



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

Civil Case 545 of 2004

- 1. RAKI INVESTMENTS COMPANY LIMITED**
 - 2. RAKI COMMODITIES LIMITED**
 - 3. MBARAKI HOLDINGS LIMITED**
 - 4. ABRAHAM MUCHOGU MWANGI.....**
-PLAINTIFFS**

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....
.....DEFENDANT

R U L I N G

In a plaint filed on 8.10.2004 and amended on 11.1.2005 the plaintiffs claimed various orders including an order of permanent injunction restraining the defendant from advertising, auctioning, selling, leasing or otherwise alienating the suit properties to wit: L.R. No.209/4931/11 registered in the name of Mbaraki Holdings Limited the 3rd plaintiff, L.R. No.209/4602 and L.R. No.209/4931/9 registered in the name of Raki Commodity Limited the 2nd defendant, L.R. No.209/4931/10 registered in the name of Raki Investment Company Limited the 1st plaintiff which was also the registered proprietor of L.R. Nos.Dagoretti/Riruta/3281, 3285 to 3363, 3391, 3394, 3443, 3559 and 3360 and LR No.12610/43 registered in the name of Abraham M. Mwangi the 4th defendant; various declarations including a declaration that the charges registered against the suit properties are invalid unlawful and unenforceable, that any interest rates levied and charged by the defendant over ledger fees commissions and other miscellaneous debits are unlawful and unenforceable, that any interest variation without the consent of the other party and the Minister for Finance contravenes the Statutory Provisions of the Banking Act and that any interest rate levied and charged by the defendant over the above 3% on the excess limit is not payable by the plaintiffs and is unenforceable in law. Special and General damages are also claimed.

The suit properties were charged to the defendant for sums advanced to the 1st plaintiff by the defendant. The 1st plaintiff's indebtedness to the defendant was guaranteed by the 2nd to 4th defendants so they pleaded. It was also pleaded that for various reasons the 1st plaintiff's core business viz. trading in coffee deteriorated because the defendant on many occasions despite requests from the 1st plaintiff delayed, neglected or refused to remit payments for coffee which resulted in delayed shipments of the coffee to its overseas customers who in turn ceased to import the product leading to losses in profits and reputation for which the plaintiffs claim damages.

It was also pleaded that the defendant refused neglected and or delayed to implement the 1st plaintiff's instructions to utilize a sum of KShs.91,418,800.00 in a fixed deposit account together with accrued interest in part payment of its indebtedness with the defendant with the result that the 1st plaintiff suffered loss on account of interest unduly charged.

It was further pleaded that interests levied by the defendant is contrary to the rate agreed upon, was unconscionable unlawful and contravenes the provisions of the Banking Act Cap. 488 Laws of Kenya and the interest levied on ledger fees, commissions and other miscellaneous debits was contrary to the terms of the contract.

In the premises the 1st defendant claimed that it was not indebted to the defendant as alleged in the Statutory Notices of Sale or at all. Further and in the alternative the 1st plaintiff pleaded that the defendant had fraudulently and/or dishonestly mismanaged run or handled the plaintiff's accounts in that the defendant had transferred funds from the 1st plaintiff's accounts to unknown accounts, fraudulently opened and operated other accounts without the 1st plaintiff's authority mandate or permission, failed to credit the 1st plaintiff's/incoming funds on the value dates and proceeds of matured treasury bills thereby occasioning loss in interest as well as escalating debt.

It was also pleaded that the charge over L.R. Nos. Dagoretti/Riruta 3281, 3263, 3391-3394 – 3433, 3559 and 3560 is invalid and/or void as it offends the provisions of Section 108 and 110 of the Registered Land Act and further no individual charges exist in respect of individual titles as required by law. And further that charges over L.R. No.12610/43; 209/4931/9-11 and 209/4602 are invalid and/or void as they contravene the provisions of Section 59 of the Transfer of Property Act and the charge over L.R. No.12610/43 is invalid and/or void for want of a valid Land Control Board Consent as required by Cap. 302 of the Laws of Kenya.

It was also pleaded that the 2nd to 4th plaintiffs have been discharged from their obligations under their respective guarantees because the terms of the original contract have been altered and varied as between the 1st plaintiff and the defendant without their involvement and further owing to the defendant's neglect failure or recklessness omission to enforce the limits agreed in the original lending agreement.

Simultaneously with the plaint the plaintiffs filed an interlocutory application which was amended on 11.1.2005. The plaintiffs sought a temporary injunction to restrain the auctioning, selling, leasing or otherwise alienating the suit properties. The application was expressed to be made under the provisions of Order XXXIX Rules 1, 2, 3, 4 and 9 of the Civil Procedure Rules the Judicature Acts of England of 1873 – 1875 and all other enabling powers and provisions of the Law.

The application was supported by an affidavit sworn by Abraham Muchogu Mwangi the fourth plaintiff who is also the Managing Director of the 1st plaintiff. He also swore a further affidavit on 26.11.2004 and a supplementary affidavit on 11.1.2005. The application was opposed. The defendant's Advocates filed Grounds of Opposition on 3.11.2004 dated 29.10.2004 and there is also a replying affidavit sworn by one Kennedy Kaunda Abuga the Senior Legal Officer of the defendant sworn on 2.11.2004. I heard arguments on 28.3.2006, 26.4.2006, 27.4.2006 and 26.7.2006.

The plaintiffs' primary complaints were in a nutshell as follows:-

- 1) That the charge documents were invalid and could not therefore form the foundation of the exercise of the power of sale by the defendant.**
- 2) That the guarantees given by the 2nd, 3rd and 4th plaintiffs were unenforceable as the defendant was guilty of material/fundamental variation in the original lending contract.**
- 3) That the defendant had failed to utilize a sum of about KShs.90 million in a fixed deposit made by the 1st plaintiff leading to escalation of the current account and the sum now claimed.**

4) That the defendant fraudulently, dishonestly and irregularly operated the 1st plaintiff's account and thereby caused loss to the plaintiffs which loss more than offsets the sum claimed by the defendant.

5) That the defendant levied interest on ledger fees and other miscellaneous debits contrary to the terms of the contract between the 1st plaintiff and the defendant with the result that the outstanding balances are exaggerated.

I shall examine these arguments in turn. On the invalidity of the charge documents, the plaintiffs contended that the one made under the Registered Land Act was not in the prescribed form and the Chief Land Registrar had not authorized or approved the use of the format used by the defendant. It was therefore doubtful according to the plaintiffs whether the charge was valid in Law. If the doubt is resolved in favour of the plaintiffs, the same charge would not give rise to the exercise of the power of sale by the defendant.

The plaintiffs further complain about the lack of attestation of the Chargor's signatures. That omission offends the provisions of Section 110 of the Registered Land Act. Another complaint made against the charge registered under the Registered Land Act was that 87 titles are charged in one instrument of charge which according to the plaintiffs was irregular and renders the instrument invalid and unenforceable.

With respect to the Charge instruments made under the Registration of Titles Act, the plaintiffs contended that they were not attested in accordance with the Transfer of Property Act to wit by two witnesses and were for that reason invalid and they too could not give rise to the exercise of the statutory power of sale by the defendant.

The last complaint made by the plaintiffs with respect to the charges was with regard to the charge created by the 4th plaintiff over LR. No.12610/43, IR 55719/1. The 4th plaintiff contended that the property was Agricultural property and was subject to the Land Control Act Cap. 302 of the Laws of Kenya. In the event consent of the relevant Land Control Board was required to charge the same to the defendant. According to the 4th plaintiff, no Land Control Board Consent was obtained and even the one purported to have been given was not valid as it was given outside the prescribed period.

The answer given by the defendant to those complaints was that the Registrar accepted the charge document under the Registered Land Act and registered it. He thereby by that action approved the charge under the Registered Land Act and the challenge made by the plaintiffs has been rather late in the day. With regard to the want of the consent of the relevant Land Control Board, the defendant contended that the property in question did not fall within a Land Control Area and consent of the Land Control Board was not therefore necessary and in any event consent was obtained though gratuitous.

The plaintiffs' arguments on the validity of the securities have given me a lot of anxiety particularly as the same have been made when large sums have been advanced on the same and no challenge has been made before. Yet the arguments cannot be ignored. In the first place the defendant did not respond to the challenge in the replying affidavit at all. On a prima facie basis therefore the challenge to the validity of the securities cannot be said to be frivolous or clutching at straws. Secondly, there is ample authority in support of the proposition that invalid security documents cannot confer any power of sale. See **Daima Bank Limited and 2 others – vs – K. H. Osmond Nairobi C.A. No.82 of 1998 (UR)** **Wilfred Koinange – vs – Glad – AK Finance Ltd and Another: Nairobi C.A No.209 of 2003 (UR)** and **Ibis Aviation Limited – vs – Equatorial Commerical Bank Limited and Another: Nairobi C.A. No.257 of 1999.**

Further the issue of whether or not consent to charge L.R. No.12610/43: IR 55719/1 was required cannot be resolved at this interlocutory stage. The 4th defendant swears that the relevant Land Control Board did not sit to approve the charge over the said property. The defendant on its part through its advocate contends that the relevant Land Control Board gave its consent to the transaction. The 4th

plaintiff counters that argument that the purported consent was not valid as the same was obtained outside the prescribed period to which the defendant answers, that in any event the consent of the Land Control Board was not required as the transaction was not controlled. Obviously a decision either way cannot be made at this stage. If the defendant's argument is accepted at this stage the sale of the challenged security will proceed. In which event canvassing the issue at the trial will be merely academic. On the other hand if the argument of the 4th plaintiff is accepted, the defendant will be restrained and in the event that the argument fails at the trial the defendant will proceed to exercise its statutory power of sale.

In the premises, I am persuaded that the plaintiffs have established a prima facie case with a probability of success that the securities may be invalid.

With respect to the second complaint made by the plaintiffs to wit material alterations to the principal lending contract I am afraid again this complaint cannot be resolved at this stage. The defendant admits that after the initial lending to the 1st plaintiff several indulgences were extended to the 1st plaintiff at its request. Additional securities were sought by the defendant and the original loan repayment was restructured several times. All that was without the consent approval or authority of the 2nd, 3rd and 4th plaintiffs. According to the plaintiffs those actions between the 1st plaintiff and the defendant constituted material alterations to the original contract the effect of which was to discharge the 2nd, 3rd and 4th plaintiffs from their guarantees.

In the event their properties should not be sold by the defendant in exercise of its statutory power of sale. The defendant's position was that the 2nd, 3rd and 4th plaintiffs were not guarantors but chargors of their respective titles and as there is default by the principal debtor, the defendant is entitled to exercise its statutory power of sale. The issue to be resolved at the trial will be whether or not the 2nd, 3rd and 4th plaintiffs were guarantors as argued by their counsel or were simply chargors. Should they succeed to show at the trial that they were guarantors, then their argument that they have been discharged by the material variations of the original contract will have far reaching consequences.

On the other hand if the defendant is not restrained and the 2nd, 3rd and 4th plaintiffs succeed in their said argument at the trial they will have lost their properties which should have been discharged.

The third complaint made by the plaintiffs was with respect to the defendant's failure to utilize about KShs.90 million in a fixed deposit held by the defendant on account of the 1st plaintiff. The plaintiffs have shown that they requested the defendant to reduce the 1st plaintiff's indebtedness with the defendant using those funds. The defendant's answer was that it could not comply with the plaintiffs' request because the sums in the fixed deposit account were used as a collateral for already drawn facilities. The defendant's position on a prima facie basis does not appear convincing. I am persuaded at least on a prima facie basis that if the defendant had complied with the instructions of the plaintiffs, the 1st plaintiff's indebtedness with the defendant would have been substantially reduced. The effect on the accrued interest would have been immense. This aspect of the plaintiffs' argument taken together with the complaint that the defendant levied interest on ledger fees and other miscellaneous debits contrary to the terms of the contract between the defendant and the 1st plaintiff, lends credence to the position taken by the plaintiffs that the 1st plaintiff is owed certain sums by the defendant. It is illustrative that the defendant did not respond to the argument that it charged interest on ledger fees and other debits.

In the premises, I am persuaded that the plaintiffs are not merely disputing the amount due but are alleging not only settlement of the debt but overpayment of the loan account. As stated earlier, I am alive to the fact that the defendant advanced money to the 1st plaintiff and on many occasions accommodated the 1st plaintiff. However, the legal challenges raised against the securities by the plaintiffs were not sufficiently answered by the defendant nor were the issues raised in respect of the treatment of the fixed deposit sum of KShs.90 million odd and levying of illegal interest on ledger fees and other debits. In the end, I find and hold that the plaintiffs have established a prima facie case with a probability of success at the trial.

With regard to whether the plaintiffs might suffer irreparable injury which would not adequately be compensated by an award of damages, I am persuaded that they would. In my view to sell the securities pursuant to charges that are said to be invalid and where the plaintiffs allege not only that the loan sums have been settled but that they have been overpaid would amount to irreparable injury. The plaintiffs have come to a court of equity. It is not enough for the defendant to say that despite the plaintiffs' complaints it can pay any damages that may be awarded should the injunction be refused at this stage and the plaintiffs succeed at the trial. In any event as I have held before and so have other Judges of this court, the rule that interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer an irreparable injury which could not adequately be compensated in damages is not cast in stone. The use of the word "**normally**" suggests that there are occasions when even where damages would be an adequate remedy the interlocutory injunction will still issue to serve the ends of justice.

Having found for the plaintiffs on the first two tests for the grant of an interlocutory injunction, it is strictly not necessary to consider the 3rd test to wit balance of convenience. But if it had been necessary to decide the application on this test, I would have held on the material availed to me that the balance tilts in favour of granting the interlocutory injunction. The securities in question are landed securities. They will still be available after trial. Besides the defendant will still be entitled to earn legitimate interest on any sum that may be found due to it.

In the end I grant the plaintiffs an order in terms of prayer 5 of the amended Chamber Summons dated 11.1.2005. The order is conditional on the plaintiffs filing separate written undertakings as to damages within the next 7 days. The 1st, 2nd and 3rd plaintiffs' undertakings shall be under their company seals and the 4th plaintiff's undertaking shall be under oath.

Costs shall be in the cause.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 27TH day of SEPTEMBER, 2006.

F. AZANGALALA

JUDGE

27/9/2006

Read in the presence of: