



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 55 of 2013

MOHAMUD SHEIKH HUSSEIN.....PLAINTIFF

-VERSUS-

GULF AFRICAN BANK LIMITED.....DEFENDANT

R U L I N G

1. The application before me is dated **14th February 2013**. It is taken out under **Order 40 Rules 1, 2 and 9** of the **Civil Procedure Rules** and **Sections 3A, 63 (c) and (e)** of the Civil Procedure Act.

2. The application is seeking for the following orders:-

a) *Spent*

b) *Spent*

c) *That a temporary injunction do issue restraining the Defendant whether by itself, its agents, servants and/or employees from selling or offering for sale whether by public auction or private treaty, transferring, charging, leasing, pledging or in any other way alienating or disposing of the property LR No. 36/II/1 pending the hearing and determination of this suit.*

d) *That the costs of the application be borne by the Defendant in any event.*

3. The application is based on the several grounds stated thereof and is supported by the affidavit of the Plaintiff sworn on **14th February 2013** as well as a Supplementary affidavit sworn by the same person on **27th February 2013**.

4. In opposing the application, the Defendant filed a Grounds of Opposition on **22nd February 2013**. The Defendant also filed a Replying Affidavit sworn on **26th February 2013** by **AMINA BASHIR**, described as the Company Secretary of the Defendant Company.

5. The background of the matter is as follows. The Plaintiff is the registered owner of all that property known as **L.R No. Eastleigh 36/II/1** (hereinafter referred to as “the suit property”). On or about March 2009, SAC (K) Limited (“the borrower”) sought a credit facility from the Defendant in order to purchase two aircrafts and related equipment. By a letter dated **6th April 2009**, the Defendant agreed to advance a **Murabaha Asset Finance Facility** to the borrower on the terms stipulated in the letter of offer. The

Plaintiff as a Guarantor of the borrower offered to mortgage his suit property, then valued at **Kshs. 160,000,000/-** as security for the **Murabaha Asset Finance Facility**. The Defendant issued a second letter of offer dated **4th May 2009** varying the terms of the **Murabaha Asset Finance Facility**. By a letter dated **24th July 2009**, the Defendant further varied the terms of the security requirements in the letter of offer dated **4th May 2009**. The terms were, *inter alia*, a 1st ranking legal charge for **Kshs. 95,000,000/-** over the suit property and Guarantee of the same amount from the Plaintiff.

6. By a Mortgage dated **9th September 2009** in favour of the Defendant, the Plaintiff conveyed his property **L.R No. Eastleigh 36/II/1** as a Guarantor to secure the principal sum of **Kshs. 95,000,000/-** advanced to the borrower. The Defendant advanced the borrower an additional **Murabaha Stock Finance Facility** for the sum of **Kshs. 15,000,000**, by a letter of offer dated **4th November 2009**. This was over and above the sums secured by the Mortgage dated **9th September 2009**. It is the Plaintiff's contention that the Defendant did not seek his consent prior to the grant of the additional facility and the same was not secured by the Mortgage dated **9th September 2009**.

7. It is further the Plaintiff's contention that by letters dated **29th January, 18th February** and **21st April 2010** the Principal borrower sought variations and accommodation on the repayment of the **Murabaha Asset Finance Facility** to his detriment as a Guarantor. The Plaintiff avers that the Defendant varied the terms of repayment of the loan facility without his consent or approval as Guarantor or Mortgagor. It is the Plaintiff's case that as a result he was discharged from his obligations as a Guarantor. According to the Plaintiff, in tacit admission of the discharge, the Defendant issued a demand letter dated **26th April 2010** to the borrower seeking payment of **Kshs. 11,305,143.78** outstanding as at **21st April 2010**.

8. The borrower sought further indulgence and confirmed that the **Murabaha Asset Finance Facility** had been fully settled by the insurers on payment of the insurance proceeds of **US \$ 370,000**. By a letter of offer dated **2nd September 2010**, the Defendant granted the borrower a third facility, a Tawarraq Working Capital Finance Facility of **Kshs. 58,672,978** repayable over a period of **24 months** at a profit of **16.5%**. It is the Plaintiff's contention that the said facility was purportedly secured by the Mortgage over the suit property without his consent and without a supplemental mortgage being registered against the suit property. The Plaintiff further contends that despite admission of liability by the borrower and numerous proposals for settlement, the Defendant unlawfully coerced and duped the Plaintiff by purporting to restructure the loan facility to make the Plaintiff the borrower by its letters of offer date **13th May 2011** and **26th May 2011**.

9. It is the Plaintiff's case that the purported restructuring was illegal and vitiated by fraud, duress and coercion so as to constitute an unconscionable bargain in law. It is also the Plaintiff's case that the security documentation and letters were all drafted by the Defendant Bank's legal department and the Plaintiff was not allowed the benefit of independent legal advice prior to signing the letter of offer dated **26th May 2011**.

10. According to the Plaintiff, there was no consideration for the purported Diminishing Musharaka Sale and Lease Back Finance Facility and to date no money has been disbursed to him. The Plaintiff maintains that he was only a guarantor and had already been discharged by the Defendant when it rescheduled the facilities in favour of the borrower.

11. The Plaintiff contends that the Defendant has now issued an invalid and irregular Statutory Notice purporting to exercise a non-existent statutory power of sale. The Plaintiff has also been issued with a Notification of sale by Garam Investments intending to sell by Public Auction on **12th March 2013**. The Plaintiff avers that he has a strong *prima facie* case with a high probability of success and that unless the Court issues the orders prayed for he will suffer irreparable loss and harm.

12. In opposing the Plaintiff's application, the Defendant filed a Replying affidavit where it is deponed that on **6th April 2009** the Defendant offered the borrower asset financing facilities ("the Facility") for the purchase of two aircrafts. The Security conditions under the letter of offer dated **6th April 2009** included a charge for **Kshs. 160,000,000/-** over the suit property and a further personal guarantee from the Plaintiff for **Kshs. 120,000,000/-** making the Plaintiff both a Mortgagor and a Guarantor.

13. It is further deponed that the asset financing facilities granted to the borrower were varied through subsequent letters of offer dated **4th May 2009** and **24th May 2009** and that the same was done within the

full knowledge and consent of the Plaintiff. The amendments that were effected to the Facility through the letters of offer were all instigated and requested for by the borrower and the Plaintiff, in order to tailor the Facility to their needs and to reduce the maximum principal amounts secured under the various securities. Therefore, the variations were not in any way detrimental nor prejudicial to either the borrower or the Plaintiff.

14. It is averred on behalf of the Defendant that the borrower paid an amount of **US \$ 260,000** from insurance proceeds and did not settle all outstanding amounts as claimed by the Plaintiff. By a letter of offer dated **2nd September 2010**, the Defendant resolved to restructure the facility due to the hardships the borrower was facing. The Defendant avers that the same was not a new facility but simply a variation of the Facility that had been issued to the borrower in 2009.

15. It is further averred by the Defendant that it had been resolved as between the Plaintiff and the borrower that the Bank's facility would be serviced by utilizing the rental income from the Plaintiff's mortgaged property until the borrower's business of aircrafts picked up again. It is the Defendant's case that due to the fact that the repayment would be coming from the Plaintiff's property it resolved to restructure the outstanding amount as a facility to the plaintiff as the principal obligor. As a result the Plaintiff was issued with a letter of offer dated **26th May 2011** in which it was clearly stated that the purpose of the facility was to restructure the existing Tawarruq facility. The security conditions within the letter of offer included, *inter alia*, a 1st ranking legal charge over the suit property in the name of the plaintiff covering his obligations.

16. It is averred by the Defendant that the Plaintiff was fully aware of the purpose of the facility advanced to him and that he was also aware that the Bank intended to create a fresh mortgage over his property. By a letter dated 21st June 2011 and copied to the Plaintiff the Defendant issued instructions to their advocates to prepare a mortgage over the suit property. It is further averred that the Plaintiff executed the security documentation and returned them to the Bank. The Defendant's advocate made an application for the registration of the security documents. However, it turned out that the deed file pertaining to the suit property was missing and this culminated in the drafting of a deed of guarantee and indemnity for execution by the Plaintiff to enable a temporary file to be opened at the file registry. Again, the deed of indemnity as executed by the Plaintiff was misplaced at the Lands office forcing the Defendant's advocate to forward a fresh set for execution by the Plaintiff. This time, according to the defendant, the Plaintiff refused to execute and return the said documents.

17. It is the Defendant's case that following the Plaintiff's lack of co-operation in the matter the Defendant sought the opinion of their Advocates on the state of affairs. Their advocates advised them that the Re-Conveyance of the Mortgage dated 9th September 2009 had not taken place on account of the missing Deed file and that the said Mortgage was still fully valid and enforceable. It is deponed on behalf of the Defendant that the undated and unsigned re-conveyance of mortgage annexed to the Plaintiff's application and purportedly drawn by **Iseme, Kamau & Maema Advocates** is a forgery. The defendant has annexed an affidavit sworn by **Norah Mbithe Mutuku**, a partner at **Iseme, Kamau & Maema Advocates**. It is also the Defendant's case that the Plaintiff's refusal to execute the Deed of Indemnity is an intention by the Plaintiff to hamstring the Defendant.

18. It is further the Defendant's case that both the Mortgage and the Guarantee dated 9th September 2009 cover the obligations of the Plaintiff to the Bank under any facility granted to him or to the borrower or any other persons or entities guaranteed by him to the Bank until payment in full.

19. The Defendant maintains that the Plaintiff was fully aware of all re-structures carried out by the Bank in favour of the borrower. To support the same, the Defendant referred to a letter dated **7th September 2011** in which the Plaintiff wrote to the Bank requesting a re-structure of the facility as the borrower was having difficulties in servicing the facility. The Defendant also avers that the Plaintiff in his own volition and free will took over all obligations of the borrower by executing a letter of offer dated **26th May 2011**.

20. The Plaintiff filed a supplementary affidavit in reply to the Defendant's Replying affidavit, essentially denying the facts as deponed to on behalf of the Defendant. The Plaintiff made various depositions, *inter alia*, that he was not the borrower but only a guarantor to the said borrower and also that he was not a party or a signatory to any of the letters of offer. Therefore, the Defendant was under a duty and obligation to notify him as a Guarantor and Mortgagor and seek his approval and/or consent on any variations.

21. It was the Plaintiff's deposition that as a Guarantor he was not aware that the Borrower had defaulted in the payment of the loan facilities or that it had sought accommodation from the Defendant in paying the same. The Plaintiff contended that the Defendant had not produced any statement of account of the borrower to exhibit the alleged default on the part of the borrower. It is further the Plaintiff's deposition that he had not borrowed any money and therefore the Bank had to consult him as the Guarantor before accommodating the borrower to his detriment. The Plaintiff maintained that he had only mortgaged his property as a security for the loan advanced under the **Murabaha Finance Facility** dated **11th May 2009**.

22. The Plaintiff averred that the idea that rental income from his property was to be utilised to pay for the borrower's loan was one crafted by the Defendant's Company Secretary and Corporate Relationship Manager. It was the Plaintiff's position that the Defendant through undue influence misrepresented to him that pledging rental income from his property was the only feasible way to salvage his property which could be auctioned without notice.

23. It is further averred by the Plaintiff that the letter of offer dated **26th May 2011** was presented to him by the Defendant's Company Secretary and he did not sign it before one **Anne Wambui Kibicho** who is unknown to him. According to the Plaintiff, he was simply instructed to sign where his name appeared. The Plaintiff went ahead to state that all letters of offer, affidavits, security documents and correspondence were drafted by the Defendant or their advocates and he was never offered the benefit of independent legal advice.

24. It is the Plaintiff's averment that he refused to sign any further documents upon realizing that the Defendant Bank had through misrepresentation, undue influence and inequality of bargaining power intended to make him the borrower and transfer the debt owed by the borrower to him. The Plaintiff further averred that the purported Statutory Notice dated **26th April 2012** did not demand payment of any outstanding Mortgage money as required by law and the purported **Diminishing Musharaka Sale and Lease Back** finance facility was not secured by the Mortgage dated 9th September 2009.

25. I have considered the pleadings, oral submissions by Counsel as well as the various authorities cited by both parties. From the foregoing, it is plain that the parties herein are contesting various issues. However to determine whether the Plaintiff is entitled to the orders sought, the main issue that arises for determination is whether the Defendant is entitled to exercise the Statutory Power of sale.

26. It is not disputed between the parties that the Plaintiff executed a Mortgage dated **9th September 2009** in favour of the Defendant. It is the Plaintiff's case however, that with regard to the said Mortgage, he was discharged from his obligations due to the variations made on the **Murabaha Facility** by the Defendant. The Plaintiff contends that the variations were made without his consent or approval. On the other hand the Defendant claims that the Plaintiff was always aware of the variations and in fact approved of the same.

27. On **26th May 2011**, the Plaintiff wrote to the Defendant instructing it to remit all funds in relation to his facility in the sum of **Kshs. 67,595,058.08** to SAC (k) Limited's Account with the defendant. The Plaintiff claims that he did not draft the said letters. He averred that all letters were drawn by the Defendant's Legal Officer and he was simply instructed to sign where his name appeared. In summary the Plaintiff alleges that he signed all documents without the benefit of independent legal advice.

28. While it is difficult to comprehend how the Plaintiff appended his signature to documents whose contents he was not aware of and did not understand the implications, it is also important to establish whether he had the opportunity of being explained to what agreements he was entering into, either by the Defendant or an Advocate. There is no evidence on record to show that the Plaintiff was consulted or notified on the variations made to the original facility. There is also no evidence that the Plaintiff was advised by the bank or given an opportunity to obtain independent legal advice.

29. There is also the allegation that the Defendant through undue influence misrepresented to the Plaintiff that pledging rental income from his property was the only feasible way to salvage his property which could be auctioned without notice. This allegation can only be proved during trial as it requires *viva voce* evidence. All the foregoing issues can only be determined if the case goes to trial.

30. That notwithstanding it seems that there was a second loan to be issued to the Plaintiff for the amount of **Kshs. 67,595,058.08** and to be secured by a mortgage over the suit property. The loan was to be issued via the letter of offer dated **26th May 2011**. The Plaintiff contends that he was not issued with

such a facility and that he did not mortgage his property to secure the same. In that light it is the Plaintiff's case that the Defendant's statutory power of sale does not arise. It is submitted on behalf of the Plaintiff that the Statutory Notice dated **26th April 2012** makes no reference to any Mortgage and does not mention any amount outstanding.

31. It is the Defendant's case that the Mortgage dated 9th September 2009 is valid and still in force as a re-conveyance of the same was never done. The Defendant contends that the securities that the Bank held were continuing securities and the Bank did not need to vary those securities. To this end the Defendant referred to **paragraph 22** of the Mortgage dated **9th September 2009** which states as follows:-

"The Mortgage being a continuing security, the Bank may make further advances and give credit to the Mortgagor and/or the borrower on a current or continuing account and such further advances shall rank in priority to any subsequent charge or mortgage of the premises."

The Plaintiff's position is that if the Mortgage dated **9th September 2009** was a continuing security, there would be no need to sign a new mortgage instrument

32. While the Defendant's case that the Mortgage dated 9th September 2009 was a continuing security sounds credible, this court cannot ignore the fact that the letter of offer dated 26th May 2011 had terms and conditions, some of which were not fulfilled. From the letter of offer dated **26th May 2011** it is clear that the facility therein was to be secured by a 1st ranking legal charge over the suit property. It has been established that a Mortgage was prepared in that regard, executed by the parties and lodged for registration. However, the said registration never took place for the reason that the Deed file in relation to the said property went missing at the Land's registry. That is the position up to date and the same has not been disputed.

33. In view of the foregoing, it is the Court's determination that the Plaintiff has established a *prima facie* case as envisaged in the case of **Giella vs Cassman Brown & Co. Ltd. 1978 EA 358**. As regards the Defendant's argument that the Plaintiff can be compensated by way of damages, it is not cardinal principal of law that an injunction cannot issue where the Defendant is able and willing to pay damages. See; **Civil Case No. 79 of 2007, Givan Okallo Ingari & Another V Housing Finance Company Of Kenya Limited [2007] eKLR**.

34. In the upshot, the Plaintiff's Notice of Motion dated **14th February 2013** is hereby allowed. The parties shall bear their own costs of the application.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 30TH DAY OF MAY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Mutua holding brief for Isaa for the Plaintiff

Odipo holding brief for Taib for the Defendant

Teresia – Court Clerk