



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO. 3 OF 2010

SOUTHERN CREDIT BANKING CORPORATION
LTD.....PLAINTIFF/APPLICANT

-VERSUS-

SOLOMON W. KARANJA.....DEFENDANT/RESPONDENT

RULING

The plaintiff had filed a suit by plaint on **2nd March, 2010** seeking Orders for the registration of a second charge, in respect of monies loaned to the defendant. Under the umbrella of the said suit, the plaintiff has moved the Court by Notice of Motion dated **8th February, 2011** and brought under Order 40, Rules 1 and 2; Order 51, Rule 1 of the Civil Procedure Rules, 2010; and ss.1A and 1B of the Civil Procedure Act (Cap.21, Laws of Kenya).

The outstanding prayer is that: the Court be pleased to grant a temporary Order of injunction restraining the defendant by himself, his servants and/or agents from selling, charging, leasing, transferring and/or in any other manner whatsoever disposing of his interests in plot L.R. No. 2476/I/MN pending the hearing and determination of the suit.

The grounds for the application are thus stated:

(a) plot L.R. No. 2476/I/MN is the suit property;

(b) the defendant has given clear indications that he wishes to dispose of his interests in the suit property;

(c) disposing of the suit property during the pendency of the suit will render the suit nugatory; and consequently the plaintiff will suffer irreparable loss and damage;

(d) sale, lease, transfer or any such mode of disposal of the suit property will offend the overriding goals of justice;

(e) the Court do sustain the status quo.

Brian Asin, the legal officer of the plaintiff Bank, swore an affidavit on **8th February, 2011** in support of the application; and the defendant filed a replying affidavit on **2nd March, 2011**. The respondent deposes that he, and one **Olive Wanjiru Karanja**, are the duly-registered joint-lessees of the suit property. The deponent further avers that: the joint-lessees, on **9th November, 1995** registered a charge in favour of **Fidelity Shied Insurance Co. Ltd.** over maisonette No.1 on L.R. No. 2476/1/MN; the said charge is still in force, securing an outstanding loan balance of Kshs.3,152,296/= as at **31st January, 2011**; the said property is still charged to a third party, and the secured obligations have yet to be redeemed.

In the supporting affidavit, the deponent avers that the plaintiff Bank now trades as Equatorial Commercial Bank Limited, and that **Fidelity Shield Insurance Co. Ltd** to which the defendant had

rendered a first charge of the suit property, is *partially* owned by the plaintiff Bank; and that the plaintiff is seeking Orders for the registration of a *second charge* against this property. The deponent avers that he has “received.....information from Fidelity Shield Insurance Limited...that the defendant is trying to dispose [of] plot L.R. No. 2476/I/MN.” The deponent avers that “the plaintiff is in Court because the defendant has failed to pay a just claim”, and “if the suit property is sold, the plaintiff will have no recourse and will suffer irreparable loss and damage.”

Learned counsel, **Mr. Munyithya** submitted from the evidence on record, that: the plaintiff had entered an agreement with the defendant on **28th August, 2006** under which the defendant *undertook* to execute a second charge over the suit property; but the defendant has now refused to register a second charge, and this has occasioned the suit. The plaintiff, by the suit, will be seeking a declaration that the plaintiff is entitled to register a second charge over the said property, for **Kshs.30,000,000/=**. During the pendency of the suit, the plaintiff has learnt that the defendant intends to dispose of the suit property, and so the main prayer is for the preservation of the *status quo*.

With regard to the replying affidavit, **Mr. Munyithya** submitted that the defendant does not dispute the *existence of a first charge* over the suit property; that the defendant does not dispute the *existing relationship* between the plaintiff and **Fidelity Shield Insurance Co. Ltd**; and that the defendant does not dispute his *indebtedness to the plaintiff*.

Counsel urged his client’s interlocutory case within the framework of the governing principles as set out in the precedent-setting case, **Giella v. Cassman Brown** [1973] E.A. 358.

Is there a *prima facie* case with a probability of success? From the affidavit evidence, the defendant undertook in writing, in 2006 to pay over to the plaintiff a sum of Kshs.30,000,000/=, and in the run-up to the payment-date, to register a *second charge* over the suit property; the defendant has admitted he is *one of* the registered proprietors of the suit property; the defendant has *not* claimed he did pay the sum of money demanded by the plaintiff; the defendant has shown *no special hardship* preventing him from executing a second charge in favour of the plaintiff; the defendant has proffered *no explanation* for the failure to perform his part in the agreement between the parties.

In the foregoing circumstances, counsel urged that the plaintiff has made the *prima facie* case for grant of the prayers sought. Such is a case in which, “*on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the [respondent] as to call for an explanation or rebuttal...*”: Court of Appeal in **Mrao Limited v. First American Bank Limited & 2 Others** [2003] eKLR.

Counsel considered the *next stage of entitlement* to interlocutory remedy: the consideration that *recompense in damages won’t do justice to the applicant*. Since the suit plot is currently charged to **Fidelity Shield Insurance Co. Ltd.**, the plaintiff has been denied the *statutory power of sale*; the plaintiff has no such right, save with the registration of the *second charge*. Had the defendant the ability to settle the debt, he would have settled it; but as he doesn’t have such ability, the plaintiff stands to be damnified; “*if the remedy lies in damages, the defendant is not able to pay those damages*” – and a Court decree for damages would be in vain.

Counsel, next, submitted that the *balance of convenience* stands in favour of the plaintiff: the plaintiff was only asking for maintenance of the *status quo*, and in this regard, “*none of the parties will suffer prejudice.*”

Learned counsel, **Mr. Kamotho** for the respondent, contested the application on the basis that “*the application seeks orders adverse to the rights of Olive Wanjiru Karanja and Fidelity Shield Insurance Limited who are not before this Court*”; and he submitted that “*the orders sought cannot be granted as they will contradict the provisions of the values of natural justice as they relate to Olive Wanjiru Karanja and Fidelity Shied Insurance Limited with respect to L.R. No. 2476/I/MN, Nyali, Mombasa*”.

In aid of the foregoing argument, counsel relied on the decision of the High Court (**Maraga, J**) in

“...the Court will not make Orders touching on accounts of people who are not party to this suit. I think it will be enough for the plaintiff to show, if he can, that the defendant cannot account for the funds withdrawn from their accounts or those held for him in her name. If he wishes to trace those funds into other people’s accounts he must make those people parties to this suit.”

For that same point, counsel also relied on another decision of the High Court (**Kubo, J**), in **Hannah Wairimu & 5 Others v. Moses Kinuthia & Another**, Nairobi HCCC No. 2863 of 1993 [2008] eKLR.

Counsel contested the prayer for an injunction on the basis that, “*the effect of [such an] Order will be to restrain the current chargee (Fidelity Shield Insurance Company Limited) from exercising its contractual and statutory power of sale over [L.R. No.] 2476/1/MN....*”

Such an argument, however, would be better coming from the interested party, rather than from the respondent herein; but it gives the signal that **Fidelity Shield Insurance Company Limited** should have been joined as a party in the suit.

It emerges, on *prima facie* perceptions, that the plaintiff does indeed have a *weighty claim* against the defendant; that, however, the plaintiff’s main prayer, to have a second charge registered, will touch on the interests of certain persons who did not formally appear as parties; that there are pertinent, cogent authorities for the proposition that Court Orders ought not to impose charges upon undoubted claims of those who have not been made parties in a suit; and that the respondent is relying on these principles to challenge the applicant’s claim.

Prima facie, the applicant has a compelling claim against the respondent; but the respondent’s suit-property is, for the moment, subject to interests not represented in the suit. The said qualification to the applicant’s case being, certainly, unanswerable, the applicant apparently, nonetheless, entertains expectations that the Court may overlook the separate personalities of the respondent being joint-owner with one **Olive Wanjiru Karanja**, and also overlook the different corporate forms of the applicant on the one hand, and **Fidelity Shield Insurance Co. Ltd** on the other. That cannot be allowed, as it would infringe upon vital elements in the identification of persons in law, and in the attribution of material rights to different claimants.

The Court is, however, all the time mindful of the obligation placed upon it by Article 159 of the **Constitution of Kenya, 2010**, which prescribes that:

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

.....

(d) justice shall be administered without undue regard to procedural technicalities...”

Since it is clear to me that the plaintiff has a weighty gravamen which ought to be resolved by determining the main cause, and as interlocutory Orders are essential for ensuring that the Court’s ultimate decree is not rendered nugatory, I hereby make Orders as follows:

(1)The plaintiff shall, within 21 days of the date hereof, amend, file and serve the plaint of 1st March, 2010 joining both Olive Mugenda Karanja and Fidelity Shield Insurance Co. Ltd as parties.

(2)Upon compliance with Order No.1 herein, and upon the additional parties filing their pleadings, the parties shall have the pre-trial process conducted with due diligence, and the matter shall be listed for mention and trial- directions.

(3)Pending the hearing of the main cause and/or any further Orders or directions by the Court, the

status quo at the suit property, namely L.R. No.2476/I/MN situate in Nyali Estate, Mombasa, shall be maintained.

(4) Parties shall have the liberty to apply.

(5) Costs shall be in the cause.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 5th day of March, 2012.

**MAUREEN ODERO
JUDGE**