



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 270 OF 2013

MARKET INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

ECO BANK KENYA LIMITED.....1ST DEFENDANT

MERIDIAN ACCEPTANCES LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 26th June 2013 and filed on 27th June 2013 was brought pursuant to the provisions of Order 40 Rules 1 and 2 of the Civil Procedure Rules and all other enabling provisions of the law. It sought the following orders:-

1. Spent
2. Spent
3. **THAT the 1st Defendant by itself, its servants, agents or auctioneers or any of them be restrained by injunction from advertising, offering for sale, disposing off, selling by public auction or private treaty or otherwise howsoever alienating, parting with possession or interfering with the Plaintiff's ownership of the property comprised of Land Title Number Dagoretti/Riruta/S.119 pending the hearing and determination of the suit herein.**
4. **THAT the costs of this application be provided for.**

PLAINTIFF'S CASE

2. The application was premised upon the grounds on the face of the application and was supported by the affidavits of Joseph Muriithi Njeru that were sworn on 26th June 2013 and 24th July 2013 respectively. In its written submissions dated 2nd September 2013 and filed on 3rd September 2013,
3. It stated that the Plaintiff was the registered owner of the suit property that was charged to the 2nd Defendant for an aggregate sum not exceeding Kshs 3,000,000/= pursuant to a Letter of Offer by the 1st Defendant to the 2nd Defendant. The security was to be secured by a Credit Agreement for Kshs 3,000,000/= by the 2nd Defendant, Demand Promissory Note for Kshs 3,000,000/=, Letter of Lien and set-off to be executed by the 2nd Defendant and Joint and several Guarantee and

- Indemnity by the 2nd Defendant's Director for a sum of Kshs 3,000,000/=.
4. Although the Plaintiff stated that it was not served with a Statutory Notice or a demand from the 1st Defendant before it exercised its right to realise the security herein, it nonetheless admitted that it received a Notification of Sale 29th May 2013 indicating that the suit property would be sold by public auction to recover a sum of Kshs 7,030,937.06 that was due and owing to the 1st Defendant herein.
 5. It, however, stated that it received the purported Statutory Notice on 18th June 2013 and that since the sale was scheduled on 31st July 2013, this was not a period of forty five (45) days that was provided for in the Auctioneers Act.
 6. It was also its submission that the 1st Defendant never issued it with a demand to pay the outstanding monies as was required in its capacity as a Guarantor. It took issue with the Letter of Guarantee that was left blank in the part indicated "**principal sum**" rendering the said letter ambiguous, not binding on and unenforceable against it.
 7. It placed reliance on the definition of a "guarantee" in the Halsbury's Laws of England Paragraph 195 and **Kenya Commercial Finance Company Limited vs Ngeny & Another (2000) I KLR** where the Court of Appeal found that what had been marked as "Statutory Notice" did not amount to a demand for the 1st Defendant therein to meet his obligation as a guarantor.
 8. It argued that the said Letter of Guarantee had to be read together with the Charge Document and referred the court to the case of **Raki Investments Company Limited & Brothers vs Co-operative Bank of Kenya Limited (2006) eKLR** to buttress its argument particularly because the 2nd Defendant had admitted the debt.
 9. It submitted that one Peter Njeru Karuana was sacked as the 2nd Defendant's Managing Director was sacked and consequently, the 2nd Defendant who was the principal debtor of the overdraft facilities with ability to pay the outstanding monies ought to pay the outstanding monies that were due and owing to the 1st Defendant. It pointed out that in any event, its maximum liability was a sum of Kshs 3,000,000/=.
 10. In view of the foregoing, it submitted that it had established a *prima facie* case with probability against the 1st Defendant as it was not issued with a proper statutory notice and redemption notice as was required and it stood to suffer irreparable loss and damage unless the 1st Defendant was restrained by the court from exercising its purported statutory power of sale which had not arisen. It therefore sought the protection of the court as the balance of convenience tilted in his favour.

1ST DEFENDANT'S CASE

11. In its Replying Affidavit sworn by Leah Apale on 7th August 2013 and filed on the same date, the deponent stated that the Plaintiff and the 2nd Defendant made a proposal to settle the outstanding claim. She referred the court to communication that had been exchanged between the 1st Defendant, the Plaintiff and 2nd Defendant which amounted to acknowledgment of the statutory notice. She averred that 1st Defendant proceeded to commence realisation of the security and exercise its right of sale of the suit property after the Plaintiff and 2nd Defendant failed to satisfy the terms of their letter dated 25th August 2011.
12. In its written submissions dated 9th September 2013 and filed on 10th September 2013, the 1st Defendant submitted that the Plaintiff was duly served with the Statutory Notice of Sale dated 25th May 2011 and the Notification of Sale which he duly acknowledged in Paragraph 13 of its Supporting Affidavit and had thus complied with the provisions of the law.
13. It pointed out that the Notification of Sale was issued after the expiry of the Statutory Notice and that the Plaintiff had not demonstrated how the sum of Kshs 7,030,937/= had exceeded the principal sum of Kshs 3,000,000/=.
14. It was its contention that both the Plaintiff and the 2nd Defendant had admitted being indebted to it to the tune of Kshs 6,000,000/= together with interests and costs an amount the Plaintiff had guaranteed as could be deduced from the Charge. It further argued that the Plaintiff had not demonstrated how the Letter of Guarantee was ambiguous, not binding or nor enforceable against

the Plaintiff.

2ND DEFENDANT'S CASE

15. Eduardo Hernandez Ciriza swore three (3) affidavits on 16th July 2013, 5th August 2013 and 13th August 2013 on behalf of the 2nd Defendant herein. Its written submissions were dated 9th September 2013 and filed on 10th September 2013.
16. It was its case its current directors had only recently seen the documents relating to the financial facility that had been advanced to it, a fact the Plaintiff never disclosed when the new directors took over. It found it odd that the Plaintiff was able to obtain a loan and secure the same with his own guarantee and use his own title as security.
17. It said that when it encountered serious financial difficulties, it carried out an audit of its affairs and found out that the Plaintiff had, during his time as its Managing Director, opened several companies that were dealing with similar business as the one it carried out. It pointed out that there were several criminal cases that were pending against the Plaintiff as a result of which it could not be held account for his fraudulent and criminal acts.
18. It argued that the fact that there were other securities held by the 1st Defendant did not mean that the same were held against the current loan and that if any loan existed, its securities could not be sold to recover a strange debt. It annexed a copy of records from the Companies' Registry dated 29th November 2012 and marked "EHC 2" showing who the current directors of the 2nd Defendant were.
19. It was its averment that the Plaintiff was bound by the Letter of Guarantee that he gave as security for the overdraft that was advanced to the 2nd Defendant and consequently, he was estopped from denying liability as he was under a duty to pay the principal sum.
20. It termed the Plaintiff's application as an abuse of the court process and urged the court not to grant the Plaintiff an injunction as he had not demonstrated that he would suffer irreparable loss if the injunction was not granted or that he had a *prima facie* case with a probability of success or that he should be granted an interlocutory injunction on a balance of convenience. It referred the court to the cases of **American Cyanamid Co Limited vs Ethicon [1975] AC 396** and **Giella vs Cassman Brown Company Limited [1973] EA 358** in this regard.

LEGAL ANALYSIS

21. The Charge Instrument dated 19th November 2008 was executed by the Plaintiff in its capacity as the Chargor. The said Charge was also executed by another director of the 2nd Defendant company. The Letter of Guarantee dated 9th October 2008 was executed by Joseph Muriithi Njeru and Njeru Karuana the persons who executed the Charge Instrument. According to the 1st Defendant's Letter of Offer dated 22nd September 2008, the purpose of the facility was to provide working capital requirements for the 2nd Defendant's business.
22. In Clause A of the Charge Instrument, the Plaintiff agreed to charge the suit property to secure the financial accommodation to a maximum principal amount of upto Kshs 3,000,000/=. Evidently, Clause 1.1 of the Charge Document indicated that the Plaintiff was to pay the said amount together with interest thereon. It is not therefore correct as the Plaintiff contended that the maximum amount he was obligated to pay was Kshs 3,000,000/= only.
23. The Plaintiff did not appear to dispute the amount that was due and owing to the 1st Defendant. In the absence of any evidence by the Plaintiff to the contrary, the court finds that there was no justification or basis for it to depart from the figure that had been demanded by the 1st Defendant.
24. Clause 27 of the Letter of Guarantee and Indemnity dated 9th October 2008 provided that any demand or notice by the 1st Defendant to the Plaintiff would be by hand delivery, registered post, telex or fax calling on him to pay the amount that had remained unpaid by 2nd Defendant.
25. The Statutory Notice dated 25th May 2011 and Notification of Sale dated 29th May 2013 were sent by registered mail to the Plaintiff. To P.O. Box 34102 Nairobi. This was the postal address that was indicated in the Charge Document. The Plaintiff did not deny

- that the postal address was belonged to it. The court was thus not convinced that the Plaintiff was not served with the said notices.
26. Clause 1.2 of the Charge was clear that the Borrower, who in this case was the 2nd Defendant, would pay to the 1st Defendant all the monies that would become due. According to Clause 1.1 of the said Charge, the Chargor, who in this case was the Plaintiff herein bound himself to pay to the 1st Defendant on written demand all monies not exceeding the principal amount together with interest thereon
 27. The issue of the ability of the 2nd Defendant to pay was not relevant but rather whether or not the 2nd Defendant had met its obligations in accordance with Clause 1.2 of the Charge Instrument dated 22nd July 2009 leaving the Plaintiff merely to ensure the payments were made as had been agreed upon.
 28. The Plaintiff was a director of the Borrower. It would be too onerous for the current directors of the 2nd Defendant to be burdened with financial obligations they had no idea about or from which they had derived no benefit. If they were aware of the same or benefitted from the banking facility, the Plaintiff failed to provide evidence to support the same.
 29. There were obvious differences between the said Peter Njeru Karuana and the current directors of the 2nd Defendant for which the 1st Defendant ought not to be dragged into. Its obligations must be met. In the absence of any evidence by the Plaintiff that the 2nd Defendant took over the liabilities of the 2nd Defendant after he ceased being its Managing Director and Shareholder or that there was a change in the guarantors and the security to be charged, the Plaintiff would have no option but to meet its obligations to the 1st Defendant.
 30. Accordingly, having considered the pleadings, the affidavit evidence and the written submissions, the court finds that this was not a proper case for it to have exercised its discretion in favour of the Plaintiff. The Plaintiff was until discharged from his obligations under the Charge or Letter of Indemnity, the Guarantor of the 2nd Defendant for all purposes and intent.
 31. The Plaintiff's argument that the Notification of Sale was for a lesser period than the forty five (45) days was a non-starter as time started running after the same was sent by registered mail and not from the date he received the same from the post office.
 32. The Plaintiff did not therefore establish a *prima facie* case with a probability of success or demonstrate that he would suffer loss that would not be compensated by way of damages if the interlocutory injunction was not granted or that he should be granted an interlocutory injunction on a balance of convenience.
 33. The 1st Defendant issued the Plaintiff the requisite notices before the new land law regime. It is therefore hereby reminded to ensure that it fully complies with the provisions of the Land Act Cap 280 (laws of Kenya) before it can exercise its statutory power of sale.

DISPOSITION

34. The upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated 26th June 2013 and filed on 27th June 2013 was not merited and the same is hereby dismissed with costs to the 1st and 2nd Defendants.
35. The interim injunctive orders that were issued on 27th June 2013 are hereby discharged, set aside and/or vacated.
36. It is so ordered.

DATED SIGNED and DELIVERED at NAIROBI this 23rd day of October 2014

J. KAMAU

JUDGE