REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT 55 OF 2009

ALI KHAN ALI MUSES [t/a KINONDO SILVER

SAND BEACH RESORT]……..…PLAINTIFF /APPLICANT

-VERSUS-

FIDELITY COMMERCIAL BANK LIMITED…….……RESPONDENT

RULING

On an earlier occasion this Court had determined two applications, both brought by the plaintiff/applicant herein: the Chamber Summons of ***26th January, 2010***; and the Chamber Summons of ***28th July, 2010***. In the Ruling delivered on ***18th March, 2011,*** Order No. (2) was in the following terms:

"(2) Order No. (1) [granting leave to amend the plaint] is granted on the condition that the plaintiff shall, within 35 days of the date hereof, deposit two-thirds of the loan facility and overdraft facility repayments that have fallen due, to be held in an interest-earning account in the joint names of the respective Advocates for the parties herein."

The plaintiff later returned to Court with the Notice of Motion of ***4th April, 2011,*** brought under ss.1A and 3A of the Civil Procedure Act (Cap.21, Laws of Kenya), and Order 45, Rules 1, 2 and 3 of the Civil Procedure Rules; and the subject of the applicant's prayers was precisely the aforesaid Order No.(2) in the Ruling of ***18th March, 2011.***

The instant application carries one main prayer:

"THAT this Honourable Court be pleased to review and vary Order No.2 of its Orders of 18th March, 2011 and thereby allow the plaintiff to deposit in Court the Original Leasehold Title Documents [for] Mombasa/Block 1/301 within such period as the Court shall direct instead of the plaintiff having to deposit two-thirds of the loan facility and overdraft facility repayment that [has] fallen due, to be held in an interest-earning account in the joint names of the respective Advocates for the parties herein."

The application, besides, carries two ordinary prayers: that the Court *"be pleased to make other or further Orders to meet the ends of justice"*; and that costs be in the cause.

The grounds for the main prayer are set out as follows:

(i) the applicant is "unable to raise monies as ordered";

(ii) the respondent is well secured under the charge instrument, "given that the outstanding amount owed by the plaintiff…presently is about Kshs.63,000,000/= whereas the market-value of the charged property is in excess of Kshs.155,000,000/=";

(iii) "nevertheless the plaintiff…is willing to [lodge in] Court his leasehold title for Mombasa/Block 1/301 to be held as security instead of depositing [two-thirds] of the loan facility and overdraft facility that may have fallen due as per Order No.(2) of the said Orders of ***18th March, 2011****";*

(iv) "the review and variation sought herein will serve the ends of justice, as by so doing the applicant shall continue to access the Court and be able to amend his pleadings and thereby ventilate his claims."

(v) the defendant/respondent stands not to be prejudiced if the said Order No.(2) is varied in the terms of the Orders now sought.

Learned counsel, ***Mr. Maosa*** who presented the applicant's case in this matter, submitted that the M/s. Tysons Limited valuation of the charged property, done in ***October, 2009***, shows that the *open-market* value of the same stands at Kshs.155,000,000; and *forced-sale* value stands at Kshs.110,000,000/=. He submitted that "*given that the current total indebtedness of the plaintiff to the defendant stands at about Kshs.73,000,000/=…the defendant is unlikely to suffer irreparable loss as the charged property… [provides] sufficient security to the defendant in the event…they are to sell the same to offset the plaintiff's indebtedness."*

Counsel restated the plaintiff's deposition: the plaintiff *"is unable to raise the money ordered to be deposited for reasons that all his own saving has been invested [in] an unfinished hotel which is standing on the charged property"*; the monies owing had been loaned to the plaintiff to enable him to erect the said hotel, but it fell short of the required amounts.

Counsel urged that the plaintiff *found himself in financial difficulty*; and this is why he was proposing to tender an *alternative security* – a deposit in Court of the suit property's documents of title pending amendments to the plaint. Counsel urged that, providing the original titles for the suit property ensures that "*the defendant's interests will.…be adequately catered for as there will be no likelihood of the defendant suffering irreparable loss or damage while the suit awaits [hearing]."*

Counsel urged that the plaintiff has moved the Court in "*an effort to have this claim ventilated, and to lock him out will deny him such an opportunity…"*

Learned counsel, ***Mr. Mutubia***, for the respondent, took a contrary position. He urged that since the Order of ***18th March, 2011*** which is the subject of the instant application, was made alongside injunctive Orders in favour of the plaintiff, *"the outstanding issue is not whether the defendant should be restrained from selling the suit premises, but whether the conditions for the grant of the injunction should be varied."* In this regard, counsel invoked Order 40, Rule 2(2) of the Civil Procedure Rules, which provides:

"The Court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit."

Counsel submitted that this Court had duly considered options, in granting injunction – a discretionary remedy – and ordered security to be deposited in the form of two-thirds of the amount due on the loan and overdraft accounts.

Counsel contested the first ground of the plaintiff's application, *"that the plaintiff/applicant is aggrieved by Order No.2 of the Court's Orders of* ***18th March, 2011****…";* and especially the attribution of the said grievance to the plaintiff's own inability to raise the monies he was required by law to pay. Counsel urged: "*The remedy available to a litigant 'aggrieved' by any decision of a Judge of the High*

Court is to appeal to the Court of Appeal." The essence of the grievance, counsel submitted, is that the Court "*ought not to have ordered the deposit of two-thirds of the amount due"*, and so a lack of jurisdiction is, in effect, being implied; or alternatively it is being contended that the Court though it had the jurisdiction, "*exercised that power injudiciously*" – and in either case, the proper remedy lies in appeal, and it is not a matter for review.

Learned counsel contested the propriety of the proposal to lodge property title in Court as security for an outstanding claim: whereas the relevant certificate of lease is dated ***14th June, 2004***, and as from that date the Indian Transfer of Property Act, 1882 which provides for security by way of deposit of title [s.100A(2)(c)], had ceased to apply to the suit property. It is wrong as a matter of law, counsel urged, for the plaintiff to attempt to create an equitable mortgage (which was applicable under the Indian Transfer of Property Act) for the suit property which is registered under the self-contained scheme of the Registered Land Act (Cap.300, Laws of Kenya). It was urged that equitable mortgages are prohibited under the Registered Land Act; hence this Court lacks the power to order a deposit in Court of the certificate of lease, in place of cash (ss.4,38, 65 and 164 of the Registered Land Act).

Counsel submitted that a security given by deposit of title, as is proposed by the applicant, would be in vain, as it cannot be enforced: for the property is held as leasehold, bearing certain restrictions; and the relevant restriction is that there can be no disposition without the written consent of the lessor, namely in this case, the Government of Kenya. The lessor had not given any consent to the depositing of the property title in Court. Counsel submitted that the plaintiff's interest in the suit property is a leasehold of 99 years, as from 1914 – meaning that his remaining interest covers only some two years.

Counsel submitted that the title document by itself, in this case, was of limited value in relation to the defendant's entitlement; for s.32(2) of the Registered Land Act provides that "*a title deed or certificate of lease shall be only prima facie evidence of the matters shown therein and the land or lease shall be subject to all entries in the register.*" Hence "*it would be unsafe to act on that certificate in the absence of a certificate of official search."*

Counsel submitted that "*the defendant merely wishes to enforce the statutory power of sale unless the plaintiff pays the amount due under the loan and the overdraft"*; for "*a deposit of a certificate of lease for land registered under the [Registered Land Act] would not entitle the defendant or the Court to sell the property comprised in that certificate because…that practice is expressly prohibited."*

Counsel submitted that as a matter of uncontroverted fact, the plaintiff had received Kshs.43,000,000/= from the defendant, and is currently indebted to the defendant in the sum of Kshs.73,000,000/= out of which no repayment has been or is being made.

In view of those facts, counsel adverted to a general principle stated in the **Constitution of Kenya, 2010**, that the Courts are to "*administer justice without undue regard to procedural technicalities"* (See **Article 159(2)(d));** and he urged: *"a man borrows money on the security of his property, defaults in repayment of the loan, admits the indebtedness, confesses that he is broke, and rushes to Court to buy time.*" He submitted that additional time would be of little value to the plaintiff who had exhausted the monies borrowed from the defendant.

Counsel submitted that the plaintiff had not shown any grounds which should be the basis for a review of existing Orders: there is no disclosure of the discovery of new and important matter or evidence which, even with the exercise of due diligence, could not have been known by the applicant at the time the Order was made; no mistake or error apparent on the face of the record has been shown.

That the plaintiff is indebted to the defendant in substantial sums is well acknowledged, and, just as learned counsel, ***Mr. Mutubia*** urged, the respondent, who is in the business of providing banking services, is entitled to realize such lawfully-committed property, like the suit premises herein, as forms part of the contractual obligation of a party who has been granted loans or overdrafts. In this Court's Ruling in earlier applications dated ***18th March, 2011*** certain statements appear which, as they fundamentally touch on the context of the instant application, may be set out here:

"The main cause is founded on certain undisputed facts: the defendant advanced a substantial loan to the plaintiff, and the plaintiff employed the same for his own purposes; but the plaintiff did not repay the loan, as repayment fell due. The plaintiff gave a security in landed property, as the basis for the loan…

"This, clearly, is a commercial contract, imposing obligations on each of the parties: and the obligation resting upon the plaintiff is to pay up; if he fails to pay any sum due, then he is under obligation to arrange a special accommodation through a subsidiary agreement."

In the earlier Ruling, this Court stated on record that:

"On the facts of this case, the plaintiff does not, from the start, show a *prima facie* ***case for the Court to consider, in relation to the application for interlocutory injunctive relief."***

The Court, however, on that occasion exercised a discretion magnanimously to grant the plaintiff leave to amend his plaint even though, from *prima facie* appearances the suit will not be able to garner any momentum of effectiveness.

In the instant application I find the only technically feasible contention to be that the plaint is being amended, and that this Court should set the stage for it to be heard. An Order issuing from this Court, for trial, is destined, for all practical purposes, to artificially prolong the contention; and if the parties appreciated this point they would seek a genuine, fresh understanding, just as this Court signalled in the earlier Ruling.

I find that no obligation in law or equity, at this stage, justifies a review of the earlier Orders in the terms proposed by the applicant. No case has been made in law for the Court to order the deposit of land title documents as security, particularly in view of the comprehensive scheme of the Registered Land Act (Cap.300) under which the suit property is registered.

Besides, the applicant seeks the review of a Ruling of the Court without showing that there was some error or mistake on the face of the record; and without any claim at all that some new fact or evidence has emerged, which with due diligence, the plaintiff could not have noticed and brought to the attention of the Court at the time of the hearing that led to the earlier Ruling.

There is no valid *lis* for judicial resolution, where a debtor avers that he is aggrieved because '*he is unable to raise monies as ordered [by the Court*]': but if indeed this is a grievance for resolution, then it would only be a matter for appeal.

I find the application to have no merit; and accordingly, I dismiss it with costs to the respondent.

Failing any consent between the parties, the main suit herein shall be listed for mention and for directions within 14 days of the date hereof.

Orders accordingly.

SIGNED at **NAIROBI** …….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 15th day of December, 2011.

H.M. OKWENGU
JUDGE