



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 415 of 2011

ZADOK FURNITURES SYSTEM.....1ST PLANTIFF

ZADOK EAST AFRICA LIMITED2ND PLANTIFF

VERSES

FINA BANK LTD.....DEFENDANT

R U L I N G

1. The Notice of Motion application dated **27th September 2011** seeks the following orders:-
 - 1) Service of this application be dispensed with in the first instance and this application be certified as urgent.
 - 2) A temporary injunction do issue to restrain the Defendant, its agents, and/or servants from advertising for sale, selling transferring or carrying out any transaction on L.R. No. 12948/54 and L.R. No. 12948/59 pending the *inter-partes* hearing of this application.
 - 3) A temporary injunction do issue to restrain the Defendant, its agents and/or servants from advertising for sale, selling, transferring or carrying out any transaction on L.R. No. 12948/54 and L.R. No. 12948/59 pending the hearing and determination of this suit.
 - 4) Costs of this application be borne by the Defendant.
2. The application is supported by affidavit of **VICTOR OGETO** dated **27th September 2011** together with annexures thereto, and is premised on the several grounds set in the application.
3. The application is opposed though affidavit of **ZAKARY MUTURI MUCHAI** dated **10th July 2012** with annexures.
4. The brief history of the application as alleged by the Applicant is that he is the director of the 1st Plaintiff Company. In April 2008, the 1st Plaintiff was nominated by Central Bank of Kenya to supply and install Furniture at Deposit Protection Offices – Marshal House and Central Bank of Kenya Headquarters subsequently entered into subcontract agreement with the Main Contract Maridadi Building Contractors Limited who had in turn been contracted by Central Bank of Kenya to carry out among other works the following works:-
 - a) *Through an agreement dated 8th April 2008 to supply furniture for Deposit Protection Fund*

offices in Nairobi which contract was initially worth Kshs.17,770,370.23 and was later increased to Kshs.24,771,809.25

b) *Through an agreement dated 23rd April 2008 to supply furniture for Central Bank of Kenya headquarters in Nairobi which contract was worth kshs.48,841,196/=.*

The 1st Plaintiff approached the Defendant to finance the said project and the Defendant agreed on condition that the 1st Plaintiff would provide a suitable security and that all payments due to the 1st Plaintiff from Central Bank of Kenya would be paid directly to the 1st Plaintiff's account with the Defendant. The 1st Plaintiff approached the 2nd Plaintiff which agreed to provide its properties L.R. No. 12948/54 and L.R. No. 12948/59 as security. The Defendant prepared agreement at various stages of the project which agreements were signed by all these parties as follows:

a) *Agreement dated 21st July 2008 for a loan facility of Kshs.8,000,000/=.*

b) *Agreement dated 5th June 2009 for a loan facility of Kshs.22,000,000/= which amount was to be paid directly to the furniture supplier and to Kenya Revenue Authority for duty and an overdraft facility of Kshs.5,200,000/=.*

c) *Agreement dated 10th August 2009 for two overdraft facilities totaling Kshs.19,100,000/=, a loan of Kshs.4,000,000/= and letter of Credit for Kshs.17,400,000/=.*

It was an express term of the Agreement that Central Bank of Kenya would make its payments due to the 1st Plaintiff to the 1st Plaintiff's account with the Defendant with the following letters:-

a) *True copy of a letter dated 16th December 2008 from Central Bank of Kenya to the Defendant confirming that payments due to the 1st Plaintiff would be made directly to the 1st Plaintiff's account with the Defendant.*

b) *True copy of a letter dated 5th February 2010 from Central Bank of Kenya to the Defendant confirming that payments due to the 1st Plaintiff would be made directly to the 1st Plaintiff's account with the Defendant.*

That payments were indeed done as indicated in the above said letters as can be seen from the following:-

a) *True copies of remittance advises from Central Bank of Kenya showing payments done of the Deposit Protection Fund offices project.*

b) *True copies of remittance advises from Central Bank of Kenya and advises from the project manager on the certificates issued for payment to be done.*

5. The Respondent denies above facts and has submitted that the Defendant remains entitled in law to realize the security properties in exercise of a chargee's statutory power of sale if the banking facilities secured thereunder were not repaid in accordance with the terms of the lending.

6. I have carefully considered the application. The only issue for me to determine at this stage is whether or not the Applicant has proved that the facilities given by the Defendant were for the Central Bank of Kenya Projects which are yet to be concluded. If it is true that the Central Bank of Kenya Projects were expressly factored into the consideration of the said facilities then obviously the Applicant will have established a *prima-facie* case which this court should try before allowing the sale of the Applicant's properties.

7. The Respondent referred me to the letters of offers dated 21/07/2008, 5/06/2009 and 10/08/2009 and submitted that these letters of offer had absolutely no mention therein that the facilities granted to the 1st

Plaintiff by the bank were to be issued solely to finance the Central Bank of Kenya Projects. However, even the Respondent conceded that, some of these facilities were to be used to finance the Central Bank of Kenya Projects. The Applicant submits that all those facilities were in recognition of the Central Bank of Kenya Projects, and that being so, as long as the projects are still ongoing the Defendant cannot purport to exercise its power of sale over the security.

8. I have no doubt that part of the said facilities were to finance Central Bank of Kenya Projects. However, there is a doubt as to whether by dint of that the Applicant's burden to discharge its obligation under the facilities was either discharged or transferred to the Central Bank of Kenya. In my view the correspondences annexed to the supporting affidavit of VICTOR OGETO as annexure VO6 – VO7 from the Central Bank of Kenya were mere comfort letters confirming that the said Central Bank of Kenya would comply with instructions by the 1st Plaintiff to pay certain monies payable to the said 1st Plaintiff as and when they fell due through its account number 1111600018 held with the Defendant. This did not in any way lessen or reduce the Applicant's legal burden to comply with the terms set out in the said facilities more so the duty to repay the loans. It was never at any time intended that the repayment would be subject to the Central Bank of Kenya making the payments due from the said projects. The communication from the Central Bank of Kenya was never intended to be a guarantee for the payment of the facilities granted to the 1st Plaintiff and indeed, the payments referred to therein were clearly conditional upon the performance of the relevant financial contracts.

9. It must be set out clearly that a mortgage contract is one between the bank and the borrower. The security in this kind of contract provides the consideration for the amount loaned. This security becomes real only when the bank is able to exercise the bank's rights over it and to turn it into money. In this particular instance, the borrower provided security quite separate from the proceeds of the Central Bank of Kenya Projects. It would be a bad precedent if this court were to deny the bank a right enshrined to it by law on account of what may amount only to comfort letters by a third party.

10. I am satisfied that this is not a proper case in which to grant an injunction to restrain the bank from exercising its statutory right to realize security. Accordingly therefore, the application must fail.

11. I must note however, that the Applicant has taken the process of this court for granted. Although the application herein was filed way back on 28/09/2011, the same was not served upon the Defendant until 20/06/2012. The Applicant secured interim orders on 03/10/2011. It enjoyed the same without serving the same on the Respondent. The said orders lapsed and on 22nd May 2012 the Applicant came to court, again *ex-parte*, without explaining to the court why the earlier orders were never secured. This is an abuse of the court process for which the Applicant should be condemned. I herewith do so.

12. The costs of this application shall be for the Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 18TH DAY OF APRIL 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Ochola for the Plaintiff/Applicant

Akecha for the Defendant/Respondent

Teresia – Court Clerk