



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 161 OF 2007

ALLAN GEORGE NJOGU::::::::::::::::::::::::::::::::::1ST PLAINTIFF
RESIDENCES COMPANY LIMITED::::::::::::::::::::1ST PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED::::::::::::DEFENDANT

RULING

This is an application for one order, apart from costs, namely, that the caution lodged by the defendant against LR NO Eldoret Municipality Block 6/308 (hereinafter “the suit property”) on 3rd August, 2001 be removed and the certificate of lease in the custody of the defendant be released to the applicant/plaintiff. The application is expressed to be brought under Order L rule 1 of the Civil Procedure Rules, sections 3 and 3A of the Civil Procedure Act, the Registered Land Act, the Banking Act and all other enabling provisions of the law. The main reasons for the application, as expressed in the application, are that the applicant has no contract disposing an interest in the suit property to the respondent; that there was no consideration for the creation of a charge; that the applicant is unable to pay rates due to the Local Authority and the Revenue Authority because of failure to produce the original title which is held by the respondent; and that it will serve the ends of the justice to remove the caution pending the hearing of the suit.

The application is supported by an affidavit sworn by the plaintiff’s director **Allan George Njogu Kamau**. The application is opposed and there is a replying affidavit sworn by one **J.M. Kisuna** the defendant’s Eldoret Branch, Manager.

The plaintiff’s claim is contained in the plaint filed on 14th September, 2007. It is pleaded, *inter alia*, that the plaintiff’s said director, at all material times, operated an account with the defendant and was, as on 4th August, 2000, indebted to the defendant in the principal sum of Kshs. 960,000/- on the security of LR Nos. **Eldoret Municipality Block 6/111** registered in the name of one **Agnes Wambui Kamau** and Uasin Gishu/Kimumu/79 registered in the name of the said director; that the defendant offered to the said director an additional loan facility of Kshs. 500,000/- on the security of the suit property with another; that the defendant failed to advance the said sum on the ground that the land rent and rates due on the securities was excessive; that the defendant then wrongfully and without cause lodged a caution against the suit property; that the said caution was lodged without lawful basis, is unjustified, oppressive and offends the provisions of sections 131, 132 and 133 of the registered land Act; that the plaintiff does not owe the defendant any sums and that if there was any liability the same is time barred.

The defendant delivered its defence on 12th October, 2007. It denied the plaintiff's claim and pleaded specifically, so far as material, as follows: that prior to 21st November, 1998, it had accorded the plaintiff's said director banking facilities and other financial accommodation and that he continuously defaulted as a result of which, as at the 21st November, 1998, he owed the defendant Kshs. 3,757,249.30; that due to his inability to repay the said sum, the defendant at the said director's request agreed to reschedule his indebtedness and an agreement dated 21st November, 1998 was executed; that it was a term of the said agreement that the said director would provide securities sufficient to cover the said indebtedness; that the said director furnished to the defendant's advocates the said securities which included the suit land; that the said director failed to pay the rates due on the securities with the results that a charge was not created over the same; that the payment by the guarantor was a product of an independent agreement with the said guarantor; and that the title to the suit land was legally placed with them or their advocates for purposes of charging the same but that the said director has failed to obtain the necessary clearance certificates and consents hence the caution;

The plaintiff filed a reply which joined issue with the defendant's entire defence and reiterated the averments in the plaint.

The pleadings were in that state when the application came up before me for hearing on 18th May, 2011. Counsel agreed to file written submissions which were duly in place by 27th July, 2011. The submissions reiterated the parties' stand-points taken, in their respective pleadings including affidavits.

I have considered the application, the pleadings, the affidavits on record, the annexures to the affidavits and the submissions of counsel. Having done so, I take the following view of the matter. The substance of the plaintiff's application is that the caution registered against the suit title is unlawfully so registered because the defendant did not advance to the said director the further sum of Kshs. 500,000/- which was the consideration for providing the title to the title to the suit property to the defendant.

From the material availed to the court by the parties, the following pertinent facts have emerged. The plaintiff and its said director have had a long relationship with the defendant spanning several years. As at 21st November, 1998 the defendant's said director was indebted to the defendant in the sum of Kshs. 3,757,249.30. An agreement was then reached under which an overdraft facility previously accorded to the director was converted to a term loan repayable in thirty (30) months, the first instalment under the term loan being Kshs. 500,000/-. The loan was to attract interest at 31% p.a. on monthly rests. The director offered, among other securities, the suit property which was then valued at Kshs. 1.2million. It was a further term of the agreement that the utilization of the facilities would be approved upon registration of security documents and confirmation that various charges had been paid.

The parties duly executed the agreement which the defendant exhibited.

It is common ground that no charge was registered against the suit property. The defendants' explanation for the failure to register the charge is that the director failed to pay the land rent and rates due on the suit property.

On 28th July, 2000 the director proposed to the defendant to pay the principal sum of Kshs. 960,000/- and 500,000/- over a period of 36 months as a decision on waiver of interest was being considered. In its response dated 4th August, 2000, the defendant accepted the director's proposal and requested for registration of a charge over two properties including the suit property.

In the end the parties never agreed on how the matter would be resolved. However, given the averments in the replying affidavit, it would appear, prima facie, that whereas a legal charge was not registered against the suit property, the director nevertheless, remained indebted to the defendant in certain sums which had previously been advanced to him. Indeed the defendant informed the director that his indebtedness was undersecured notwithstanding the failure to disburse the additional loan of Kshs. 500,000/-.

The plaintiff did not file a further affidavit to rebut the allegations contained in the replying affidavit. That is notwithstanding the averments that the director himself tendered the title to the suit property to the defendant to be charged pursuant to the said agreement of 21st November, 1998 and that the caution registered against the suit property is to safeguard the defendant's interest.

In view of which I have discussed above, I am of the prima facie view that the primary order sought by the plaintiff in its application is in appropriate at this stage. My view is buttressed by the fact that the plaintiff's main prayer in its plaint is the removal of the caution and the return of the title to the suit property. To grant the prayer sought in this application will in effect substantially determine the plaintiff's claim. It would indeed amount to granting summary judgment to the plaintiff on affidavit evidence. Yet the defence delivered by the defendant and the replying affidavit it has filed, raise serious bonafide issues which cannot conclusively be determined without a trial. The law is now settled that if the defence raises even on bona fide triable issue then the defendant must be given leave to defend. In **Patel -Vs- E.A. Cargo Handling Services Ltd (1974) E.A. 5 at Page 76, Duffus P.** rendered himself as follows:-

“In this respect defence on the mails does not mean in my view a defence that must succeed it means as Sheridan J, put it

“a triable issue” that is an issue which raises a prima facie defence and which should go to trial for, adjudication.”

I am not of the view that the defence set up by the defendant with regard to the caution is a sham. I cannot at this stage determine with conclusiveness whether the defendant's caution will be maintained at the trial. The material availed by the defendant as stated above clearly disclose, prima facie reasonable basis for the caution. I should however, be careful not to determine its validity at this stage as that is the function of the trial judge.

In view of the foregoing, the plaintiff's application is for dismissal. I accordingly dismiss the same. The defendant will have the costs of the application.

It is so ordered.

**DATED AND DELIVERED AT ELDORET
THIS 5TH DAY OF OCTOBER, 2011**

**F. AZANGALALA
JUDGE
5TH OCTOBER, 2011**

Read in the absence of :-

Mr. Muhoro H/B for Leimani for the plaintiff and
Mr Oduor H/B for Mr. Tororei for the defendant.

**F. AZANGALALA
JUDGE
5TH OCTOBER, 2011**