



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

Civil Suit 176 of 2009

**CHARLES MUTAHI MWANGI
APPLICANT/PLAINTIFF**

VERSUS

**IMPERIAL BANK LIMITED.....1ST
RESPONDENT/DEFENDANT**

**QUEST LOGISTICS LIMITED.....2ND
RESPONDENT/DEFENDANT**

**ROGERS GACHUHI KAMITI3RD
RESPONDENT/DEFENDANT**

RULING

By way of stating the background of this matter, the plaintiff/ applicant instituted this suit against the defendants seeking a permanent injunction restraining the 1st defendant or their agents from attaching or disposing his motor vehicle Reg. No. KAX 316 L or selling it by public auction. The plaintiff also filed a Notice of Motion 17th March 2009 seeking for injunctive relief as well as a mandatory order to compel the 1st defendant to release his log book and motor vehicle Reg. No. KAX 316L.

The application is premised on the grounds stated on the body thereto and the supporting affidavit sworn by the applicant on 17th March 2009. According to the plaintiff, he entered into an agreement dated 29th February 2008 with the 3rd defendant in which he granted the 3rd defendant the log book for his motor vehicle Reg. No. KAX 316L Mitsubishi bus to enable the 3rd defendant obtain an overdraft facility from the 1st defendant. That agreement provided that the 3rd defendant would settle the overdraft with the 1st defendant within two months and the log book of his motor vehicle would be returned to him.

The 3rd defendant also agreed that should the 1st defendant dispose off the plaintiff's motor vehicle due to default, the 3rd defendant was liable for the value of that motor vehicle. On the basis of that agreement, the plaintiff executed a guarantee in which he stood surety for the 3rd defendant. The plaintiff contends that he was not informed by the 1st defendant that the 2nd and 3rd defendants were not servicing an overdraft facility. The plaintiff also alleged that he was not sent the statements regarding the overdraft account and the 1st defendant declined to surrender the log book after the expiry of two months when the overdraft he guaranteed expired.

The plaintiff further argues that the guarantee was to remain in force for a period of two months. The

plaintiff claims he was also in the dark regarding the default by the principal debtors, he only realized that he was in jeopardy when he was informed by a representative of the 1st defendant that his vehicle would be attached because the 2nd and 3rd defendant had defaulted in the loan repayment. The plaintiff tried to place a caution over the 2nd and 3rd defendant's property which they were developing with the money secured from the overdraft without success.

It is the plaintiff's argument that no consideration was passed to him by the defendant therefore the guarantee was a nullity. Counsel urged the court to be persuaded by the decision in Kisumu Civil Appeal No. 20 of 2002 Washington Otieno Ogindo vs. The Co-operative Bank of Kenya. In that case, Tanui J. Held that an extension of time within which to pay the original loan was tantamount to a material variation of the contract which affected the rights under the guarantee. Counsel drew a parallel and submitted that since no consent was sought from the plaintiff to extend the period of two months the plaintiff's guarantee should be released.

This application was opposed by the respondent; counsel relied on the replying affidavit by Hilda Wanjiku the legal officer of the 1st defendant. According to the 1st defendant, the 2nd defendant requested for an overdraft facility of Ksh.1.5 million to enable him clear a consignment of goods at Mombasa Port. A letter of offer dated 7th March 2008 was issued to the 2nd defendant and the conditions stipulated that the facility would be secured by the 3rd defendant. The plaintiff signed the letter of offer on his own volition and committed himself to those terms.

It was an express term of that letter of offer that the plaintiff would pledge his motor vehicle registration No. KAX 316L as security for the overdraft. Subsequently the plaintiff executed a guarantee and pledged his motor vehicle by depositing his original log book and transfer forms signed in blank with the 1st defendant. The 1st defendant was not a party to a separate agreement between the plaintiff and the 3rd defendant. The 1st defendant was not privy to the arrangements between the plaintiff and the 3rd defendant under which the plaintiff agreed to guarantee the facility and pledged his motor vehicle.

The plaintiff having pledged the motor vehicle on the terms and conditions contained in the letter of offer and having fully signed the acceptance to be bound by the terms and conditions cannot now turn round after the 2nd defendant failed to service the loan and demand for the release of the motor vehicle. The purpose of a guarantee is to vest a duty upon the guarantor to ensure the 2nd defendant honored his obligations in order to protect the security which was pledged.

According to the 1st defendant the plaintiff failed in his duty to ensure the overdraft was repaid, there is a sum of Ksh.2,607,591.40/- still outstanding and the plaintiff is liable and so is the security pledged in respect of that borrowing which the 2nd defendant has failed to pay despite several reminders and demands. On the allegation that the security of pledge was to expire after two months, the 1st defendant contends that the security was to remain in force until the settlement of the facility by the 2nd defendant. The 1st defendant is not obliged to release the pledge until the debt is settled.

In further exposition of the above grounds counsel argued that the plaintiff pledged his motor vehicle through the 1st defendant thereby giving the right to repossess and sell it in the event of default. According to the letter of offer, the facility was available until 31st March 2008, when it was supposed to be reviewed. What the period meant was the 2nd defendant could utilize the facility and the matter would be reviewed on that date. The 2nd defendant has written several letters admitting its inability to pay. Although the guarantee document is not stamped section 19 of the Stamp Duty Act, makes it inadmissible in evidence but it can be stamped subsequently, as it is a contract. The guarantee is not invalid and does not stop the parties from exercising their rights under the document.

Counsel submitted that the plaintiff failed to meet the threshold set out for granting a mandatory order of injunction which can only be granted in very clear cases. In this case there is an outstanding amount which is not disputed. In any event the plaintiff can be compensated with damages if the motor vehicle is

repossessed and sold.

Having set out the summary of the rival submissions, the issue for determination is whether the plaintiff has established a prima facie case with a probability of success to warrant the granting of a mandatory order of injunction. Mandatory orders of injunction cannot only be granted on the basis of clear evidence because the order is final in nature. It is determinable from the material before this court that the plaintiff with the 3rd defendant prior to signing the letter of offer by the 1st defendant had entered into a mutual agreement dated 29th February 2008. That agreement provided and I quote

“That I Rogers Gichuhi Kamiti I/D No.3621338 of P.O. Box 70797 Nairobi have been given a log Book for the KAX 316L Mistubishi matatu (FH 215) which value is Ksh.3.525,000/- that Mr. Charles Mutahi Mwangi who is the registered owner of the referred motor vehicle registration KAX 316L has agreed to give his log book to Mr. Roger Gichuhi Kamiti for purposes of securing an overdraft from Imperial Bank for Ksh.1.5 million. That the said overdraft will be paid within a period of two months by the said Mr. Roger Kamiti upon which the log book will be returned to Mr. Mutahi. If by the said two months the said money would not have been paid then Mr. Kamiti would have to make sure the log book is returned to Mr. Mutahi without fail. NB for any reason if he fails to return the log book then Mr. Mutahi losses his vehicle to the bank then he will have no option but to demand the value of his motor vehicle from Mr. RogerS Kimiti which is Ksh.3.525.000/-

Signed by Mr. Roger Gichuhi

Signed by Mr. Mutahi

Signed Witness”

As per this mutual agreement, it is discernable that the plaintiff envisaged a situation whereby the 3rd defendant was likely to fail to settle the loan with 1st defendant. That is why the agreement provided that the plaintiff would recover the value of his motor vehicle from the 3rd defendant. Further from the replying affidavit, a letter of offer dated 7th March 2008, spelt out the terms of the overdraft facility in which the plaintiff signed as the guarantor. That letter of offer provided under clause 3:-

“Repayment Period and Disbursement

All amounts drawn and remaining outstanding (inclusive of any and all interest and sums that will have accrued thereon) in respect of the above-mentioned facilities shall be due and payable at any time forthwith on demand”

That letter of offer was duly accepted by the plaintiff and he signed, he is therefore bound by the provisions of the repayment period which was upon demand. The 1st defendant was not party to the mutual agreement between the plaintiff and the 3rd defendant. He cannot be held responsible for the terms stipulated therein. From the replying affidavit by the 1st defendant demand letters were issued and also copied to the plaintiff especially the letter dated 20th March 2009 recalling the overdraft facility.

The conditions for granting an order of injunction were long settled in the oft' cited case of Giela v Cassman Brown and Company Limited. The conditions are sequential; the applicant must demonstrate a prima facie case with a probability of success. Secondly, irreparable harm which would not be compensated for in damages would arise and if in doubt the court would determine the matter on a balance of convenience. Applying the above conditions to the present case, the plaintiff willingly pledged his motor vehicle to secure the facilities extended to the 2nd and 3rd defendants. Although the plaintiff and the defendant had their own mutual agreement in which the 3rd defendant was supposed to ensure the payment of the loan and the return of the log book within two months the 1st defendant was not privy to that mutual agreement.

Moreover if the plaintiff was to lose his motor vehicle due to the 3rd defendant's failure to pay the bank, the 3rd defendant was supposed to compensate the plaintiff for the loss of the motor vehicle and the sum for compensation is stated. In the circumstances, I find the plaintiff's claim can adequately be compensated for with damages. The upshot of the above findings, the plaintiff's application does not meet the threshold of granting the orders sought and it is hereby dismissed with costs to the 1st defendant.

RULING READ AND SIGNED AT NAIROBI ON 31ST DAY OF JULY 2009.

M.K. KOOME

JUDGE