideration; that the respondent didn't advance any money to the applicant; and that the applicant has a prima facie case, is ready to pay damages, is likely to suffer irreparable loss, while the respondent will suffer no prejudice if the prayers are granted.
4. The applicant's supporting affidavit introduces him as the owner of the suit property. He deponed that on 18/12/2012 he received a letter from **GARAM INVESTMENTS** threatening sale of the suit property. It is deponed that the applicant executed the charges dated 26/8/2007 and 28/8/08 but was not advanced any money by the respondent contrary to the terms of the charges. The applicant says he was duped and that he did not execute the charges to guarantee any person. The respondent is accused of misrepresentations and the applicant asserts that the respondent has no legal basis for selling the suit property. He asserts too that his suit raises serious issues concerning consideration and charge documents, hence showing a prima facie case that can succeed.
5. The Respondent filed a replying affidavit on 30/1/2013. It emerges from that affidavit that the applicant had actually guaranteed one Sophia Akumu – called principal debtor in the affidavit to

procure a loan of 2,500,000/=. The suit property was security for that loan and it is for that reason that the applicant executed the two charges he mentions.

6. The principal debtor then defaulted in payment. The process of realizing the owed amount then started and the suit property was targeted for sale. The applicant and the principal debtor are said to have first ignored communication of intended sale but when it dawned on them that the suit property would really be sold, they rushed to Court and filed a suit – **CMCC NO.142/2012** – precisely to forestall or block the sale.
7. In that suit, the applicant is said to have admitted guaranteeing the principal debtor and offering the suit property to the respondent as security. An application for restraining orders was also filed in that suit. It was dismissed. The respondent depones the application was similar to this one and therefore the present application is **RES JUDICATA.**
8. The applicant is accused of selective reading of the charge documents and the application is viewed as aimed to frustrate the respondents rights to realize the security offered. The court was asked to dismiss the application and its jurisdiction was doubted and denied on the basis of the issues raised concerning **RES JUDICATA.**
9. The application was not heard. Parties filed written submissions instead. The applicants submissions were filed on 3/9/2013. The respondents submissions were filed on 16/9/2013.
10. The applicant submitted, interalia, that by charges issued on 26/08/07 and 28/10/2008 the respondent was to grant a financial facility to him or to a borrower guaranteed by him. The respondent never advanced such facility to the applicant and the applicant didn't guarantee anybody to get such facility. The applicant then filed the suit herein alleging fraud and misrepresentation on the part of respondent.
11. The respondent then advertised the suit property for sale alleging default by applicant in payment of a financial facility advanced to him. The applicant says he has never had any account with the respondent and no financial facility or loan was advanced to him. The allegation that the applicant guaranteed one **SOPHIA ANYANGO** is rejected as no document of guarantee is availed to support that allegation.
12. As no financial facility was advanced by the respondent to the applicant, the statutory power of sale is said not to arise. The sale would be illegal, null and void, it was submitted.
13. The replying affidavit was faulted for alleging that the applicant guaranteed one Sophia Onyango Akumu. It was submitted that the charge instruments are only between the applicant and the respondent. Sophia does not feature at all.
14. And the demand letter dated 18/10/2011 said to be sent to **SOPHIA ANYANGO AKUMU** is actually addressed to **SOPHIA ANYANGO ONYANGO.**
15. The suit referred to in the replying affidavit – **CMCC NO.142/2012** – was said to have been withdrawn before filing the instant suit. The suit was not determined. It is said to have been a different suit and therefore the allegation of **RES JUDICATA** is unfounded.
16. The applicant's position is that he has established a primafacie case by dint of demonstrating that no financial facility was advanced to him. He blames the respondent for fraud and misrepresentation and faults the demand letter sent to him dated 1/11/2011 alleging that he was accorded a loan facility. The respondent, by not filing defence, is alleged not to have challenged all that.
17. Irreparable damage is also said to be a likely result if the intended sale is carried out. The applicant submits that he stays in part of the suit property. The fact that the validity of the charge is in issue is said to outweigh the fact that the respondent is in a position to pay damages. Two cases

MARY NYAMOGO VS BARCLAYS BANK OF KENYA LTD: KSM:HCC NO.172/2010, and **JOHN JOEL KAVALI VS FIDELITY COMMERCIAL BANK: CA NO.264/2011, NAIROBI** – were cited to show instances where courts have refused to treat damages as adequate remedy. **JOSEPH M. KARIUKI VS EQUITY BANK LTD & ANOTHER: HCC NO.85/08, NAIROBI,** was also availed to the same effect.

18. The respondent's submissions show the applicant as a guarantor for **SOPHIA ONYANGO AKUMU** for a total of 2,500,000/= loan. As a guarantor, the applicant offered the suit property as security and executed two charges, one for 2000,000/= and another for 500,000/=. The principal

debtor, **SOPHIA AKUMU,** defaulted in payment, hence the intended sale.

19. When the applicant and the principal debtor noticed that the sale was imminent they went to Court and filed a case – **KISUMU CMCC NO.142/2012: SOPHIA ANYANGO AKUMU & JOHN ONYANGO AKUMU VS BARCLAYS BANK OF KENYA. An** application for injunction, which is allegedly similar to the one herein, was made and the same was dismissed. This is the basis of the respondents assertion that this suit is **RES JUDICATA.**
20. The applicant is said not to have established a prima facie case. The terms of the charge(s) were breached and a statutory notice of sale was sent to the applicant. The applicant had duly executed the charge and was bound by its terms. There was default in payment. The applicant, it was argued, cannot claim that the notice served upon him was unlawful because the charge(s) empowered the respondent to issue such notice.
21. The applicant is also said to be aware that he is being pursued as a guarantor of the loan to the principal debtor. This is said to be demonstrated by his execution of the charge(s) and the letter of offer that preceded the charges. The letter of offer in particular is said to be signed by the applicant and has a part for security and guarantees where the applicant is clearly indicated as the guarantor.
22. The respondent says there is an unpaid amount outstanding and the law is that injunction cannot issue where there is default and the outstanding debt remains unsettled.
23. On irreparable loss, the applicant is said not to have demonstrated any such loss which cannot be remedied in damages. The applicant is said to have been aware that the suit property can be sold in case of default in payment. The suit property itself is said to be valued in monetary terms and it is therefore easy to quantify damages. A number of decided cases were cited to buttress this argument. They are **JOSEPH KIARIE MBUGUA V CONSOLIDATED BANK OF KENYA VS GARAM INVESTMENTS (2006) Eklr, AUGUSTINE KIBET VS SAVINGS & LOAN (K) LTD: HCC NO 45/06, KERICHO, GIMALU ESTATES LTD & 4 OTHERS VS INTERNATIONAL FINANCE CORPORATION & ANOTHER (2006) EKLR AND NAHASHON MBATIA VS HOUSING FINANCE COMPANY LTD: HCC NO.1042/2001, NAIROBI – MILIMANI.**

The general thrust noticeable in these cases is that the person offering property as security is aware that such property can be sold in case of default in payment. The loss of such property therefore can be made good by a suitable award in monetary compensation.

24. The balance of convenience was also said not to lie in the applicants favour. The respondent is said to be the one to suffer more since it stands to loose what is rightly due to it. It was argued too that the respondent has the capability to compensate the applicant. But the converse is true of the applicant and the principal debtor since they are unable even to repay the loan facility.
25. I have looked at all the material laid before me. There are several issues to grapple with and a summation of them would go thus:

- Are the charges executed by the applicant invalid for fraud, misrepresentation and lack of consideration?

- Has the Applicant established a primafacie case?

- Will the applicant suffer irreparable loss not compensable by an award of damages?

- Where does the balance of convenience lie if the court is in doubt as to the issue of irreparable loss or establishing primafacie case?

- Is the application herein **RES JUDICATA?**

- On consideration of all the material laid before me, is the applicant entitled to the restraining order that he is seeking? The answers to these issues follow shortly.

VALIDITY OF THE CHARGES EXECUTED

26. I don't intend to delve deep into this issue. It would be appropriate to gloss over it at this stage because it is at the core of the case. Indeed the Kernel of the case is founded on fraud, misrepresentation and lack of consideration. I am not deciding the main suit now. There is danger therefore that an elaborate exposition on this issue may lead to a premature expression of position.
27. Be that as it may however, I must observe that clause B, which is exactly the same in both the first charge and the further charge executed by the applicant, is aimed at two kinds of scenarios viz: 1. The chargor as the recipient of the monies advanced and (2) the chargor as a guarantor of person or persons who are recipients of the monies advanced.
28. The applicant would have us believe that he executed the charge as a recipient of the money. The support for this is said to be the same clause B and that clause is lifted from the charge and replicated in paragraphs 5 and 6 in his plaint. These paragraphs form the basis of the suit. The respondent on the other hand says the applicant is being pursued as a guarantor, not as a borrower who was supposed to receive or actually received money.
29. Between these two scenarios, I have to decide which is more credible. To do this I need to look at other materials availed. The applicant seems to rely entirely on the charge documents. Perhaps the only other useful document was the statutory notice sent to him. As I have pointed out, the clause being relied on in the charge documents is capable of more than one interpretation. The statutory notice itself is of little consequence in this regard because whether the chargor is the borrower or guarantor, the charge documents enjoin that he pays.
30. But questions must be asked regarding the applicants position. The whole transaction started with a letter of offer addressed to the person the applicant is said to have been guaranteeing. That letter contains a schedule titled "**SECURITY AND GUARANTEES**" where the security for the loan is stated as the suit property and the guarantor is the applicant. Bearing this in mind, the applicant would have done himself a favour to avail a letter of offer showing him in a capacity different from guarantor. The letter of offer is a crucial document. It comes before the execution of charge document. It cannot be isolated from the whole transaction. This is one reason why the applicant has not persuaded me that he was the one meant to receive the money.
31. But there is also another reason: There is a previous case filed (Supra) against the respondent by the applicant himself and the person he is said to have guaranteed. That case concerned the same issue. The respondent availed some of the proceedings for effect here. In that case an application for injunction was also made. The applicant herein swore an affidavit in support of the application. Referring to the same transaction and the same suit property herein, he deponed at para 4:

"That I know of my own knowledge and did offer my property for security for a financial facility for the 1st plaintiff".

For information, the 1st plaintiff was **SOPHIA ANYANGO AKUMU**, the very person the respondent says the applicant herein guaranteed.

32. Yes, it is clear at the time that the applicant understood he had offered the suit property as security. He was in essence a guarantor. The charge documents were the same documents in this case. But now look at what the applicant says at paragraph 5 of his supporting affidavit in this application:

".....and I did not guarantee any person pursuant to the two security documents". This is what is called doublespeak and it normally issues from the mouth of a liar. It could well be that there are good reasons for this apparent contradiction but at this stage it is obvious that the applicant is not persuasive in his assertions.

PRIMA FACIE CASE

33. The applicant submitted that no financial facility was advanced to him. He accused the respondent of fraud and misrepresentation. The respondent was faulted for not filing defence to all this. Because of this, the applicant feels he has established a primafacie case.
34. The respondent on the other hand says that the applicant breached the terms of the charges he

executed. A statutory Notice was sent to him because of that breach. According to the respondent the applicant has not established a primafacie case.

35. I have considered the arguments advanced by both sides on this issue. It is necessary to consider too the other material laid before me. I think the applicant proceeds on the premise that the charge documents address him as a person who received some money. The premise is not entirely correct. I have already pointed out the clause relied upon by him for that also has the possibility of addressing him as a guarantor. I have gone further and pointed out that the letter of offer availed by the respondent shows him as a guarantor.
36. The applicant himself has not availed a letter showing him as a person who had made a request or applied for a loan facility. Such a letter would really reinforce his position. On balance, the respondents arguments are more persuasive when considered alongside the other material availed. I therefore refuse to accept that the applicant has established a primafacie case.

IRREPARABLE LOSS

37. The applicant argued that he stays on part of the suit property and its sale would therefore occasion irreparable loss to him. The whole process of trying to sell the suit property was also said to be null and void. It is not enough therefore, it was argued, that the respondent is able to compensate. According to applicant his reasons for opposing sale far outweigh any compensation he may get. Two decided cases – **MARY NYAMOGO VS BARCLAYS BANK OF KENYA LTD** (supra) and **JOHN JOEL KAVALI VS FIDELITY COMMERCIAL BANK** (supra) – were cited as good authorities for this position.
38. The respondent on the other hand was of the view that possibility of irreparable loss is not demonstrated. There is default in payment, it was argued, and the applicant knew all along the consequences of default. The suit property is said to have been valued and its monetary value is known. The decided case of Joseph Kiarie Mbugua (supra), Augustine Kibet (supra), Gimalu Estate Ltd (supra) and Nahashon Mbatia (supra), were availed as supporting propositions for this stand.
39. I have looked at rival arguments offered. I would agree with the respondent. It is not enough to say that the applicant stays on part of the land. He gave his land as security knowing well that it could be sold. Consideration of possible loss of his residence should have weighed heavily on him before offering the land as security. I have expressed my reservations elsewhere concerning the argument that the intended sale is null and void. I need to add or observe that the applicants case seems to be based on the charge documents. Yet at the end of the day, the court will have to consider every other material availed. And a cursory look at what is already availed seems to weaken rather than strengthen the applicant's view. Bearing all this in mind, I take the position that the resulting loss if the suit property is sold would be compensable in damages.

BALANCE OF CONVENIENCE

40. The applicant has not submitted on this. Yet it is necessary to consider it because the respondent has submitted on it and also because the other two principles that normally precede it have been rejected. The respondent submitted that the balance of convenience is in its favour. It was submitted that the respondent has not recovered its money and the debtors are not making repayment. I think the respondent is making a good point. There is default in payment. The debtor and guarantor are not making repayments. And interests obviously continue to accrue and escalate. In my view, granting an injunctive relief at this stage is making worse an already bad situation for the respondent. I am persuaded therefore that the balance of convenience lies in the respondents favour.

RES JUDICATA

41. According to the respondent, the application filed in the previous case and the one filed in this case are similar. Since the one in the previous case was dismissed, so too should this one on the basis that it is **RES JUDICATA.**
42. The applicant on the other had submitted on the suit itself and submitted that it is not **RES**

JUDICATA. And that position is taken since the previous suit was never decided; it was withdrawn. By extension also, the application was also said not to be **RES JUDICATA**. This is so, it was argued, because whatever decision the court renders on the application, that decision cannot be said to be conclusive. The main suit must go for trial for a conclusive decision to be made.

43. On this issue I agree with the applicant and have looked at the previous case as availed by the respondent. I have also looked at this case as filed. They are not the same though they relate to the same suit property and the same financial facility.

The issues are vastly different. Issues like fraud, misrepresentation, or lack of consideration did not arise in the previous suit. In any case, and as pointed out by applicant, that suit was not determined. It was withdrawn. This suit is therefore not **RES JUDICATA.**

44. What about the application? The two applications are only similar to the extent that they both seek restraining orders. **BUT** when one considers the applicable principles in granting or refusing injunctive reliefs in interlocutory stages, it is easy to realize that the principles will be considered against a background of two different cases. For instance, to handle the issue of primafacie case, I have had to consider the possibility of the applicant not being a guarantor. I have had to give thought too to issues of fraud, misrepresentation or lack of consideration. These are not issues that would have been considered in the previous case as they were never raised. The court in the previous case had different considerations. I am grappling with different considerations here. I therefore reject the respondent arguments on the issue of **RES JUDICATA.**

CONSIDERATION OF ALL MATERIAL

45. There is not much to say on this. Suffice to observe that the applicant mainly pegs his suit on the charge documents. But the court is enjoined to consider all material availed by both sides. A look at the material relating to the previous case and the material in this case paints the applicant as somebody shifty, dishonest or a liar. I have already pointed out his position as regards guaranteeing another person. The position is plainly contradictory.
46. The applicant is asking for an equitable remedy. One principle of equity is that one who comes to equity must have clean hands. The applicant seems to lack this. In **MOSES NGENYE KAHINDO VS AGRICULTURAL FINANCE CORPORATION: HCC NO.1044/2001, NAIROBI,** Ringera J (as he then was) had this to say on an issue like this:

"**And of course it requires no stressing that as an injunction is a discretionary remedy, if the applicants conduct in relation to the subject matter of the suit is shown not to meet the approval of a court of equity, the relief may not be granted however meritorious the case may otherwise have been".**

47. From all the foregoing, the inevitable and inescapable conclusion is that the applicant's application herein is unmeritorious and I dismiss the same with costs.

A.K. KANIARU – JUDGE

29/5/2014

29/5/2014

A.K Kaniaru – Judge

Dianga G. - C/C

No party present

Interpretation – English/Kiswahili

Gichamba for Plaintiff/Applicant

Mungai M (Absent) for defendant/Respondent

COURT: The application filed here on 20/12/2012 and dated the same is read and delivered in open **COURT.** Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

29/5/2014