



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 649 OF 2004

NANCY KARIMI PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD 1ST DEFENDANT

KING PRIME INTERNATIONAL LIMITED 2ND DEFENDANT

PAUL KIMANI 3RD DEFENDANT

REGISTRAR OF TITLES 4TH DEFENDANT

RULING

I have before me an application by the plaintiff expressed to be brought under the provisions of Section 63 (c) and (e) of the Civil Procedure Act and Order XXXIX Rules 1, 2 and 3 of the Civil Procedure Rules for the following main orders:-

1. *A temporary injunction restraining the 1st defendant from selling by public auction or by private treaty alienating, dealing in or with or otherwise interfering with the plaintiff's property known as L.R. No.37/245/3(IR 13564) (hereinafter "the suit property") until the hearing and determination of the suit.*

2. *an order of prohibition prohibiting the Registrar of Titles from registering any dealing in or with the plaintiff's said title.*

The main grounds for the application as expressed on the face of the application are as follows:-

(a) *That the plaintiff has never obtained any monies by way of a banking facility or loan from the 1st defendant nor does she have an account at all with the 1st defendant, save executing a document purporting to be a guarantee with the 1st defendant which liability if at all was discharged by the full payment by the 2nd defendant of any sums due to the 1st defendant.*

(b) *That the 1st defendant purported to register an instrument purportedly identified as a charge against the suit property when in fact there was no valid or legal charge that the 1st defendant could place on the suit property.*

(c) That the 1st defendant purported to create a further charge by a purported instrument dated 11.11.2001 against the suit property well aware that the plaintiff has never executed any such instrument or consented to the creation of the purported further charge. Acting at the behest of the 2nd defendant and without informing the plaintiff the 1st defendant now purports to exercise a non-existent statutory power of sale to wrongfully sell by public auction the suit property.

(d) That the entries kept by the 4th defendant clearly indicate the wrongful registration of the suspect instruments of the 1st defendant as entries No. 7 and 8. The sum allegedly secured is Kshs.1,400,000/= with an unexplained change on the alleged sum purportedly advanced of Kshs.1,800,000/= (which the plaintiff never received a cent of)

(e) that even assuming that the 1st defendant's purported instruments were valid (which is denied) the plaintiff has not been informed of the 2nd defendant's default and failure or efforts on the 1st defendant's part to realize any monies owed to it by the 2nd defendant or the 3rd defendant as director of the 2nd defendant.

The application is supported by an affidavit sworn by the plaintiff. The affidavit elaborates the above grounds. The application is opposed and there are various affidavits sworn by Eunice Karau the 1st defendant's Manager, Credit Risk Management, Mbari Kioni the advocate who attested the charge and guarantee and Jocelyn Mwendu Muthoka the advocate who attested the further charge.

The plaintiff respondent to those replying affidavits by filing a supplementary affidavit. On 25.10.2007, counsel for the parties (plaintiff and the 1st defendant) agreed to file written submissions – which were finally put in on 15.10.2007 and 31.10.2007 respectively.

I have considered the application, the affidavits filed both for and in opposition to the application, the written submissions made and the authorities relied upon. Having done so, I take the following view of the matter. I am not hearing the case. I am not therefore required to determine with conclusiveness the rights and obligations of the parties. At this stage, the applicant should show that she has a prima facie case with a probability for success at the trial. She must also show that she would suffer an irreparable injury which would not be adequately compensated by way of damages if the injunction is not granted. Where the court is in doubt the application is to be considered on a balance of convenience. Those principles were set out in the precedent setting case of Giella –vs- Cassman Brown & Co. Ltd. [1973] EA. 358. I am bound to consider the plaintiff's application on the basis of those principles.

The gist of the plaintiff's case revolves around the validity of the charge, further charge and guarantee allegedly executed in favour of the 1st defendant by the plaintiff. The plaintiff contends that she did not execute the charge and further charge and in fact never appeared before Ms. Kioni and Ms. Muthoka the advocates who are said to have attested her signature. The plaintiff further contends that she did not consent to charge the suit property and no facility was ever extended to her by the 1st defendant. The plaintiff's further contention is that the 1st defendant has committed acts of negligence and fraud with relation to the documents of charge, further charge and guarantee. In the premises according to the plaintiff the 1st defendant's statutory power of sale has not arisen.

With regard to the plaintiff's challenge against the guarantee I have found *prima facie* that she indeed executed the same exhibited as “NK 2” by herself. The document speaks for itself. The plaintiff bound herself to pay and satisfy to the 1st defendant on demand all sums of money which the debtor, the 2nd defendant, then or from time to time thereafter, owed to the 1st defendant. In my view, the plaintiff's argument that she merely made a guarantee request and never received any acknowledgment or communication from the 1st defendant regarding her request is not serious. The validity of the guarantee was not dependent on a written acceptance by the 1st defendant.

With regard to the challenge made by the plaintiff against the charge I have found as follows:- The

copy of the charge exhibited by the plaintiff as “NK 4” is dated 1.4.1999. The same was drawn by M/S Mbari Kioni & Company Advocates. The plaintiff’s property is correctly described on the face of the charge. Page 1 at the heading and the recital part of the charge also correctly describe the suit property. There is no doubt that the plaintiff under the charge instrument is the chargor, the 1st defendant the lender and the 2nd defendant the borrower. The misdescription of the IR Number in the schedule in my view would not in itself invalidate the charge. At any rate, the suit property is correctly described by its LR Number in the said schedule.

The charge is expressed to have been executed by the plaintiff before Mbari Kioni Advocate. Although the plaintiff has sworn that she did not appear before the said advocate, there is an affidavit sworn by the said Advocate to the contrary. Mbari Kioni swears that the plaintiff in the company of the 3rd defendant went to her office where she explained to the plaintiff about the charge document and the consequences of non-payment of the loan before the plaintiff executed the charge in Kioni’s presence.

Confronted with that affidavit the plaintiff in her supplementary affidavit did not, expressly deny Mbari Kioni’s averments in her affidavit. Mbari Kioni is categorical that the plaintiff went to her office in the company of the 3rd defendant and executed the charge after the same had been explained to her. I find *prima facie* that the plaintiff did execute the charge as the charge document states.

With regard to the further charge which is also denied by the plaintiff, I have found as follows on a *prima facie* basis. The same is said to have been executed by the plaintiff before Jocelyn Mwendu Muthoka advocate. She has sworn that on or about 11.12.2001 the 3rd defendant went to her office accompanied by a lady he introduced as Nancy Karimi – his partner and associate. The lady confirmed to Ms. Muthoka that she was the chargor named in the further charge. She then explained to the lady the contents of the further charge in the presence of the 3rd defendant whereupon the lady executed the charge. The plaintiff does not in her supplementary affidavit expressly deny Ms. Muthoka’s averments in her affidavit. She is content to say that Ms. Muthoka never signed the certificate in the further charge which in her view confirmed the plaintiff’s assertion that she never met Ms. Muthoka. However, as I have stated earlier the document speaks for itself. The certificate in the further charge appears to have been signed by Ms. Muthoka.

Without assuming the role of a handwriting expert, a visual observation of the impugned signatures shows marked similarities with the signatures admitted by the plaintiff i.e. the signatures on the guarantee, her own supporting affidavit and the verifying affidavit.

On a *prima facie* basis, I find that the further charge was executed and attested as the document itself indicates. The same cannot *prima facie* be vitiated or invalidated on the basis of want of execution by the plaintiff.

As I have observed above, documents speak for themselves. They do not normally admit oral testimony to vary them save in special circumstances which do not obtain in this case. The further charge is exhibited by the plaintiff to her supporting affidavit as “NK 5”. In recital 2 at page 1 it is stated that the chargor’s interest in the suit property was to secure for the payment by the chargor of advances or other financial accommodation granted or to be granted by the bank to the chargor from time to time to an aggregate amount not exceeding Kenya Shillings Four Million only (KShs. 4,000,000.00).

In recital 3 at page 2 of the charge, it is provided inter alia as follows:

“The bank has at the request of the chargor --- agreed to grant banking facilities to the chargor by permitting the chargor to overdraw the chargor’s current account with the bank or by granting to the chargor other financial accommodation to an aggregate amount not exceeding Kenya Shillings One Million Four Hundred thousand (KShs.1,400,000.00) (hereinafter called “the Additional Charge Debt) making with the Existing Charge Debt an aggregate maximum principal sum of Kenya Shillings Five Million Four Hundred Thousand (KShs. 5,400,000.00) (hereinafter called the Charge Debt ---” .

It is plain that the further charge expressly stated that the loan sums had been advanced to the plaintiff and she would be entitled to other financial accommodation from the 1st defendant. The plaintiff maintains that she never ever received even a coin from the 1st defendant on account of any facility with it as she never maintained any account with the defendant at all.

The 1st defendant in response to that averment by the plaintiff merely stated that the plaintiff gave her guarantee and offered her property as security for a loan advanced to the 2nd defendant by the 1st defendant.

It was submitted for the 1st defendant that for the plaintiff to guarantee loan facilities granted to the 2nd defendant by the 1st defendant it was not a requirement either in law or otherwise that she had to have an account with the 1st defendant and further that for the guarantee to be effective the loan facility need not have been given to the plaintiff herself. The contract became complete when the 1st defendant gave the facilities to the 2nd defendant. That may very well be the position but the further charge had to say so. It is one of the documents that formed the foundation of the contract between the plaintiff and the 1st defendant. Its terms cannot be added to subtracted or otherwise varied by submissions of counsel. Any variations would have to be by another agreement which has not been exhibited. It was submitted by counsel for the 1st defendant that clause 2 of the recital of the further charge set out the particulars of the charge vide which the 1st defendant granted a loan facility of Kshs. 4 million to the 2nd defendant and clause 3 thereof says the 1st defendant had agreed not to call for the immediate payment of the existing debt i.e. the KShs.4 million and had further agreed to grant banking facilities to the chargor of a sum not exceeding Kshs. 1,400,000.00. With all due respect to counsel for the 1st defendant a plain reading of the further charge shows that the charge does not expressly state that the loan facility of KShs. 4 million had been advanced by the 1st defendant to the 2nd defendant. To the contrary the further charge expressly states that the facility had been granted by the 1st defendant to the plaintiff. Clause 3 of the recitals puts the issue beyond controversy.

In my view the further charge is not merely defective in form. It does not speak the truth. In the premises, the plaintiff has persuaded me that she has a *prima facie* case with a probability of success at the trial that the further charge may be found to be defective. It is one of the basic documents upon which the 1st defendant relies to found its statutory power of sale. Should the trial court find that the further charge is defective the 1st defendant's statutory power of sale would be founded on quick sand.

With regard to damages, the plaintiff has sworn that unless the injunction is granted the suffering she will undergo is immense and intolerable. The property comprise her house and she would have nowhere to go with her children. I am in the premises persuaded that damages would not be an adequate remedy.

In conclusion therefore I will allow prayers 2 and 3 of the chamber Summons dated 26th December 2004. This will be upon the condition that the plaintiff files within the next five (5) days an appropriate undertaking as to damages under oath.

Costs of the application shall be in the cause. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER 2007.

F. AZANGALALA

JUDGE

Read in the presence of Ruara for Kinyanjui for the plaintiff and Kimondo for the defendant.

F. AZANGALALA

JUDGE

20.11.2007