REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 523 OF 2010

SIMON NJII MWANGI....................................1ST PLAINTIFF

JAMES MWANGI THIONGO ....2ND PLAINTIFF

VERSUS

EQUITY BANK LIMITED............................1ST DEFENDANT

RICHARD MURIGU WAMAITA T/A

GRAW ENTERPRISES.................................2ND DEFENDANT

RULING

The applicants in the Chamber Summons dated 30th July 2010, have moved the Court under **Sections 3** and **3A** of the **Civil Procedure Act**, **Orders XXX1X rules 2, 3, 4, 5**, and **7** and **X1X** of the **Civil Procedure Rules** praying, *inter alia,* for the following orders:

1. That a temporary injunction do issue to restrain the 1st Defendant/Respondent whether by itself, officers, directors, servants and/or its agents or anyone acting on its behalf from selling, advertising for sale, transferring and/or dealing with the 1st Plaintiff/Applicants' property known as plot 938 Section 111 Eastleigh, Nairobi (L.R. No. 30/111/938) and the 2nd Plaintiff/Applicants' property L.R. 36/1/764 pending the hearing of the Chamber Summons.

2. That a temporary injunction do issue on the same terms as in prayer 1 above, pending the hearing of the suit.

3. That the 1st Defendant/Respondent do deliver to the Plaintiff/Applicants accounts in respect of the 2nd Defendant/Respondent's Letter of Credit Account No. 0010592531155 and/or account No. 0010290083617 "on the amounts of money deposited and withdrawn by the 2nd Defendant/Respondent on those accounts".

Temporary restraining orders, pending the hearing and determination of the application were issued on 3rd August 2010, and have been renewed from time to time since. The Applicants wish that the court

now finds that the same should be confirmed and ordered to remain in force until the suit is heard and determined.

The application is premised on 38 grounds and is supported by the affidavit of the 1st Plaintiff/Applicant sworn on 30th July 2010, on his own behalf and that of the 2nd Plaintiff/Applicant. The 1st Plaintiff/Applicant depones that the 1st Defendant/Respondent's notice of the intended sale of the applicant's properties was received through third parties. The same is dated 25th January, 2010.

The applicants have stated that the 1st Defendant/Respondent, under a 90 days letter of credit dated 7th September 2007, advanced the 2nd Defendant/Respondent credit to import 1000 metric tons of Bitumen for sale to various customers, including the Ministry of Works. Under what the applicants say was misrepresentation, the 2nd Respondent caused them to execute blank Guarantee forms and Mortgage instruments to secure the advances accorded to him by the 1st Respondent. That despite being paid by the various customers a sum of Kshs. 29,438,000/=, being the value of the Bitumen imported and sold to them, which sum was equivalent to the amount advanced under the letter of credit, the 2nd Respondent was allowed by the 1st Respondent to withdraw this money from his account with the 1st Respondent through which the money advanced were to be repaid, and to operate the said account as a personal account, despite the fact that it was intended for the servicing of the loan advanced under the letter of credit.

The applicants claim to have been discharged from any liability under the letter of credit on the grounds that the 2nd Respondent has received Kshs. 75,000,000/= paid into the subject account in respect of the Bitumen Sales and that the Respondents altered the terms of the loan by entering into a secret agreement without involving the applicants, whereby the letter of credit was converted into a term loan of three years, with the Plaintiff/Applicants properties being committed to secure the same, despite the fact that the entire value of the letter of credit (Kshs 29,428,000/=) had been fully settled.

The applicants state also that the mortgage instruments under which the 1st Respondent intends to sell the Applicants' properties are void for reasons that the same were not executed in the manner prescribed under **Section 59** of the **Indian Transfer of Property Act**, the same having neither been attested to by an advocate and the contents thereof having not been explained to the applicants by an advocate.

The applicants read bad faith on the part of the 1st Respondent in not notifying them of the 2nd Defendant's default and failing to serve them notice under the guarantee and mortgage instruments. The 1st Applicant contends that when he and the 2nd Applicant signed the security instruments, at the reception of the offices of the 1st Respondents' advocates, their genuine intention was to assist the 2nd Respondent only in securing the letter of credit and securing his liability thereunder, strictly in accordance with the terms thereof. He admits having been the one who led the 2nd applicant into signing off his own property as security for the 2nd Respondents liability to the 1st Respondent under the letter of credit, the terms and nature of which, according to the 1st Plaintiff/Applicant were neither appreciated nor understood by the 2nd Plaintiff/Applicant owing to his advanced age and low level of education. The applicants have submitted that they stand to suffer irreparable loss, not capable of compensation in damages, if the intended sale of their properties is not restrained by way of the temporary injunction sought herein.

The application is opposed on the strength of two Replying Affidavits sworn by the 1st and 2nd Respondents respectively as follows:

(i) The 1st Respondents' Replying Affidavit of 18th August, 2010.

(ii) The 2nd Respondents' Replying Affidavit of 12th August, 2010.

Parties filed written submissions which were highlighted in court on 25th October, 2010. The submissions, together with the authorities cited in support of the respective positions have been duly considered. It is the Respondents' contention that the securities herein are valid and enforceable in all circumstances and that the applicants are not entitled to the prayers sought.

For the sake of expediency I have found it more appropriate to deal with the substantive arguments and not give undue regard to technicalities, being of the view that the same do not alter the legal position of the parties, wherein the principal debt is disputed nor is the creditor-principal debtor relationship. By the 1st applicants own admission he did agree with the principal debtor that he would assist him in securing the letter of credit for the importation of 1000MT of Bitumen, and offered him not only his own property as security, but also caused his aging father, the 2nd applicant, to do the same. This is borne out in paragraph 42 of the supporting affidavit sworn by the 1st plaintiff/applicant where he depones as follows:

"THAT I am the son of the 2nd Plaintiff and upon being approached by the 2nd Defendant honestly believed that the 2nd Defendant genuinely required his assistance. The 2nd Defendant then misled me to include my fathers' (2nd Plaintiff) property to assist the 2nd Defendant procure the Letter of Credit. The 2nd Defendant (Plaintiff/Respondent?) did not understand or appreciate the nature and consequences of the 2nd Defendant's request".

At this stage, the merits of the suit are not for consideration except only as the same relate to the issue of whether a prima facie case had been made out by the applicants for the granting of the interlocutory injunction sought. The guiding principles in applications of this nature still remain as settled in the celebrated case of **GIELLA -vs- CASSMAN BROWN CO. LTD [1973] E. A. 368.** My task therefore is to decide, firstly, whether based on the facts before me;

1. The applicants have made out a prima facie case with a likelihood of success.

2. The applicants have demonstrated that they are likely to suffer irreparable loss not compensable in damages in the event that the orders sought are not granted.

Secondly, and only if I am in doubt as regards the requirements in 1 and 2 above, whether, on the balance of convenience, the orders sought should be granted.

The question whether the applicants have made out a prima facie case hinges on the validity of the guarantee contract and the security documents. I see nothing in the copies of the guarantee and mortgage documents exhibited herein, all of which were executed simultaneously on 27th September 2007, to confirm the alleged misrepresentation as regards the execution thereof.

The terms of the credit facility granted to the 2nd Defendant/Respondent by the 1st Defendant/Respondent under the letter of 7th September 2007, are not disputed. The only issue raised in regard thereto is that it was converted into a three year loan facility, whereas the initial advance was payable within 90 days. Clause 3 thereof stated, *inter alia,* that;

"The facility will be repaid within 3 months upon demand by the bank".

The 1st Plaintiff/Applicant in his deposition states that the purpose for which the letter of credit was granted was accomplished by the importation, by the 2nd Respondent, of the products for which the advances were made, and the same paid for, through the 2nd Defendants' account with the 1st Respondent. In this regard, the 1st Respondent has stated that the monies recovered from the sale of the Bitumen was not sufficient to cover the advances made under the letter of credit and the interest accrued thereon, leading to the renegotiation of the credit facility and rescheduling of payments under a new arrangement. The 1st Respondent contends that the charges executed in its favour were continuous

securities going beyond the initial sums advanced under the letter of credit and that the facility was converted into a term loan of three years with the Applicants' knowledge and participation.

Annexed to the 1st Respondents' Supporting Affidavit is the 2nd Respondents' letter to this effect, signed *inter alia,* by the 2nd Respondent and the 1st Applicant. It does not however, bear the signature of the 2nd Applicant. The said letter acknowledges that the 2nd Respondent was indebted to the 1st Respondent to the tune of Kshs. 22,175,000/= of which he promised to pay Kshs. 2,200,000/= by the 25th of June, 2009 inorder that the term loan of three years would be in respect of Kshs. 20,000,000/= only. Another letter, dated 19th July 2010, written to the 1st Respondent by the 2nd is also exhibited. It states that the 2nd Respondent was indebted to the 1st Respondent in the sum of Kshs. 17,042, 993.46/= as at that date, acknowledging also that the 1st and 2nd Applicants' properties, forming the subject matter in this suit were still charged to the 1st Respondent as securities for the 2nd Respondents' indebtedness. By the said letter, the 2nd Respondent requested the 1st Respondent to release the 2nd Applicants' property, Plot No. 764 Eastleigh to him, on the ground that the value of the properties was higher than the loan balance, stating that the 2nd Respondent was an old man over 90 years and was very concerned that he would not be able to wait for the remaining two years for the 2nd Respondent to clear the loan.

From the facts, it appears to me that the 1st Plaintiff/Applicant was well aware of the goings on between the 1st and 2nd Respondent and of the performance of the 2nd Defendant's account towards discharging his obligations under the loan arrangement between himself and the 1st Respondent. This is borne out of the fact that he is shown to have made a personal payment of Kshs. 1,000,000/= into the 2nd Respondents' loan account on 26th March, 2009. I am therefore not persuaded that the variation of the contract, if any, can be deemed to have been without the 1st Applicants' consent, as to lead the court to consider him discharged from the guarantee executed by him and supported by the mortgage document signed by himself and which, expresses itself in clause 2:1 as follows;-

" In consideration of the lender (1st Respondent) making or continuing to make loans or advances to or otherwise giving credit or granting banking facilities or accommodation or granting time to the debtor for as long as it may think fit, the guarantor hereby unconditionally guarantees to pay the lender on demand in writing all monies and discharge the debtor's obligations without deduction, set-off or counterclaim, together with interest from the date of such demand and together also with costs and expenses."

The guarantees constituted a continuing security under Clause 3:1 thereof which is also captured under Clause 3:1 of the mortgage instruments. In its letter of 11th June, 2009 which would appear to have led to the 2nd Respondent's request for the rescheduling and conversion of the loan by *inter alia,* the 1st Respondent clearly stated that the outstandings ought to be cleared, to avoid the guarantor's properties being sold.

Whereas the nature of a guarantee is such that a guarantor may call upon the principal debtor to pay off the debt after it has become due, this must be done before the guarantor has been asked by the creditor to pay it and the creditor is not bound to follow the principal debtor prior to invoking his security under the guarantee. Moreover, it is clear from recital (B) of the Mortgage Instruments that the charge was made in consideration of mortgagee fore bearing to sue the principal debtor or to demand immediate payment from him. The 2nd Applicant, whom I have already stated appears t have been all along aware of the principal debtor's performance, never made any attempt to have the guarantee discharged at the time he alleges the terms of the letter of credit were fulfilled. If he believed that the value of the letter of credit had been paid, he was legally bound to request the creditor to call in the debt which he did not do. It was never the duty of the latter to keep the guarantors informed of the extent of the 2nd Respondent's indebtedness, since a contract of guarantee is not one of utmost good faith.

Although the 1st Plaintiff/Applicant has brought the suit jointly with the 2nd Applicant, it is clear

from his depositions in support of the application that he was the negotiator of the guarantee and security contracts entered into by himself and the 1st Respondent. It is clear that the 2nd Applicant has been the **“silent Participant”** in the whole arrangement, as is supported by the fact that he was dragged into the scheme by the 1st Applicant, and that the never signed the letter requesting for the rescheduling of the loan and its conversation into a term loan. His position as a reluctant guarantor and mortgagor is clearly demonstrated by the 1st Applicant’s deposition and as supported the 2nd Respondents letter of 19th July 2010, part of which has been reproduced in this ruling. Since, in law, guarantees and mortgages are, in essence, contracts, the court must be satisfied that there was consensus ad idem between the parties thereto inorder to ascertain the rights and obligations thereunder. Considering the facts as presented before court, there is clear doubt as to whether 2nd Applicant voluntarily executed the guarantee and mortgage documents in favour of the 1st Respondent.

Considering all the facts and my findings as set out herein above I have formed the opinion that the Applicants have not established a prima facie case against the 1st Respondent, against whom the orders sought are, in essence, directed. I hold the view that as regards the 1st Applicant, no irreparable loss can be presumed since the 1st Respondent would be able to compensate him in damages, and given the fact that his right to pursue the 2nd Respondent for compensation remain open, if indeed the latter induced him, through misrepresentation, to give property to secure the 2nd defendant’s loans. I find therefore, that he is not entitled to the orders sought.

In view of what I have stated concerning the 2nd Applicant’s involvement in the whole arrangement, I find that irreparable loss may occasion him given the fact that he may be happier to have his property than receive monetary compensation. In the event that the same is sold, and the court thereafter finds that he never voluntarily charged his property, then monetary compensation by the 1st Respondent would not constitute adequate compensation. I find, therefore, that the balance of convenience tilts in favour of the 2nd Plaintiff/Applicant.

While dismissing the application as regards the 1st Applicant I hereby allow the same as regards the 2nd and grant prayer 3 thereof as follows:-

1. **Pending the hearing and determination of the suit an order for a temporary injunction do issue, restraining the 1st Defendant/Respondent, whether by itself, officers, directors, servants and/or agents or whomsoever acting on its behalf from selling, advertising for sale, transferring and/or dealing in any other manner, with the 2nd Plaintiff/Applicant’s Plot NO. 764 Section 1 Eastleigh, Nairobi.**

2. **The issue as relates to the rendering of accounts shall be dealt with at the substantive hearing.**

3. **Costs shall be in the cause.**

DATED SIGNED and **DELIVERED**at **NAIROBI** this **9TH**day of **FEBRUARY, 2011**

M. G. MUGO
JUDGE

In the presence of:

Mr. Amadi — For the Applicant

No appearance — For the Respondent