



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 39 OF 2012**

**JIMMIESON MKUMBO MBOGHO**

**T/A ZIOTECH MOTORS ..... PLAINTIFF/APPLICANT**

**V E R S U S**

**BARCLAYS BANK LIMITED ..... DEFENDANT/RESPONDENT**

**RULING**

1. The relationship between a firm called '**Ziotech Motors**' and the Defendant is one of Banker and Customer. The Plaintiff Jimmieson Mkumbo Mbogho is a partner in Ziotech Motors. The Plaintiff charged his property to the Defendant as security for a loan facility issued to the firm. That property is **LR No. MN/Section 1/3774 (CR 18629) Nyali, Kongowea, Mombasa**.
2. It is not denied that the firm is indebted to the Defendant. The Plaintiff however by this action seeks for orders of permanent injunction to stop the Defendant from selling in realization of its security the Plaintiff's said property. He also seeks for a declaration that the loan obtained and the charge instrument were as a result of fraud and that the interest that is charged by the Defendant is too high unreasonable and illegal.
3. The Plaintiff by a Notice of Motion dated 2<sup>nd</sup> February 2012 seeks temporary injunction restraining the Defendant from selling the property by public auction or howsoever.
4. The firm Ziotech Motors has two partners namely the Plaintiff and Constance Nkuku Mkumbo. However that being so, the Plaintiff stated that he was approached by a person he identified as Benard. Benard introduced himself as an employee of the Defendant. He allegedly informed the Plaintiff that the Defendant would be able to offer the Plaintiff Kshs. 2.5 million as unsecured loan. According to the Plaintiff, he was promised by yet another employee of the Defendant called Ogeya that he would get such a loan. Ogeya was working at the Defendant's Digo Branch in Mombasa. He allegedly informed the Plaintiff that he would get his loan facility within two weeks. This however was not to be and on the Plaintiff requesting "**for assistance**" the said Ogeya gave the Plaintiff Kshs. 250,000/- in cash. The Plaintiff further deponed that-

***"7. That on or about 18<sup>th</sup> September 2009, the Defendant's Officer in Charge, Business Loans, Digo Road Branch, Mr. Ogeya called me to the Bank whereupon I was given the letter of offer dated the 14<sup>th</sup> September, 2009. The said officer demanded for my signature and the original Certificate of Title***

*for the suit property, to wit, LR Number Mainland North/Section 1/3774 (CR Number 18629), which I had no option but to hand over since an amount of Kshs. 250,000/- had been advanced. Annexed hereto and marked "JMM 1" "JMM 2" are photo stat copies of the said letter and Certificate of Title.*

*8. That once the loan process was completed in late October 2009, it turned out that the amount to be advanced was Kshs. 1,000,000.00 and not Kshs. 2,500,000.00 and upon the receiving the same, I was forced and/or coerced to issue an open cheque of Kshs. 312,000.00 to the said Ogeya who was in the company of a lady by the name of Benter A. Onyango whom I met then for the first time, and they demanded a further payment of Kshs. 250,000.00 which I could not afford to give.*

*9. That subsequent to instructing his Advocates (sic), I am informed by my Advocate on record, Mr. R. M. Tindika, and I verily believe the same to be true, that upon checking the records at the Lands Office, he discovered that a Charge had been registered against the Title herein, a fact I did not know all along because I was not made aware of it nor was the Charge given to me.*

*10. That I shall aver and content (sic) that the loan and/or Charge herein were obtained by fraud and/or fraudulent misrepresentation.*

*11. That subsequent to the said advance, I, in addition to making several payments (on a without prejudice basis) have severally raised the issues herein with the Defendant, to no avail.*

*12. That however and to my dismay, I have discovered that the Defendant contrary to the position of this matter, has advertised the property herein for sale in the Daily Nation of 31<sup>st</sup> January, 2012 and which sale is due for the 6<sup>th</sup> February, 2012 without, inter alia, giving the mandatory statutory notice and 45 days redemption notice together with the notification of sale. Annexed hereto and marked "JMM 3" is a photo stat copy of the advertisement."*

5. It should be noted that the Plaintiff's allegation of fraud do not go further than the depositions reproduced above. The letter of offer which the Plaintiff alleges he was forced to sign was signed by both himself and his partner. That letter of offer provided that the security for a loan of Kshs. 1 million would be the Plaintiff's property.
6. The Plaintiff also alleged that the Defendant did not serve him with the requisite statutory notices before embarking on the sale of the property. The sale of the property was due to take place on 6<sup>th</sup> February 2012 but was stopped by this Court by an interim injunction.
7. The application is opposed by the Defendant. The Defendant contends that the Plaintiff not only signed the letter of offer but also provided his property for the purpose of registering the charge.
8. It should be noted that the Plaintiff has alleged that he was not provided with a copy of the charge but there is no evidence produced before this Court to show that the Plaintiff requested for such a copy which was denied. Whether or not the Plaintiff had a copy of the charge would have no bearing on the rights of the Defendant to realize its security. It is also worthy mentioning that the Plaintiff's advocate did a search over the property and found that the charge had been registered. The Plaintiff was therefore aware that the charge instrument he signed was registered.
9. The Defendant also argued that the Plaintiff had been served with the requisite statutory notices. Those notices were attached to the Defendant's replying affidavit. The Defendant's three (3) months statutory notice is in a letter dated 30<sup>th</sup> March 2011. It is addressed to the Plaintiff and its partner. The Defendant also attached a Certificate of Posting of that notice to both the Plaintiff and his partner. The Auctioneer's forty five (45) days notice was in a letter dated 3<sup>rd</sup> September

2011. It was addressed to the Plaintiff. There is also attached a notification of sale and evidence of its postage and postage of the 45 days notice.

10. In the supplementary affidavit the Plaintiff denied receiving those notices and submitted that it was the obligation of the Defendant to prove that the notices had been received.

11. I see three issues presenting themselves for consideration in this matter. The first is whether there was fraud in respect of the loan facility granted to the firm. The second is whether the Plaintiff was served with statutory notices of sale. The third is whether the charge of interest can lead this Court to grant the injunction being sought.

12. Before I consider those issues I caution myself that what is before me is an interlocutory application and the correct approach in dealing with such an application is not to decide the issues of facts but rather to weigh up the relevant strengths of each sides proposition. See the Case of **Mbuthia -Vs- Jimba Credit Finance Corporation & Another [1988] KLR 1.**

13. On the first issue I find on a prima facie basis that the Plaintiff failed to spell out clearly in what form the alleged fraud occurred. It is not clear whether the Plaintiff's allegation was that he did not sign the charge instrument or whether that the Defendant did not advance the loan. In the paragraphs of Plaintiff's affidavit reproduced above it is clear that such clarity is lacking. On a prima facie basis the Plaintiff failed to meet the higher standards required to prove fraud. In the Case **Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others Civil Appeal No. 215 of 1996** the Court of Appeal in considering the standard of proof required where fraud is alleged had this to say-

***“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case.”***

The Plaintiff has failed to prove the first issue.

14. On the second issue I state that it was not enough for the Plaintiff to say that he was not served with the statutory notices of sale. This is in the light of the notices that were attached to the Defendant's replying affidavit. Once the Defendant produced those notices the burden of proof shifted to the Plaintiff. See Section 107(1) of the Evidence Act Cap 80. That Section is in the following terms-

***“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”***

The Plaintiff ought to have made inquiries through the Post Master General in order for the Plaintiff to confirm whether those notices were received and if not their whereabouts. In this regard reference is made of the case **Mbsa High Court Civil Commercial & Admiralty Division Case No. 31 of 2013 Fredrick A. Makumbi -Vs- Kenya Commercial Bank Limited** in which the Court in its Ruling relied on the case **Maithya -Vs- Housing Finance Corporation of Kenya HCCC No. 1129 of 2002** as follows-

***“It is the Plaintiff who alleged that he was not served with the Statutory Notice. Once the Defendant provided evidence of that service the burden of proof shifted to the Plaintiff. This shifting of burden of proof is based on the rule that “he who asserts must prove.” See the book of Principles of Evidence by Alan Taylor 2nd Edition. The onus was on the Plaintiff to prove non service of the Plaintiff. In view of the fact that the Plaintiff failed to prove the same the Plaintiff has failed to satisfy that burden. It is obvious that the Plaintiff could have obtained information from the Post Master General on whether the said notice was posted and the whereabouts of it. The Plaintiff did not on prima facie basis do so.”***

The Plaintiff therefore also fails in the second issue.

15. On the third issue the Plaintiff does not deny that the Defendant is

owed some amount in relation to the loan granted to the firm and secured by his property. The dispute therefore if any of interest rate cannot be a basis for granting an interlocutory injunction. On this issue also the Plaintiff fails.

16. Before ending this Ruling, I need to mention that it is imperative when a party relies on any authorities to ensure that such authorities are supplied to the Court. In this case the Defendant in its written submissions relied on many authorities but failed to supply copies of those authorities to the Court. This Ruling is probably the poorer for not having the benefit of those copies of authority.

17. In the end I find no merit in the Plaintiff's Notice of Motion dated 2<sup>nd</sup> February 2012 and the same is hereby dismissed with costs to the Defendant. Any injunction that is subsisting in this matter is hereby vacated.

Dated and delivered at Mombasa this 20<sup>th</sup> day of September, 2013.

**MARY KASANGO**

**JUDGE**