



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 238 Of 2005

ARTS 680 LIMITED1ST PLAINTIFF

CHUNILAL GHETA SAMAT SHAH2ND PLAINTIFF

VERSUS

MIDDLE EAST BANK KENYA LIMITEDDEFENDANT

JUDGEMENT

By their Originating Summons of the 5th May, 2005 the Plaintiff sought the following orders:-

- 1. The charge given by the 2nd plaintiff to the defendant over title number L.R. No.209/102/2/11 and the charge over title number L.R. No.209/102/2/11 and L.R. No.MN/111/3082 dated 18th September 1996 given to the defendant by the plaintiffs be discharged.**
- 2. The title documents over L.R No.MN/III/3082 be released to the 1st plaintiff by the defendant.**
- 3. Costs of the application.**

Mr. Esmail for the Defendant opposed the application on the grounds;

- 1. That the Defendant had a right to release the charged documents as there was a debt due to it which was covered by the Terms of the charge or**
- 2. That the Defendant had a common law lien over the documents for moneys due to it.**

In the affidavit of Borkatte Srinivas Pai he alludes to a loan granted by the Defendant to one Joseph Muigai Wanene who had borrowed money from the Defendant and had defaulted and was in debt to the Defendant in a sum in excess of Kshs.23 million. Mr. Wanene had been introduced to the Defendant by the second Plaintiff as appears from his letter to the Defendant marked 69 in the exhibits annexed to the affidavit of the 2nd Plaintiff in support of the Originating Summons.

For the purposes of this judgement I will assume that the Defendant has a valid claim against the Second Plaintiff sounding in damages for either misrepresentation or negligence.

I am not informed that any proceedings have been taken by the Defendant against the Second Plaintiff and as such the question of the liability of the Second Plaintiff has not been determined nor the quantum

of damages. The claim is at most a contingent claim.

Mr. Esmail referred to the wide wording in the two charges granted by the 2nd Plaintiff in favour of the Defendant defining what was due to the Defendant. It includes the words “*for any moneys whatsoever which then may be due and owing.*” “*or for any other account whatsoever or otherwise howsoever for an actual or contingent liability.*”

Do the words cover the sums, which the Defendant hopes to recover from the 2nd Plaintiff in respect of its claim against him for misrepresentation or negligence?

In one sense it can be said to be a contingent liability so far as the 2nd Plaintiff is concerned but it is a contingent liability intended to be covered by the wording in the charges. The Oxford Advanced Learners Dictionary defines contingent as “***dependent on something that may or may not happen.***”

In my view, the words contingent liability refer to some liability which might arise in future out of and connected with the sums secured by the charge and it does not include a possible claim against the chargor arising out of some different circumstances to that of the borrowing secured by the charge.

Mr. Esmail relied on **In re London and Globe Finance Corporation [1902] 2 Ch page 416** in support of his contention that the Defendant had a right to a lien over the security documents held by it in respect of the claim it has against the 2nd Plaintiff. In that case Buckley J held that stockbrokers have a general lien on documents in their possession in respect of any balance due to them from the customer on whose behalf they held the documents.

He also relied on **Baker v Llyod’s Bank, Limited [1920] 2 KB page 322.** In that case a bank claimed a lien over two sums of monies or the securities from which the sum arose on the ground that it had discounted bills and incurred a liability as a result. Roche J held in favour of the bank and in his judgement after referring to claims on a deed of assignment on which the bank relied said:

“The Plaintiff contends that those two claims do not assist the bank, and that no right either of set off or lien can be asserted in respect of the sums that might become due on the bills, because at the date of the assignment the liability of the firm in respect of the bills was only a contingent and not an actual liability. It is true that the liability was contingent. In this sense that the amounts would become due in respect of the bills was not ascertained, but it was in my judgement certain that there would be a deficiency.”

He also relied on **Halsbury’s Laws of England 4th Edition Vol. 3 (1) page 164.**

In the first case cited above there was an existing debt and in the second case it was certain that a liability would arise although not yet ascertained. These are different cases from this, where there is no certainty of either liability or quantum.

In my view a lien cannot attach to the 2nd Plaintiff’s securities nor the contingent claim against the 2nd Plaintiff.

In the result, I find that the Defendant has neither a right to refuse to allow the 2nd Plaintiff redeem the securities nor a lien or set off in respect of its proposed claims against the 2nd Plaintiff.

In the result, I dismiss these objections and give judgement as prayed with costs.

Dated and delivered at Nairobi this 4th day of April 2006.

P. J. RANSLEY

JUDGE

