



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL SUIT NO. 43 OF 2011

PAUL KIPROTICH ARAP KENDUIYWO alias

KIPROTICH ARAP KENDUIYWO.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD.....1ST DEFENDANT/RESPONDENT

DENNIS KIRUI t/a SADABRI AGENCIES LTD.....2ND DEFENDANT/RESPONDENT

ANDREW KENIK.....3RD DEFENDANT/RESPONDENT

RULING

This Ruling relates to three applications namely -

1. *The Plaintiff's applications dated 15.06.2011 and filed on 30.06.2011 and which the Applicant sought and was granted interim orders against the 1st Defendant on 8.07.2011, and which orders are still subsisting today.*
2. *The Plaintiff's Application dated 2.05.2012 filed on 3.05.2012 in which the Plaintiff seeks an order directed at the Defendant to release the original charge for scrutiny by a private hand-writing expert.*
3. *The Defendant's Application said to be dated 29.05.2012, but filed on 28.05.2012 and in which the Defendant seeks an order to discharge the interim orders which have been running for 2 years.*

By an order made on 6.05.2013, I directed that the three applications be canvassed together, and also directed counsel for the parties to file written submissions for and against the orders sought.

Both the Plaintiff's and the Defendant's Counsel's written submissions dated 10.05.2013 were filed on the same day. Thereafter counsel for the plaintiff was granted 14 days to file a response to the Defendant's written skeletal submissions. The Plaintiff's counsel further submissions dated 22.05.2013 were filed on 24.05.2013. I have perused the respective submissions, and I set in the paragraphs following my opinion and conclusion on each of the three applications.

I will consider opposing the applications of 15th June 2011 and 28th May 2012 together and I will

consider the Plaintiff's Application of 2.05.2012 separately. The reasons for this treatment will appear in the body of the Ruling.

A. The Applications of 15.06.2011 and 28th May 2012

The two applications seek orders opposed to each other. The Plaintiff's application seeks the continuation of the orders of injunction, the Defendant seeks the discharge of those orders.

Whereas the Plaintiff's Counsel has gone into what I consider irrelevant polemics about substantial justice, without technicalities, the issue in the plaintiff's application for injunction is quite simple. The Defendant has through the Replying Affidavits of one Damaris Gitonga, its Manager Legal Services, made clear disclosure as to how it became entitled to enforce the security made by the 3rd Defendant (*now deceased*), to the defunct Kenya Capital Corporation Ltd (*Kenyac*). There has been a litany of attempts to enforce the security but the Plaintiff has used every administrative effort to defeat the Defendant's attempts to do so.

The point really is what happens in commercial transactions between lender and borrower. The borrower seeks finance for his/her project. The Lender after considering the purpose or request by the proposed borrower, if it accepts the proposals, offers the loan or credit facility to the person requesting the facility or loan. The terms are then settled and the relationship of lender and borrower is established.

Where the terms include the provision of a security to secure the loan/credit facility, no disbursement of the loan or credit will be made until the security is perfected. This was the situation between the Plaintiff and the Kenya National Capital Corporation Ltd (Ltd) (KENYAC).

In consideration of the loan of Ksh 350,000/= the plaintiff offered as security, the parcel of land known as KERICHO/KAPSIMBIRI/518 (*the suit land*), the property of KIPROTICH ARAP KENDUIYWO also known as PAUL KIPROTICH ARAP KOECH, to which the Plaintiff attached his thumb-print before K. S. Shah Advocate of P. O. Box 275, Kericho.

The charge is drawn in terms of the Registered Land Act (*Cap. 300, Laws of Kenya now repealed*), under which the title to the suit land was issued. There is no averment in the Plaintiff's Affidavits that the Defendant's exercise of its statutory power of sale is irregular or unlawful. The Plaintiff's sole ground is that of fraud, that he never guaranteed the 3rd Defendant (*who is now deceased*) for any loan of Sh 350,000/= or any other sum. The loan has generated interest and now stands at Kshs 14.3 million.

As I understand it, the law of borrower and lender is this. If a person takes out a loan or credit, whether secured or unsecured, the loan must be repaid to the lender, and usually with interest – that is, the cost of money. Where the loan is secured, the person who grants the security clearly acknowledges that if he defaults or fails to pay the loan, then the security will be realised, or sold, to recover the entire loan plus interest or part of it.

To resist the realisation of the security given the borrower must show among other things that the lender has not observed his part of the bargain, under the instrument of security, that no notice of default was given, that no statutory notice was given, that no valuation was done, that there was no auctioneer's notice given before the purported sale. In the absence of such breaches, the principles which have been handed down to us in our jurisprudence in **GIELLA VS. CASSMAN BROWN & CO. LTD [1973] E.A. 358** come into play -

- ***that the Applicant has not made a prima facie case with a probability of success,***
- ***that the Applicant will suffer irreparable loss which the Defendant cannot compensate in damages,***
- ***that the balance lies in favour of the Applicants.***

The whole principle of giving security in consideration of a loan or credit is an acknowledgement that if there is any default in the repayment of the loan, the item or property given as security may be sold to recover the loan as already stated.

There is analogy between taking a loan and pawning the family jewellery, or grandfather's stool, or the family's coat of arms and sword of chivalry. In both cases a person giving away, something valuable, in this case, land, is in need of money perhaps to start a new venture, or perhaps to expand an existing one. Similarly the person pawning away the property which has been in the family for generations, is in need of funds, perhaps urgently. Both understand that if the loan or credit is not repaid as agreed, the land, or the pawned property will be sold to recover the loan or credit advanced.

The person who pawns away the family jewelery, the patriarch's stool, or sword of chivalry for temporary credit acknowledges on the pawn receipt that unless the credit is repaid according to the terms agreed, the treasured family trinket will be lost to a buyer from the pawnbroker.

So also is the case of those who charge or mortgage the family's primary means of production and a livelihood, land. If they repay the loan, there will be no risk that the ancestral land or home will be sold and bought away by a stranger. If they default like the pawner, they run the risk of losing the family jewelery, the patriarch's stool, and the family's coat of arms and sword of chivalry. So once those items are pawned or the land charged they cease to be property or things of sentimental value to the chargor or pawner.

To paraphrase Hon. Mr. Justice Ringera in many of his celebrated judgments on this subject, once charged or pawned, "*the property becomes a commodity for sale*". Those who offer their lands as security, accept this principle when they append the pens or thumb-prints on the security documents-charge or mortgage. It is not therefore open them in the mouth to say "*I have sentimental value for this property, this is my ancestral home.*" I think such sentiments are totally irrelevant.

I am keenly aware that the Plaintiff alleges fraud against the 1st Respondent. That is a tall order to prove, but if he does so, the 1st Defendant is not impecunious, and will certainly be in a position to pay the Plaintiff substantial damages.

In the circumstances, the balance of convenience lies with the Defendant, it is a trustee of a customers' funds, and where it has lent, it must make every endeavour to recover, and to remain profitable.

For those reasons, I allow the Defendants' application wrongly dated 29.05.2012, but filed on 28.05.2012 and discharge the injunctive orders made on 8th July 2011.

OF THE APPLICATION DATED 2ND MAY 2012

I must on the outset say that, I agree with the submission by counsel for the Defendants that this application is self-defeating, and the reasons are quite apparent.

A party to litigation cannot abrogate and reprobate at the same time. Here is a party who comes to court on the strength of a charge which it believes is valid and obtains temporary orders of injunction pending the hearing *inter partes*. He abrogates. In the same breath, hardly six months later while enjoying the interim injunctive orders, comes to court and says, I do not believe in that document, I think it is a fraud, I need to check it independently – he reprobates. I think that is acting in extreme bad faith, and for these reasons -

- 1. It is common knowledge of which the court must take judicial notice, which coincides with Section 108 of the Registered Land Act (Cap. 300, Laws of Kenya – now repealed) that a charge is executed in triplicate. The chargor must get one after due registration of the charge.***
- 2. A question of fraud is not “pеса-pap”. It cannot gestate over twenty (20) years and fail to be reported either as theft or other loss. Banks or other lenders do not collect titles from the street.***

They are handed over to them and receipt acknowledge. The Defendant herein admits it has been holding the security for over 20 years, and its loss by way of fraud – has never been brought to its attention by the plaintiff, or the deceased, 3rd Defendant.

- 3. In a dispute situation like in this case, it could be inherently unwise and prejudicial for the defendant to make any order to hand over the original documents to a handwriting expert whose particulars – name and qualifications are unknown. In any event such an order may in my humble opinion be made only after due evidence of alleged fraud has been tendered, and not by way of interlocutory application.*

In this regard the invocation of Article 35 of the Constitution of Kenya, 2010 (regarding the right to information) is no panacea for seeking skewed orders which are prejudicial to a party such as the Defendant.

- 4. It is both curious and odd that the application for release of the original document is made one year after interim orders were obtained. It was an afterthought, and indeed sounds in bad faith.*

For those reasons, the Plaintiff's application dated 2nd May 2012 is dismissed with costs to the Defendants.

In summary, the Plaintiff's application dated 15th June 2011 is dismissed, with costs, the orders of injunction are hereby vacated and discharged. The application dated May 2, 2012 is likewise dismissed with costs. The Defendant's application filed on 28.05.2012, (*but erroneously dated 29.05.2013*) is hereby allowed with costs against the Plaintiffs.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 19th day of July, 2013

M. J. ANYARA EMUKULE

JUDGE