



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 269 OF 2013

PETER NJERU KARUANA.....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 Gaturi/Githimu/1667 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 Plaintiff's affidavits that were sworn on 26th June 2013 and 24th July 2013 respectively. His written submissions were dated 2nd September 2013 and filed on 3rd September 2013.
3. The Plaintiff was the registered owner of the suit property that was charged to the 2nd Defendant for an aggregate sum not exceeding Kshs 6,000,000/= pursuant to a Letter of Offer by the 1st Defendant to the 2nd Defendant which guarantee was not to exceed a sum of Kshs 6,000,000/=. He was the 2nd Defendant's Managing Director until 17th September 2012 when he was sacked.
4. Despite the 2nd Defendant undertaking to hold a Shareholders' meeting to pass a resolution that would remove him as a guarantor of the financial facility that had been advanced to the 2nd Defendant by the 1st Defendant, the 2nd Defendant failed to do so.

5. At some point which was not disclosed to this court, he discovered that the 2nd Defendant had stopped making the payments and on 17th June 2013, he collected registered mail which was a Notification of Sale by Valley Auctioneers dated 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.
6. He stated that the said Notification of Sale marked as Exhibit “PNK 10” was addressed to Market Investments Limited and was in relation to L.R. No Dagoretti/Riruta/S.119. In addition, the said Notification of Sale related to L.R. No Gatari/Githimu/1667 whereas his property was Gatari/Githimu/1667 which rendered the said Notification defective. He pointed out that the valuation that was carried out was in relation to Dagoretti/Riruta/S.119 and not Gatari/Githimu/1667.
7. It was also his submission that the 1st Defendant never issued him with a demand to pay the outstanding monies as was required in his capacity as a Guarantor. He 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 him.
8. He 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 his argument particularly because the 2nd Defendant had admitted the debt.
9. It was his contention that the 2nd Defendant was at all material times aware of its indebtedness to the 1st Defendant as was evidenced by the annual returns that the 2nd Defendant filed with Kenya Revenue Authority (KRA) and it had ability to pay the outstanding monies. His argument was that the 1st Defendant ought to have recovered the outstanding monies from the other securities it held which included joint and several guarantee and indemnity by the 2nd Defendant’s directors for Kshs 6,000,000/=, credit agreement for Kshs 6,000,000/= and a letter of lien and set off by the 2nd Defendant.
10. In view of the foregoing, he submitted that he had established a *prima facie* case with probability of success against the 1st Defendant as he was not issued with a proper statutory notice and redemption notice as was required and he 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. He therefore sought the protection of the court as the balance of convenience tilted in his favour.

1ST DEFENDANT’S CASE

11. In opposition to the application herein, Leah Apale swore a Replying Affidavit sworn on behalf of the 1st Defendant on 7th August 2013. It was sworn on the same date. Its written submissions were dated and filed on 9th September 2013.
12. Its case was that both the Plaintiff and the 2nd Defendant had admitted being indebted to it to the tune of Kshs 6,000,000/= together with interest and costs an amount the Plaintiff had guaranteed as could be deduced from the Charge and that the Plaintiff did in fact make a settlement proposal on behalf of the 2nd Defendant herein.
13. It referred the court to communication that had been exchanged between the 1st Defendant, the Plaintiff and 2nd Defendant which amounted to acknowledgment of receipt of the statutory notice. It said that the Plaintiff has failed to show how the letter of guarantee and indemnity was ambiguous and therefore not binding upon it or unenforceable against the Plaintiff.
14. It contended that it 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 Statutory Notice of Sale and the Notification of Sale, notices that the Plaintiff acknowledged receipt in Paragraph 20 of his Supporting Affidavit.
15. The Notification of Sale, which was served after the expiry of the Statutory Notice, showed that the Redemption Notice was in respect of two (2) properties whose registered owners were clearly indicated and that the suit property herein was clearly indicated as the one it wanted to exercise its

statutory power of sale. It has thus complied with the provisions of the law.

2ND DEFENDANT'S CASE

16. James Ndwigah Muchugu 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.
17. 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.
18. 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.
19. 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 "JNM 2" showing who the current directors of the 2nd Defendant were.
20. 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.
21. 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

22. The Charge Instrument dated 22nd July 2009 was executed by the Plaintiff in his capacity as the Chargor and as a director. The said Charge was also executed by another director of the 2nd Defendant company. The Letter of Guarantee dated 30th June 2009 was also executed by the Plaintiff and the same director who executed the Charge Instrument, namely Pamela Nkirote Itume.
23. The minutes of the meeting that was held on 22nd May 2009 showed that the resolution to seek the banking facility in the sum of Kshs 6,000,000/= was signed by both the Plaintiff and the said Pamela Nkirote Itume. According to the Request for enhancement of an overdraft facility to Kshs 6,000,000/= dated 21st May 2009 from the 1st Defendant to the directors of the 2nd Defendant, the purpose of the facility was to provide working capital requirements for the 2nd Defendant's business. Part of it was to be utilised to take over the 2nd Defendant's outstanding liabilities at Kenya Commercial Bank.
24. From the documentation that was presented before the court, it is apparent that the facility was for a particular purpose while the Plaintiff and the said Pamela Nkirote Itume were directors 2nd Defendant's and that the 2nd Defendant's current directors were not part of the resolution that approved the taking of the banking facility.
25. 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 6,000,000/=. Evidently, Clause 1.1 of the Charge Document indicated that the Plaintiff was to pay the said amount together with interest thereon.
26. It is not therefore correct as the Plaintiff contended that the maximum amount he was obligated to

pay was Kshs 6,000,000/= only. The Plaintiff did not dispute the amount of the outstanding balance. It does appear that the Plaintiff was detaching himself from having any knowledge of how payments were to be done yet he was a director of the 2nd Defendant at all material times until 17th September 2012. Indeed in Paragraph 13 of his Supporting Affidavit he stated as follows:-

“The plaintiff learnt that agreement reached between the 1st and 2nd defendant for the amount to be repaid in monthly instalments of Kshs 250,000/= for a period of 36 months....”

27. However, in the absence of any evidence by the Plaintiff to the contrary, the court finds that the last payment which appeared to have been made on 10th December 2012 and there was no justification or basis for it to depart from the figure that had been demanded by the 1st Defendant.
28. Clause 27 of the Letter of Guarantee and Indemnity dated 30th June 2009 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.
29. There was no indication of how the letter dated 20th January 2011 Exhibit marked “PNK 6” demanding for a sum of Kshs 6,844,940.43 was dispatched to the Plaintiff. However, what is clear in Paragraph 12 of the Plaintiff’s Supporting Affidavit is that the Plaintiff admitted that the said letter was received by the 2nd Defendant.
30. The Statutory Notice dated 25th May 2011 and Notification of Sale dated 29th May 2013 were sent by registered mail to Peter Njeru Karuana at P.O. Box 12914- 00100 Nairobi. This is the postal address that was indicated in the Charge Document dated 22nd July 2009 and marked as “PNK 2”. The Plaintiff did not deny that the postal address was belonged to him. The court was thus not convinced that the Plaintiff was not served with the said notices.
31. The issue of how the name of the subject property was spelt in the Notification of Sale was splitting hairs as it was clear which property had been advertised for sale by public auction. It specifically stated that the property known as L.R. No Gaturi/Githimu/1667 belonging to Peter Njeru Karuana and L.R. No Dagoretti/Riruta/S.119 registered in the name of Market Investments Limited were scheduled for sale by public auction to recover a sum that as at 23rd May 2013 stood at Kshs 7,030,937.06. There was no ambiguity as to who the registered owners of the properties and the descriptions of the said properties were.
32. 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
33. 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.
34. 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.
35. There were obvious differences between the Plaintiff 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 new directors of the 2nd Defendant took over the liabilities that had been incurred by Plaintiff and the said Pauline Nkorote Itume 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.
36. 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.
37. 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.
38. 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.
39. 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

40. Accordingly, 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.
41. The interim injunctive orders that were issued on 27th June 2013 are hereby discharged, set aside and/or vacated.
42. It is so ordered.

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

J. KAMAU

JUDGE