REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 128 of 2009

HARVEER INVESTMENTS COMPANY LIMITED…..……
PLAINTIFF

VERSUS

EQUITORIAL COMMERCIAL BANK LIMITED …..1ST DEFENDANT

PRAHLAD SINGH BHANGRA ……....2ND DEFENDANT

COME-CONS AFRICA LIMITED …….3RD DEFENDANT

ADMATNX COMPANY LIMITED ……..…..4TH DEFENDANT

R U L I N G

The facts of the case are that the Plaintiff/Applicant, on the 17th September 2003, applied for a loan of Kshs.20 million from the 1st Defendant. The letter applying for the loan is annexure I in Mr. Kiiru's affidavit. The 1st Defendant gave the Plaintiff a Letter of Offer for advance of Kshs.20 million, dated 18th September 2003. The offer was accepted and the money advanced. On the 14th November, 2003 the Applicant applied for additional facility of Kshs.7 million which was also granted. This latter advance has been contested by the Applicant.

The Plaintiff has challenged the two transactions leading to the borrowings in issue in this case on the following grounds:

1. The transaction between it and the 1st Defendant is oppressive and should be set aside because:-

a) It was obtained by coercion and use of threats and undue influence over Harvinder Pal Kaur Bhangra.

b) There never was any money due from Come-Cons Ltd, Admatnx Ltd or Prahlad Bhangra to the 1st Defendant nor any debt between them.

c) There being no debt, there was no basis for the transaction between the plaintiff and the 1st Defendant.

d) The charge of 19th September 2003 is therefore invalid for lack of consideration.

2. The 1st Defendant has loaded the Plaintiff's account with a sum of kshs.7,000,000 which sum is not part of the charge of 19th September 2003.

3. The sum of Khs.7,000,000 not being part of the charge, the 1st Defendant has no power of sale respecting this figure and its accrued interest.

4. The 1st Defendant cannot show if any money is still due to it once it removes the sum of Kshs.7,000,000 and its accrue interest.

The Plaintiff also relies on the affidavit sworn by the 2nd Defendant in which the following facts are deponed in support of the application.

1. That he had fled the country after being threatened by the 1st Defendant's C.E.O.

2. That he remained outside the country and could not come back till his wife executed a charge in favour of the 1st Defendant.

3. That he never owed the 1st Defendant any money.

4. That come-Cons Ltd and Admatnx Ltd did not owe the 1st Defendant any money.

5. The said Prahlad Bhangra has produced evidence that the accounts of Come-Cons Ltd, Admatnx Ltd and his own were in credit at the time it is alleged that they owed the 1st Defendant Kshs.20,000,000.

The issues which emerged from this application are:

1. Failure of consideration in regard to both borrowings.

2. The issue whether there was a second borrowing of 7th November 2003.

3. Whether there was undue influence and coercion in regard to the execution of the document touching on the two borrowings.

On the issue of consideration, Mr. Mwangi for Plaintiff/Applicant submitted that the Bank was unable to prove any consideration for the mortgage. Mr. Mwangi contended that the letter of offer executed between the Plaintiff and the 1st Defendant clearly stated that the money was being borrowed to pay the debts of the 2nd, 3rd and 4th Defendants. Counsel relied on the affidavit sworn by the 2nd Defendant in which he has produced statements of account for the 2nd to the 4th Defendants which show a credit balance at time the debt is alleged. Mr. Mwangi submitted that since the 2nd to 4th Defendants' statements were in credit at the time of the alleged borrowing, that in the circumstances there was a *prima facie* case that there was no consideration for the case which the 1st Defendant is trying to enforce, and that interim injunction should issue. The Advocate relied in the case National Bank of Kenya vs Kwanza House Ltd CA 236 of 1996 thus:

"*There was more than sufficient evidence to support the crucial holding of the learned Judge of the superior court that the consideration for which the respondent's property was charged to the appellant namely, that the appellant would open a letter of credit to the value of Kshs.75 million, and this not having been done by the appellant, entitled the respondent to have the charge discharged by the appellant."*

With respect, the cited case does not apply to this case. In the instant case, the Plaintiff applied for and obtained loan facilities from the 1st Defendant.

Mr. Karori for the 1st Defendant opposed the application. Counsel relied on the affidavit of Joseph Kiiru, sworn in reply to the instant application. Counsel submitted that at page 71 of that affidavit, the court will note that it is a statement of account of the Plaintiff held by the 1st Defendant which is for the period between 1st October 2003 and 19th February 2009. Counsel drew the court's attention to an entry in that statement which demonstrated how the Kshs. 20 million was arrived at. Mr. Karori submitted that the same statement had various entries showing payments made by the Plaintiff towards the reduction of the Kshs.20 million loan. Mr. Karori contended that if no consideration for the loan was given to the Plaintiff, then there was no need for the Plaintiff to make any repayment towards reduction of the loan. Counsel submitted that as demonstrated in the Plaintiffs' statement with the 1st Defendant, there was indeed a debt owed to the 1st Defendant by the Plaintiff. Counsel also drew the court's attention to page 1 of Mr. Kiiru's annexture, which is an application for a loan by Mrs. Bhangra made on behalf of the Plaintiff. In that letter the Applicant, who is the Plaintiff, clearly indicated that the Kshs.20 million loan was required to pay the debt owed by the 2nd to 4th Defendant. Mr. Karori submitted that the Plaintiff could not be heard to deny that he applied for the loan when the letter is self explanatory.

Mr. Karori also relied on various correspondences between the 1st Defendant and the Plaintiff. He pointed out that at page 54 of Mr. Kiiru's affidavit was a hand written note in which the Plaintiff was forwarding a payment of Kshs.799,000/- towards the reduction of the loan. At page 56 of the same affidavit is a letter in which the Plaintiff makes reference to the loans.

I have considered the submission by both counsels. I have noted that the following documents were executed in support of the two loans facilities, the one for 20 million, granted on 18th September 2003 and the additional loan of Kshs.7 million, granted 7th November 2003.

(i) Credit Facility letters executed by the plaintiff to secure both facilities, one dated 18th September 2003 and the other 7th November 2003. These are annexure "JK2(a)".

(ii) General Terms and conditions of the credit facilities executed by the Applicant on 19th September 2003. These are annexure "JK2(b)".

(iii) Letters of Agreement for Advance Accounts and Financial Accommodation executed by the Applicant, dated 19th September 2003 and 14th November 2003 respectively. They are annexure "JK3(c)".

(iv) A letter dated 6th November 2003, instructing the 1st Respondent to transfer the 2nd Respondent's account to the Applicant's loan account. The letter is "JK3(b)".

(v) In support of authority to obtain the loan facilities, the Plaintiff gave minutes and Directors Resolution dated 19th September 2003. These are "JK4 & 5".

(vi) Guarantees for Kshs.20 million executed, one by Sukhdep Bhadur Singh Bhangra and the other by Harvinder Kaur Bhangra both dated 19th September 2003, "JK6a" and "JK6b".

(vii) Guarantees for Kshs. 7 million by Mr. S.B.S. Bhangra and Mrs. H.K. Bhangra both dated 14th November 2003. They are "JK6c" and "JK6d" respectively.

The 1st Defendant contends that the Applicant defaulted in repaying the loan amount and that as at 21st June 2003, it was indebted to the 1st Respondent in the sum of Kshs.20,553,785.55. The 1st Defendant has annexed its letters in which it demanded the said sum from the Plaintiff dated 21st June 2005 as "JK8 & 9". The 1st Defendant has annexure JK10 and 11 in Mr. Kiiru's replying affidavit which is proof that the Plaintiff sought indulgence from it to repay the loan. Also annexed as JK12 is the Plaintiff's letter to the 1st Defendant requesting for the re-scheduling of the balance of the sum outstanding, and offering

repayment by monthly installments of Kshs.400,000/=. The letter is dated 1st May 2006. Another proposal dated 30/9/2008 is annexure JK15. The 1st Defendant's case is that there was default in the payments leading to issuance of Demand and Statutory Notices to the Plaintiff by the 1st Defendant's advocates. The Demand and Notices are JK13 and JK14. The Demands issued after default in payments as per the proposals in the Plaintiff's letter of 30th September, 2008 are marked JK16 and JK17. Those issued after default in payments as per the proposals made on 2nd December 2008 are JK20 and JK21.

The 1st Defendant has annexed JK19, a statement of the Plaintiff's loan account with it showing indebtedness as at 2nd October 2008.

I have considered the submissions by both counsels. I have also considered the evidence placed before the court. There is massive documentary evidence to show that the Plaintiff applied for two loan facilities, that is the loan of 20 million applied for on the 18th September 2003 and the additional loan of 7 million, applied for on the 14th November, 2003. Both loans were granted. There is massive documentary proof that the Advances were made to the Plaintiff and that eventually the Plaintiff did make repayments towards reducing the two loans. The letter of application for the first loan, which is dated 17th September, 2003 clearly shows that the Plaintiff indicated that the loan was being sought for repayment of debts owed by the 2nd to the 4th Defendants. The Plaintiff has purported to challenge this position through the affidavit of the 2nd Defendant, in which he has annexed Statements of Accounts for the 2nd to the 4th Defendants which indicate that all three Defendants had no indebtedness at the time the two loans were allegedly applied for. Those Statements cannot assist the Plaintiff. The purpose of the loan was not indicated by the 1st Defendant but by the Plaintiff. Having succeeded in obtaining that loan and the monies having been advanced, it matters little what the purpose of the loans was or how the Plaintiff applied the monies so obtained. I am satisfied that the evidence before the court clearly proves that the Plaintiff did obtain the two loans from the 1st Defendant. The two loans were advanced as demonstrated in the Plaintiff's statement of account. The Plaintiff also secured both loans by executing Guarantees and Indemnities, and providing security in form of Charges, to secure both loans to the 1st Defendant. There is proof thereafter that the Plaintiff embarked on repaying the two loans before defaulting. On a balance of probabilities, the issue of consideration can only be resolved in favour of the 1st Defendant.

The second issue is whether there was a second borrowing of Kshs.7 million in November, 2003. This issue is already answered in my findings on the issue of consideration, and I need not delve into it any further. I do find documentary proof that the Plaintiff applied for an additional loan of Kshs.7 million in November, 2003 and that the loan was advanced. In addition to this, the Plaintiff also supplied Guarantees and Indemnity and Charges for the purposes of securing the additional loan to the 1st Defendant.

In regard to the issue of undue influence and coercion, the Plaintiff's contention is that it was coerced into applying for the two loans in order to secure the 2nd Defendant's debts. Mr. Mwangi for the Plaintiff contends that Mrs. Bhangra, who applied for these loans on behalf of the Plaintiff company, is the wife of the 2nd Defendant. Mr. Mwangi submitted that since the application for the loan was by the 2nd Defendant's wife, that should have put the bank on notice that there was a likelihood the Plaintiff was being coerced to secure the 2nd Defendant's indebtedness. For this preposition the advocate relied on two English cases. In Barclays Bank PLC vs. O'Brien & Another [1994] 1 A.C. 180 it was held:

"*There was no basis for providing special protection in equity to wives in relation to surety transactions; but that where a wife had been induced to stand as surety for her husband's debt by his undue influence, misrepresentation or some other legal wrong, she had an equity as against him to set aside that transaction; that on ordinary principles the wife's right to set aside the transaction would be enforceable against a third party who had actual or constructive notice of the circumstances giving rise to her equity or for whom the husband was acting as agent; that when a wife offered to stand surety for her husband's debt in a transaction which was not to her financial advantage and which carried a substantial risk of the*

husband committing a legal or equitable wrong entitling the wife to set aside the transaction, the creditor was put on inquiry and would have constructive notice of the wife's rights unless he took reasonable steps to ensure that her agreement to stand surety had been properly obtained; that, in the circumstances, the bank was fixed with constructive notice of the wrongful misrepresentation made by the husband to the wife and that the wife was entitled as against the bank to set aside the legal charge on the matrimonial home securing the husband's liability to the bank."

The second English case relied upon was Royal Bank of Scotland Plc v. Etridge (No. 2) [2002] 2 AC 722 where it was held:

"*Whenever a wife offered to stand surety for the indebtedness of her husband or his business, or a company in which they both had some shareholding, the lender was put on inquiry and was obliged to take reasonable steps to satisfy itself that she had understood and freely entered into the transaction. The steps reasonably to be expected of a lender in relation to past transactions were to bring home to the wife the risk she was running by standing surety, either at a private meeting with her or by requiring her to take independent advise from a solicitor on whose confirmation the lender might rely that she had understood the nature and effect of the transaction. In respect to future transactions the lender should contact the wife directly, checking the name of the solicitor she wished to act for her and explain that … protection it would require his confirmation as to her understating of the documentation to prevent her from subsequently disputing the transaction. The lender should not proceed until it had received an appropriate response from the wife and should in every case receive the written confirmation from the nominated solicitor. Subject to the husband's consent to disclosure, without which the transaction could not in any event proceed, the lender should routinely furnish to the nominated solicitor financial information relating to the facility and the husband's existing indebtedness to enable a proper explanation to be given to the wife. The nominated solicitor should require confirmation that the wife wished him to act for her, and he might, so long as no conflict of duty or interest arose and he was satisfied that it was in her best interest to do so, also act for the husband or the lender……."*

In response to the submissions by Mr. Mwangi on the issue of coercion and undue influence, Mr. Karori submitted that the court should note that the application for the loans was by a company and not by the wife of the 2nd Defendant. Counsel submitted that the Plaintiff was a company and that the arguments that the loan was by a wife does not apply to the circumstances of the case. Mr. Karori urged the court to find that Mr. Mwangi's argument was misleading especially with the statements that the bank was put on notice that a wife was securing her husband's indebtedness. Counsel distinguished the cases relied upon by Mr. Mwangi and submitted that they did not apply. Counsel has relied on the case of Kenya Commercial Bank Limited and Another vs. Samuel Kamau Macharia & 2 others [2008] eKLR where the Court of Appeal has set out the principles that apply to the doctrine of economic duress which is the doctrine invoked by Mr. Mwangi. At page 20, the court observed:

"*The doctrine of economic duress is therefore now clearly established in the Law of England and its existence was firmly stated by the House of Lords in Dimskal Shipping Co. Ltd. vs. I.T.W.F [1992] 2 AC 152 and in a subsequent number of other cases. Although the doctrine is now firmly established, however, there remains considerable doubt and some disagreement over the circumstances in which relief will be granted, and how the decisions are best explained. It is evident from the dicta in Occidental (ibid) and the decision in the Pao On case that a party who has agreed to a contractual variation cannot always avoid the variation simply because the other party had threatened to break the contract if it was not varied and this threat had some influence on the party seeking relief. It must be stated that in all cases of duress it is necessary that the victim's agreement was caused by the duress. However, it appears that the nature of the causation required differs according to the nature of the duress. In Barton v. Armstrong [1976] AC 104 the Privy Council, relying on the analogy of fraud, held that it was sufficient that the threat was a reasons for the victim entering the contract; not only it did not have to be the predominant reason, but the victim was entitled to relief even if he had not shown that he would not have entered the contract without the threat. It would be up to the party who made the threat to show that it had not influenced the victim in any way.*

….At common law money paid under economic compulsion could be recovered in an action for money

had and received; See Astley v Reynolds [1731] 2 Stra 915, 93 ER 939. The compulsion had to be such that the party was deprived of "his freedom of exercising his will." It would appear that American Law, also, now recognizes that a contract may be avoided on the ground of economic duress. See Williston on Contracts (3rd Edn, 1970 chapter 47). The commercial pressure alleged to constitute such duress must, however, be such that the victim: -

(i) - must have entered the contract against his will;

(ii) - must have had no alternative course open to him; and

(iii) - must have been confronted with coercive acts by the party exerting the pressure. (see Williston on Contracts (ibid)

A keen study of decisions of economic duress shows that American Judges pay great attention to such evidential matters as the fact or absence of protest, the benefit received and the speed with which the victim has sought to avoid the contract."

In addition to this Mr. Karori drew the court's attention to a certificate that was signed by Mr. Mwangi himself, who is the Plaintiff's advocate, which is found at page 47 of the 1st Defendant's bundle, where Mr. Mwangi has given the following certificate:

"*I CERTIFY that the above-named HARVINDER BHANGRA and SUKHDEV BHADUR BHANGRA appeared before me on the 19th day of September 2003 and being identified by/known to me (being known to me) acknowledged that above signatures or marks to be his/her/theirs and that he/she/they had freely and voluntarily executed this instruments and understood its contents.*

SIGNED DATE

ADVOCATE 30-9-2003

SEALED with the Common Seal of:

EQUATORIAL COMMERCIAL BANK LIMITED

In presence of:

Director

Secretary"

I have considered the submission of counsel and the cases cited on the issue of undue influence and coercion. Mr. Karori for the Respondent maintained that the doctrine of coercion cannot apply to this case because the borrowings in issue in this matter were applied for by a company and not an individual. That is not the correct position. The Royal Bank of Scotland case, supra, is illustrative that even where a company was applying for the facility or securing it, if both the wife and the husband were shareholders, the Bank is put on inquiry. In the cited case, the Banks obligation is to confirm from the wife or her solicitor that she understood the transaction and that she had entered into it voluntarily. The applications herein were made in writing and all the Guarantees and Securities executed as required. In addition to this the Advocate of the borrower, who also happens to be the Advocate for the Plaintiff in this case, wrote a certificate confirming that the parties who executed the charge, that is HARVINDER BHANGRA, wife of the 2nd Defendant and a Director of the Plaintiff and SUKHDEP BHADUR, had freely and voluntarily executed the instruments. That is true of the Charge executed for the first loan.

The Applicant has neither alleged nor shown that duress was used directly upon Mrs. Bhangra to coerce the Plaintiffs' representatives to either apply for the loan or to provide securities for the said loans. The

Applicant needed to present before the court some fact or evidence which, in the eyes of the law could be regarded as coercion of Mrs. Bhangra will, who together with Mr. Bhadur applied for and executed the securities for the loans in question. Without any fact that could lead the court to find that there is material upon which it could find that there was no true consent on the part of the Plaintiff's representatives to apply for and/or to secure the loans, the court cannot rule in the Plaintiff's favour. There was no evidence placed before the court to show that coercion influenced the will of Mrs. Bhangra at the time she applied for the two loans in the Plaintiff's name, as a director of the Plaintiff.

The Plaintiff has relied on the affidavit of the 2nd Defendant in which he has stated that he fled this country before the loans were applied for as a result of threats against him by the Chief Executive Officer of the 1st Defendant. In law, coercion can only apply if the person who entered into the contractual situation was the one upon whom duress was applied. In this case, Mrs. Bhangra, the 2nd Defendant's wife, cannot rely upon any duress, coercion or influence that may have been exerted upon her husband, the 2nd Defendant, as a ground upon which to challenge the transactions and invoke the doctrine of economic duress to vitiate the transaction. Coercion has to be direct, it cannot be implied, or applied by remote control. As set out in the case of Kenya Commercial Bank & Another vs. Macharia, supra, to constitute duress, there must be evidence that the victim entered the contract in question against his/her will; that he had no alternative course open to him and that he was confronted with coercive acts by the party exerting the pressure. In the instant case there is a disconnect between the coercive acts complained of and the party who entered into the transactions in question. It is my view therefore that the Applicant has not met the requirements to invoke the doctrine of economic duress. There is no proof that there was any coercion in law that would vitiate the contract in issue.

I have come to the conclusion that the evidence placed before this court is clear that the plaintiff applied for two loan facilities from the 1st Defendant; that the loans were advanced to the Plaintiff. That the Plaintiff was provided Indemnity Guarantees, and Charges as securities for the two loans so advanced; that it has defaulted in repayments. I have also come to the conclusion that the Plaintiff's representative, in particular Mrs. Bhangra entered into the contractual transactions voluntarily without any coercion exerted against her. Her advocate then Mr. Mwangi confirmed in writing under certificate that Mrs. Bhangra entered into the contract voluntarily. Neither Mrs. Bhangra nor her Advocate can renege from the certificate. I find that in the circumstances the Plaintiff has not established a prima facie case with a probability of success at the trial. In any event, damages would be an adequate remedy for the loss of the suit property, if the Plaintiff succeeds at the trial. Finally on a balance of convenience, I find that convenience tilts in favour of the Respondent. The application dated 25th January, 2009 is therefore dismissed in its entirety with costs to the Respondent**.**

Dated at Nairobi this 29th day of May 2009.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mungai holding brief Mr. Mwangi for the Plaintiff

Mr. Karori for the Respondents

Ms. Mate for 1st Defendant/Respondent

LESIIT, J.

JUDGE