

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 477 of 2011

BELL ATLANTIC COMMUNICATIONS LTD.....1ST PLAINTIFF

FRANCIS MWAURA IKINU2ND PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LTD.....DEFENDANT

R U L I N G

1. By a Notice of Motion dated 15th May, 2012, the Defendant has applied for the discharge of the order of injunction made herein on 16th January, 2012. The application is made under Order 40 Rule 7 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The grounds upon which the application is made are that the Plaintiff did not challenge the charge document in both the Plaint and Supporting Affidavit, the Plaintiff has admitted both the debt and default, that the complete charge had now been annexed, together with the statutory notice duly served upon the Plaintiff and that the Plaintiff is asking the court to re-write the contract of the parties. The Defendant contended that the Plaintiff had made no efforts at all to reduce the debt which is not disputed. Mr. Chege, learned Counsel for the Defendant submitted that the charge over LR No. 14598 is admitted, the debt of Kshs.26,468,752/60 is also admitted, counsel urged that the order of 16th January, 2012 be discharged. He referred to the cases of **Matex Commercial Supplies Ltd & Anor –v-s Euro bank Ltd EA LR (2008) I EA 261, Muhu –v-s Savings & Loan (K) Ltd & Anor EAR 1 (2008) 2 EA 261** amongst others.

2. In opposition the Plaintiffs filed a Replying Affidavit by Francis Mwaura Ikinu sworn on 29th May, 2012. The Plaintiffs denied that they were indolent in prosecuting the matter, that a considerable long time was spent by the deponent in nursing his brother a co-director in a subsidiary company Bell Atlantic Communications (Nakuru) Ltd who however eventually died in May, 2012, that due to red-tape the Kenya National Hospital has not paid the 1st Plaintiff a sum of Kshs.35 million owed to it. In submission, it was admitted that a charge was created to secure a sum of Kshs.12,927,847/60, that the order sought was in the discretion of the court, that the court ought to be guided by the desire to do justice and not to discharge the injunction and thereafter be engaged in an academic exercise, that the Defendant had not shown that the charge had been lawfully executed, that the law has since changed from the Registration of Titles Act Cap 281 to Land Registration Act, 2012, that there is now a spousal interest on the property which this court cannot ignore under Section 28 of the Land Registration Act and that the discharge applied for should therefore be declined.

3. I have considered the Affidavits on record, and the written submissions. The orders sought are discretionary. This is so because of the use of the word “may” in Rule 7 of the Order 40 of the Civil Procedure Rules. In my view, in such an application the applicant has to show reasons for being dissatisfied. Such an applicant must show, inter alia, that the conditions prevailing at the time of the making of the order have changed or are different from those prevailing now.

4. I have looked at the Plaint and affidavit in support of the injunction application. They did not challenge or deny the existence of the charge over LR No. 14598 (IR No. 681010) Karen Plains Estate. There is

also no denial that there is default. The Defendant has now produced the charge document dated 27th March, 2009 and the statutory notice dated 20th January, 2011. That notice is shown to have been properly served on 17th February, 2011 (see the Affidavit of one Alexander Ochwo Alela). Looking at the charge dated 27th March, 2009, it is not in doubt that the same is now a complete version of the one that was produced at the time the injunction was being heard. I have carefully considered the same and noted it is the same as the one produced at the injunction application stage. However, the present one has page 1 thereof which clearly shows that the borrower was the 1st Plaintiff and not the 2nd Plaintiff.

5. In my ruling of 16th January, 2012, I had granted the injunction on the basis that the charge then on record did not properly disclose how and to whom the facilities were granted. I had also noted that the statutory notice of sale relied on was defective. I also noted that there was an attempt by the Defendant to produce the proper documents vide their application of 5th December, 2011 which was however dismissed for non-attendance. The proper documents have now been properly introduced. This court has seen them and I have no doubt that since neither the Plaintiff nor the supporting Affidavit had challenged the validity of the said documents, this court cannot ignore them.

6. I am alive to the Plaintiff's contention that under Section 28 of the new Land Registration Act, 2012 the spousal interest in the suit property cannot be ignored and that the law applicable presently is the Land Registration Act 2012 and not the Registration of Title Act, Cap 289 Laws of Kenya. My view is that the passage of the Land Registration Act, 2012 did not invalidate the existing securities. Under the transitional provisions, the Land Registration Act, 2012 did not invalidate all or any of the securities that may have been existing and properly created under the previous law. In any event, the Plaintiffs did not point any provisions in the said Land Registration Act that invalidated the Defendant's security in this matter. I reject that contention. As regards the alleged spousal interest in the suit property under the Land Registration Act, 2012, my take of it is that none of the Plaintiffs can assert the same, if at all it exists. I have no spouse before me exerting any such interest over the suit property.

7. In view of the foregoing, I am satisfied that a case has been made for the discharge of the injunction granted on 16th January, 2012. Accordingly, I discharge the injunction order made herein on the 16th January, 2012. The costs of the application will be in the cause.

DATED and DELIVERED on the 28th day of September, 2012.

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A. MABEYA

JUDGE