REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 82 of 2006

MATEX COMMERCIAL SUPPLIES LIMITED……1ST PLAINTIFF

MARY S. NDETTO ……..…..……..2ND PLAINTIFF

VERSUS

EURO BANK LIMITED (IN LIQUIDATION) ……....DEFENDANT

RULING

This is the Chamber Summons dated 28th February, 2006. It is an application under Order 39 Rules 1(a) and (b), 2 and 3 of the Civil Procedure Rules. The Applicant seeks:

(1) A temporary injunction be issued against the Defendant by themselves, its agents, servants or whomsoever from, advertising for sale, transferring, alienating, selling, auctioning, disposing or in any manner whatsoever interfering or altering or changing property L.R. no. 209/10482/75 pending the hearing and final determination of this suit.

(2) The defendant, its servants, agents or whomsoever, be restrained and prohibited from entering, accessing, alienating, transferring, interfering or in any manner whatsoever altering the nature and Title of L.R. No.209/10482/75 pending the hearing of this suit.

(3) The costs of this application be in the cause.

The case of the Applicant is as follows: That a dispute has arisen as to the amounts purported to be owed by the 1st Plaintiff to the Defendant, which the 1st Plaintiff intends to challenge. Secondly it alleged that the 1st Plaintiff paid all the money due under the charge and the Defendant should have discharged the property of the 2nd Plaintiff. Thirdly the 2nd Plaintiff is apprehensive that should the injunction not be granted, there is reasonable concern that the property will move beyond the reach of the 2nd Plaintiff, by the time the suit is heard and determined. It is also the case of the two Plaintiffs that the suit property is the matrimonial and only home of the 2nd Plaintiff and unless an injunction is granted, she will suffer irreparable loss that cannot be compensated by an award of damages.

In the supporting affidavit the 2nd Plaintiff avers that on or about 20th May, 1998 the 1st Plaintiff sought and entered into an agreement with the Defendant for financial accommodation in the form of an overdraft of Kshs. 3.4 million for a period of one month. The security for the said overdraft was a legal

charge over L.R. No.209/10482/75. The 1st Plaintiff accepted the said facility with an interest rate of 36% per annum. The 2nd Plaintiff together with her husband offered the suit property as security for the overdraft of the 1st Plaintiff and a charge was registered on 26th May, 1998.

The 1st Plaintiff continued trading and as at 4th July, 2000 the purported balance outstanding was Kshs.23,333,181/55. On 5th July, 2000 the 1st Plaintiff deposited a cheque of Kshs.25,332,700/= in its account with the Defendant. On the strength of that subsequent credit in the account of the 1st Plaintiff, the 2nd Plaintiff now alleges that the security ought to have been discharged and the said title released to her upon the said payment. In her view upon that repayment of the overdraft in full, her liability became fully discharged. And that she did agree for the security to be a continuing guarantee in a further contract or agreement, hence the Defendant has no legal lien or right to hold the title or sell the charged property for a debt by the 1st Plaintiff, which she did not agree to, therefore she alleges that the statutory power has not arisen.

It is also alleged that the 1st Plaintiff is desirous to challenge any interest charges levied and subsequent deductions to its account with the Defendant and wants the court to determine how much the 1st Plaintiff owes or is owed, if at all. And the holding of the title to the suit property after the overdraft was paid amounts to undue and unjust enrichment.

The other point put forward on behalf of the Plaintiffs is that the bank is under liquidation and if the Plaintiffs are successful in their suit, there is no guarantee that the liquidator will be able to pay back the value of the house, the costs and interest.

The response of the Defendant is that the Plaintiffs are not entitled to an order of injunction as the position taken by them is contrary to the expectation of equity. No doubt that the 2nd Plaintiff is a director of the 1st Plaintiff and that the 1st Plaintiff applied for an overdraft facility from the bank which was granted. And all the documents that were signed on behalf of the 1st Plaintiff was done by the 2nd Plaintiff including the request for the banking facility. And that the Applicants have not demonstrated a good measure of good faith, therefore the application should fail.

I have taken into consideration the respective positions taken by the both counsel and the various authorities submitted for my consideration. I appreciate the energy and endeavours of Miss Njoroge and Mr. Ochieng Advocates who put their best feetl forward in the success of their client's case. And when confronted with the vibrant submissions and various decisions in support, I must warn that both parties cannot share success. In determining the successful party in so far as this application is concerned, the Plaintiffs must be able to shift the burden to the Defendant. In essence the Plaintiffs must show an infringement of a right which must await full and final determination of the matter. In doing so the conditions for grant of an interlocutory injunction must be fulfilled. As stated in Giella vs Cassman Brown & co. Ltd. [1973] E.A., the Applicant must show;

(1) A prima facie case with a probability of success

(2) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated in damages.

(3) If the court is in doubt it will decide the application on the balance of convenience.

It is therefore incumbent a party seeking an equitable remedy of an injunction to meet the conditions set in the above case.

It is the case of the Plaintiffs that the charge did not provide for a continuing facility and that when the 1st Plaintiff deposited the sum of Kshs.25 million on 5th July, 2000, the 2nd Plaintiff was entitled to a discharge of the charge. The charge is the very foundation of the relationship between the parties herein. And once a party attacks the validity of the charge, he is saying the foundation of the contract is non-

existent or shaky. Let me say that this court is reluctant at this stage to determine with finality on the facts and law as put forward by the parties.

I am aware that what is before me is an application for injunction. And at this stage the Applicants are required to show that they are entitled to the injunction sought and on the known principles. The question is whether the Plaintiffs have shown a prima facie case with a probability of success at the trial. I think the duty of the court is to enforce or legitimize what the parties agreed between themselves. It is no power of the court to enforce what it thinks ought to have been fairly agreed between the parties. That is the essence of contractual relations. Parties bargain for their interest and benefits, therefore the court cannot alienate or allocate a person a right it did not bargain for because may be he/she bargained poorly.

There is no dispute that the 1st Plaintiff sought for an overdraft from the bank to the tune of Kshs.3.4 million. The 2nd Plaintiff who is a director then offered her property as a security for the facility. The overdraft facility was extended and a charge created over the suit property. The parties continued trading together and as at 4th July, 2000, the balance outstanding on the account of the 1st Plaintiff was Kshs.23,333,181/55. the 1st Plaintiff then deposited a cheque of Kshs.25,332,700/= on 5th July, 2000 in its account with the Defendant. As a result there was a credit balance and now the 2nd Plaintiff states that her security ought to have been discharged and her title released to her.

The position of the bank is that the 1st Plaintiff continued to operate the said account and utilized the overdraft banking facility after 5th July, 2000, a fact well known to the 2nd Plaintiff, but which was conveniently not disclosed by the Plaintiffs. The Defendant then exhibited documentary evidence showing 17 withdrawals made after 5th July, 2000, which put the account into a debit balance. It is also the position of the Defendant that it is holding the title as a security for the overdraft enjoyed by the 1st Plaintiff with the full knowledge, consent and approval of the 2nd Plaintiff. And the failure of the Plaintiffs to disclose that they continued to run the account well after the 5th July, 2000 is dishonest and meant to mislead the court. The Defendant also exhibited various correspondences exchanged between the Plaintiffs and the Defendant. The Defendant therefore, contends that the present position taken by the Plaintiffs in incompatible to the true position. In fact the 2nd Plaintiff wrote a letter dated 20th September, 2003 acknowledging the debt and she pleaded for more time to make arrangements to pay the amount.

In a letter dated 15th March, 2004 signed by the 2nd Plaintiff on behalf of the 1st Plaintiff, the 1st Plaintiff stated:

"I wish to thank you for accepting our proposal as requested earlier. …I kindly request to be given upto 30/4/2004 to clear the debt…I also request you to accept a post dated cheque for the full amount of Kshs.1,900,000/= and after the cheque is cleared you discharge the security which you are holding to us".

It appears the Plaintiffs entered into a negotiation with the liquidation agent of the bank, which was accepted. The proposal by the Plaintiffs was to pay a sum of Kshs.1,900,000/= as full and final settlement of the debt. The Defendant accepted the proposal made by the 1st Plaintiff and as a result the 1st Plaintiff sent a cheque No.900159 for the sum agreed, which was returned unpaid. This was communicated to the 1st Plaintiff in a letter dated 20th May, 2004. Again the 1st Plaintiff was given up to 20th June, 2004 to pay the sum agreed through a letter dated 9th June, 2004. That letter was categorical that failure to pay the agreed and negotiated would result in the arrangement being revoked and the entire outstanding balance recalled. In another letter dated 18th January, 2005 the 1st Plaintiff requested to be given up to 20th February, 2005 to clear the debt. That letter was signed by the 2nd Plaintiff on behalf of the 1st Plaintiff.

I think it is crudely dishonest and inequitable to aver that the 2nd Plaintiff was not a party to the agreements made by the 1st Plaintiff, when she always dealt for both Plaintiffs for the purposes of the security. The facility/arrangement provided for overdraft banking facility. She offered the suit property

as a security for that facility, which she enjoyed. It is clear that all correspondences, agreements, negotiations, arrangements and above all the charge was signed by the 2nd Plaintiff. The charge created rights that were binding on the parties and any assertion to the contrary is misconceived. In my view there is uncontroverted evidence to show that the Plaintiffs continued to draw from the account after the credit of 5th July, 2000 and which withdrawals were allowed on the strength of the security held by the Defendant. The denial by the Plaintiffs that the account was not used subsequently is shallow and cannot validly resist and/or defeat the rights and obligations as created by the charge.

It is also wrong for the 2nd Plaintiff to deny ever requesting and negotiating for the amount owed. And I think the simplistic denial does not controvert or impeach the validity of the documents exhibited by the Defendant.

The onus of discharging the security given by the Plaintiffs vested on them and the Defendant could not discharge the same without express and explicit instructions from the Plaintiffs. There is no evidence tendered by the Plaintiffs to show that they did not want or desired to access and use the overdraft banking facility after 5th July, 2000. The Defendant could not force the Plaintiffs to terminate the overdraft, provided there was a security. In any case the charge provided that the security to be a continuing guarantee. I think it is absurd to say that the Defendant ought to have discharged the security even when the Plaintiffs continued to use and access substantial banking facility to run their business.

In my view overdraft means the party/client would have access to the account, monies and all related facilities even when the account had no funds. The party is able to operate the account on the strength of the overdraft facility and such facility has its foundation from the security offered by the client. The client is given access to funds to enable him run his business or whatever he desires. However, it must be noted that the bank has no money of its own. Equally the liquidating agent has a duty to recover all debts and assets belonging to the bank in order for him to fulfill his obligation to the creditors and depositors.

The liquidator owes the bank a duty to exercise reasonable care in carrying out his function and it would seem one such function is to recover all monies outstanding. The liquidator should in my view examine the books of account and records for evidence of liabilities and debts. There is evidence of a debt outstanding in respect of the accounts of the 1st Plaintiff. The Plaintiffs sought for an accommodation. It was granted but they failed to honour their promise. It means the debt is outstanding. At this moment I have no evidence to show the assets of the bank in the hands of the liquidator would be insufficient to satisfy any future liability. Of course I believe the agent would put in place contingency plans in anticipation of the apprehension expressed by the 2nd Plaintiff. In view of what has fallen from my pen, I think the Plaintiffs have not shown or demonstrated a prima facie case to enable me grant an injunction.

It is the case of the 2nd Plaintiff that the suit property is the matrimonial home of her family and if sold she would suffer irreparable loss or injury. The 2nd Plaintiff is the director of the 1st Plaintiff Company. She offered her matrimonial property as a security to enable the 1st Plaintiff to do its business with funds from the bank. I have to reckon again that the bank has no money to lend. The money it lends belongs to the public and in particular depositors. The bank through its liquidating agent has a responsibility to recover all monies outstanding. It is in the interest of the public that the agent recovers all monies due and owing to the debtors.

In my view any property whether it is matrimonial home or spiritual house, which is offered as a security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured. This court is concerned with the importance and the comfort such a home generates but once a party feels that the property is suitable for purposes of a security, it means the party has destroyed, defaced and/or degraded the sanctity and rituality of the said matrimonial home.

Of late there has been a tendency to enroll the courts into the preposterous viewpoint of what is commonly referred to as matrimonial home. The rite of marriage and the place where the marriage is celebrated usually has no relation to a contractual obligation which has matured. The issue whether a

party attaches special sentimental value is not an issue meant for consideration in the grant of an injunction. My position is that where the property is the sole family home, it may attract considerable and significant sympathy from the court but shorn of that, nothing else attaches. In this case it is the persons who joined in the marriage who felt, the property was suitable merchandise for sale by making it a security for an overdraft. In my view the word matrimonial home is not a rule of conduct and/or general truth. It is obvious that matrimonial home can change depending on the circumstances. I am alive to the fact that the alleged matrimonial home may be memorable, it may be memorial and it may contain the family memoirs of the 2nd Plaintiff. I think it is time for the parties to have a local memorandum of understanding not to take the matrimonial property to the den of the lion. And once parties decide to deface that sanctified place by making it a security for a loan/overdraft, then that legal position cannot be relegated to a position lower than the material and sentimental position of the family unit. In this case, it is the family that made the decision to convert its property into saleable commodity, with all the risks accruing therefrom.

I am satisfied that the bank will suffer greater prejudice if an injunction, is granted because the liquidator must as quickly as possible recover all debts. In any case the liquidator is the representative of the Central Bank of Kenya. And usually the Deposit Protection Fund through the Central Bank can comfortably compensate the 2nd Plaintiff for the sum of Kshs.3.2 million. It means the Plaintiffs have failed to satisfy conditions 1 and 2 in the grant of an injunction. And of course I am not in doubt as to the balance of convenience. In my view the balance of convenience tilts in favour of the Defendant who is able to compensate the Plaintiff for any eventual loss or injury. In the premises the application for injunction is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 15th day of March, 2007.

M. A. WARSAME

JUDGE