



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang J.)

CIVIL CASE NO. 22 OF 2010

MUHUDDIN MOHAMMED MUHIDDIN.....PLAINTIFF/APPLICANT

-VERSUS-

- 1. CFC BANK LIMITED**
 - 2. MOHAMMED YUSUF**
 - 3. THAARA AUCTIONEERS**
- DEFENDANTS**

RULING

The applicant moved the Court by Chamber Summons dated **5th July, 2010** and brought under the former Civil Procedure Rules, Order XXXIX, Rules 1 and 2. The application carried one substantive prayer, for –

“An injunction...to restrain the defendants, their servants and/or agents from selling, disposing of, or in any other manner whatsoever dealing with the plaintiff’s property known as MOMBASA/BLOCK XXV/59, Flat no. B, 1st Floor, until the hearing and determination of this suit or further orders of the Court.”

The applicant depones in his affidavit of **5th July, 2010** that 2nd defendant requested him to be surety and to guarantee 2nd defendant in respect of a Kshs.2,500,000/= loan advanced by 1st defendant – and the deponent agreed; the applicant would provide his property, L.R. No. MOMBASA/BLOCK XXV/359 – Flat No. B 1st Floor, as security over which 1st defendant would create a legal charge. He depones that when he signed 1st defendant’s documents on **21st February, 2007** he believed he was signing a guarantee in favour of 2nd defendant; but thereafter he received no communication from 1st or 2nd defendant, until **5th May, 2010** when he was served with notification of sale from 3rd defendant. Prior to the notification, neither 1st nor 2nd defendant had informed the deponent of matters such as: a default in making payment by 2nd defendant; the amount which was then outstanding and due to 1st defendant from 2nd defendant; the repayments that had been made by 2nd defendant; the dates when defaults in payment had been made by 2nd defendant.

The deponent averred that no demand had ever been made upon him as guarantor, requiring him to make any payment on behalf of the debtor (2nd defendant); and that upon receiving the notification he had proceeded to the Lands Office and obtained the relevant records – which showed him as *chargor* and 2nd

defendant as *borrower*; he had always believed he was only a *guarantor*. The charge document bore a recital to the effect that “*the plaintiff as chargor [and] debtor*”; and it also stated that 1st defendant “*has agreed to grant to the chargor (the plaintiff) and to others for whom the chargor is or may from time to time be surety, such further financial accommodation by way of loan.*”

The burden of the supporting affidavit is that the defendants, and in particular 1st and 2nd defendant, have created a less-than-transparent loan transaction imposing upon the plaintiff the role of chargor, and exposing his property to the risk of disposal in the interests of those two defendants. The deponent avers that even the address stated in the charge document is not his; he further deposes:

“...from the matters stated in paragraph 9 [of the affidavit], the charge document clearly describes me and indeed wholly treats me as the borrower and principal debtor of 1st defendant Bank.”

The deponent deposes:

“...I have never borrowed any money from the 1st defendant, no banking [facilities] have ever been granted to me by 1st defendant and no advances and/or other financial accommodation [have] ever been granted or [accorded] to me in the manner alleged in the said charge or in any other manner whatsoever.”

The applicant avers that “*unless restrained by injunction the 1st and 3rd defendants will certainly proceed to auction my property to recover an alleged debt which I do not owe 1st defendant....*”

The deponent makes a final plea:

“...in the premises, it will be unfair, unjustifiable and unconscionable if the defendants...were to proceed to sell my residential property, whereat I reside, [thereby] rendering me homeless.”

Hannah Ndarwa of 1st defendant’s Debt Management Unit, swore a replying affidavit on **17th August, 2010**, deponing that on **21st February, 2007** the plaintiff had charged the suit property to 1st defendant, “to secure the repayment of a loan, financial accommodation, banking facilities, overdraft or advances of Kshs.2,500,000/= advanced to the plaintiff and the second defendant.” The deponent avers that both the plaintiff and 2nd defendant had executed the legal charge, “and confirmed having understood the contents [thereof].”

The supporting and the replying affidavits take mutually opposed positions, the deponent in the replying affidavit even attributing falsehood to the applicant:

“...what is deponed at paragraphs 9 and 13 and at paragraph 15 of the supporting affidavit show that the plaintiff is ...deliberately confusing the true nature of the relationship that exists between him, the second defendant and the first defendant.”

The deponent avers that, as at **7th May, 2010** the amount owing from the plaintiff and 2nd defendant was Kshs.6, 509,178/70 with interest charges on top.

The 2nd defendant filed grounds of opposition to the application herein, contending as follows:

- (i) the application “*is premature, misconceived and fatally defective and should be struck out....*”;
- (ii) the orders sought are “*ambiguous and untenable in the circumstances of this case*”;
- (iii) the orders sought cannot be enforced as against 2nd respondent herein;
- (iv) the application herein is bad in law and an abuse of Court process;
- (v) it is “*in the best interest of justice that the application herein...be dismissed with costs to2nd respondent.*”

The Court has to weigh the one set of facts against the other: and this is done, firstly, by a focused assessment of the material facts; and secondly, by an appraisal of the relative strength of the submissions of counsel.

A remarkable element to be noted at the beginning is that whereas 1st defendant attributes liability collectively to the plaintiff **and** 2nd defendant, and pronounces itself to be seeking the sale of the suit property on account of loan default by **both** the plaintiff and 2nd defendant, 2nd defendant protests the plaintiff's application, and asks for it to be struck out on certain technical grounds. It is notable, in this respect, that 2nd defendant brings *no evidence* to explain his standing *vis-à-vis* the plaintiff, and how *the two* relate in financial transactions, and in regard to the suit property, to 1st defendant. Such a state of affairs, from the start, obscures the view of the Court, as to the permutations in the relevant financial transaction. It may be stated here that *a judicial decision*, if it is to rest on a foundation of conscientiousness, must be clear on such facts and such financial relationships; and where such clarity is lacking, it is the norm that the Court will reserve decision to the stage following the full hearing and taking of **evidence**.

What are learned counsel's positions on the foregoing threshold issue? And how do they sustain the claims of their clients in this matter? The answers to these questions will give the basis for this Court's Orders.

Mr. Buti for the plaintiff/applicant, submitted that "*the plaintiff has never borrowed and has never had any money advanced to him by 1st defendant to entitle [1st defendant] to sell the plaintiff's property*"; and that the notification of sale had given the name of 2nd defendant as the *principal debtor* and not the plaintiff. Counsel submitted that 1st defendant's letter of offer of loan, dated **10th January, 2007** was addressed to 2nd defendant, and not to the plaintiff.

Learned counsel submitted that "*the plaintiff's contention that he at all times thought that what he was signing were documents of guarantee remains uncontroverted on the basis of available evidence.*" Counsel contested the integrity of the charge-document displayed by 1st respondent herein: that, while the plaintiff was being treated as the chargor, and the borrower and principal debtor, there is no basis for this, since the principal debtor, the borrower, is 2nd defendant. Counsel submitted that while it is 1st defendant's position that the moneys advanced to 2nd defendant were so advanced by way of *overdraft*, 1st defendant has given no evidence "*to show the mode or manner in which the plaintiff allegedly drew the said money from 1st defendant.*"

Counsel concludes his submission by urging that: the plaintiff "*has a strong prima facie case, with a probability of success at the ...hearing of this suit*"; the plaintiff has shown that if the suit property, which is his residence, is sold, this will occasion him irreparable loss; the Court should proceed on the basis that "*having a home (residence) is a...basic right for any person [and] being deprived of the same...occasions irreparable loss to the person losing such right*"; in all the circumstances, the balance of convenience lies in favour of the applicant who stands to suffer more than the bank.

Learned counsel, **Mr. Omondi** for 1st and 3rd defendants, urged that the suit property had been offered by the plaintiff as security; the plaintiff and 2nd defendant had signed a letter of offer and charge – both of which spelt out the terms of the lending; the said letter gives 1st defendant the absolute and exclusive discretion to determine interest rates; the plaintiff **and** 2nd defendant had defaulted in their repayment obligations – and so, a statutory notice was duly served.

Counsel urged that the plaintiff has not established a *prima facie* case with a probability of success; that "*the plaintiff and the second defendant indeed defaulted, thus causing the 1st defendant's power of sale to become exercisable.*"

As to the core argument in the applicant's case, that he was not "principal debtor", counsel urged as

follows:

“That argument is, with due respect, misguided and irrelevant. The plaintiff seems to labour under the mistaken [belief] that he [will] only be liable if he received money from the first defendant.”

Counsel submitted that the express purpose of the charge in question was “to secure a loan, financial accommodation, banking facilities, overdraft or advances which were granted to him or to others for whom he was surety”, and “it therefore does not matter whether he calls himself borrower, chargor, principal debtor or any other terminology”, “the bottom line is that he offered the property as security.”

Counsel submitted that in this case, the parties had freely and lawfully entered into a binding contract, and “the Court cannot unilaterally alter the terms of the contract.” Counsel placed reliance on statements appearing in a Court of Appeal judgment, ***National Bank of Kenya Ltd. v. Pipeplastic Samkolit (K) Ltd & Another*** [1999] LLR 3269 (CAK); it appears that the relevant paragraph is the following:

“A court of law cannot rewrite a contract, between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge...The learned Judge erred not only in substituting what he thought ought to have been the proper rate of interest in place of what was agreed between the parties but he also erred in assuming jurisdiction to hear arguments, and rule thereon, on taking and settlement of accounts when such a relief was not part of the plaintiff’s claim.”

Counsel submitted that “***this [was] a clear case of default by the applicant to honour the terms of a lawful lending contract freely and commercially entered into and reduced into the form of a legal charge.***”

Counsel submitted that the plaintiff had failed to establish a *prima facie* case with a probability of success; that damages will suffice to compensate the plaintiff; and that, the balance of convenience tilts in favour of 1st defendant.

The Advocates on record for 2nd defendant are *M/s. Miller & Co. Advocates*; and the counsel with the conduct of the matter was **Mr. Nyabicha**. His general position was that the plaintiff’s property was being rightly subjected to sale by 1st defendant: because the plaintiff had admitted that he had executed a deed of guarantee and indemnity in favour of 2nd defendant; the plaintiff had admitted that he executed the charge document in favour of 2nd defendant; and so “*the plaintiff...is bound by the express and/or implied provisions in the charge document...*”

Counsel urged that the state of the law was in favour of 2nd defendant and against the plaintiff: “*the law governing guarantees and indemnities provides that the lender is always to claim from the guarantor and not the borrower*”; and so “*it was incumbent upon the guarantor to prevail upon the borrower to ensure that loan repayments are made promptly.*”

Consequently, **Mr. Nyabicha** urged: “*the plaint filed herein does not have any cause of action as against 2nd defendant and therefore, the prayers sought in the plaint do not affect 2nd defendant.*” Counsel submitted that the orders sought by the plaintiff’s application “*do not affect 2nd defendant [and] cannot be enforced as against 2nd defendant.*”

Even though the very property that secured the loan to 2nd defendant is the one threatened with sale by the chargee, counsel admits that his client “*does not have any claim in respect of all that parcel of land known as MOMBASA/BLOCK XXV/59, FLAT No. B 1st FLOOR.*” So, quite clearly, counsel is extolling what would amount to a relationship of **unjust enrichment**, as his client has given no evidence providing an explanation of the loan having been secured on this property that is acknowledged to belong

to “someone else”!

If 2nd defendant’s position is curious, and puts the Court on notice that the ground is set for unjust enrichment, it necessarily also compromises 1st defendant’s position in the eye of equity: how did 1st defendant come by this security which is so completely unrelated to any ownership claims by the borrower? The Court must give effect to the policy that the law is not to be used as subterfuge, or pure technicality, to validate *unjust gains* by a party. At this stage in the proceedings, this Court is guided by equitable principles – and one of them is to exclude any scenario of unjust enrichment.

All the defendants have anchored their cases, at the interlocutory stage, on technicalities – and they have invoked past decisions which upheld, in the relevant contexts, such technicalities. But, since 27th August, 2010 this country has a new **Constitution**, the overriding law, which binds this Court in its approach to dispute settlement. **Article 159 (2)** creates a new obligation as follows:

“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....”

Being guided by the foregoing principle; bearing in mind the vital issues of *equity* already noted; and taking into account the applicant’s uncontroverted averments that the suit property is his duly-registered property and his actual residence – firstly the law predisposes the Court to find, *prima facie*, in favour of the applicant; and secondly, the proper perception of “convenience” suggests it to be in favour of the applicant.

From the analysis in this Ruling, it is evident that the Court can speak with full certainty only after a hearing of the main cause; but at this stage, interlocutory orders must be made in favour of the plaintiff. Accordingly, I will make Orders as follows:

(1) An injunction is hereby granted, to restrain the defendants, their servants and/or agents from selling, disposing of, or in any other manner whatsoever dealing with the plaintiff’s property known as MOMBASA/BLOCK XXV/59 FLAT NO.B 1st FLOOR until the hearing and determination of this suit, or until further Orders of the Court.

(2) The Registry shall list this matter for mention and directions for the hearing of the suit, within 14 days of the date hereof.

(3) Costs shall be in the cause.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 21st day of November, 2011.

**H.M. OKWENGU
JUDGE**