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

Civil Case 59 of 2006

FINA BANK LIMITED…….....…….PLAINTIFF

VERSUS

KIRIT KAPURCHAND SHAH…….....…….1ST DEFENDANT

SURYAKALA KIRIT SHAH…….....……2ND DEFENDANT

KAPURCHAND DEPAR SHAH…….....…..3RD DEFENDANT

NELSON SOAP INDUSTRIES LTD…….....…….4TH DEFENDANT

R U L I N G

The defendants herein have brought this application to seek an injunction that would restrain the plaintiff from selling the suit property L.R. No. 209/12143/3, NAIROBI.

The said suit property is registered in the name of the 2nd defendant, and was charged to the plaintiff so as to secure a loan to the 4th defendant.

It is the defendants' case that even though the 2nd defendant was notified in January 2006, that the sum of Kshs. 43,495,663/45 was owing, that was inaccurate. And in endeavour to demonstrate the said inaccuracy, the defendants have placed before me copies of the pleadings and proceedings in **NELION SOAP INDUSTRIES LTD V FINA BANK LIMITED, NYERI HCCC NO. 5 of 2006.** In that case, (which will hereinafter be cited as "**the Nyeri case")** the plaintiff has sought a declaration that it had cleared the debt due to the defendant. In the alternative, the plaintiff has sought a declaration that there be taken accounts, with a view to ascertaining the extent of the plaintiff's indebtedness to the defendant.

The plaintiff in the Nyeri case was prompted to move to court by the fact that the defendant therein had appointed receivers and managers over its assets, on 14th February 2006. That development had been preceded by the seizure of the plaintiff's motor vehicles, on 31st January 2006.

Those facts are not disputed by the plaintiff herein. However, the plaintiff submits that the defendants herein have failed to establish a prima facie case with a probability of success. That submission is premised on the plaintiff's contention that the suit property was not the subject matter of this suit.

From a literal perspective, the plaintiff is right to state, as it did, that the suit property is not the subject matter of this suit, as nowhere in the Plaint or Defence is the said property cited.

A careful scrutiny of the Plaint herein reveals that the claim is founded on instruments of guarantee and indemnity which the 1st, 2nd and 3rd defendants executed, as security for the loan facilities accorded by the plaintiff to the 4th defendant. It is asserted that the 4th defendant had defaulted in the repayment of the loan, and that the other 3 defendants were thus liable, under the guarantees which they had executed.

In answer to the Plaint, the four defendants filed a joint defence, denying the averments that some money had become due and payable by them, to the plaintiff. They also point out that there were already some issues which were substantially similar, between the same parties, in the Nyeri case.

Having given due consideration to the issues in this suit as well as in the Nyeri case, I note that the guarantees are dated June 2003, whilst the legal charge over the suit property is dated 7th November 1996. In effect, the two sets of securities were executed about seven years apart.

The plaintiff submits that the charge was not in any way a back-up security for the guarantees. With that, I would agree, as the charge was first in time, and does not mention the guarantees.

However, the guarantee instruments have not been adduced in evidence before me. Therefore, it has not been possible for the court to verify whether or not the guarantees made any reference to the charge. Therefore, it was not possible for me to verify the plaintiff's assertion that the two sets of securities were not in any manner associated.

But it is very evident that the sum being claimed in this suit as well as in the Nyeri case is exactly the same. It is KShs. 43,495,663.45. That leads me to believe that it is more probable than not that the charge instrument as well as the guarantees were all securities for the very same loan which the plaintiff herein had given to the 4th defendant herein.

That implies that if the plaintiff in the Nyeri case was to succeed in getting judgement in its favour, there would be no basis for the plaintiff herein taking steps to realise the security. For now, the plaintiff herein has not controverted the assertion that the 4th defendant has already obtained an exparte interlocutory judgement in the Nyeri case. It has also not been denied that the said Nyeri case is scheduled to come up for formal proof on 9th November 2006.

In the light of those developments, I hold the considered view that the defendants have established a prima facie case with a probability that their defence herein will succeed. I say so because to my mind the facts of this case are so intertwined with those of the Nyeri case, that although there is no express mention of the suit property in this case, by necessary inference the decision in the Nyeri case would have a direct bearing on this case.

I also share the defendants' contention that if the plaintiff is permitted to simultaneously proceed with all the steps which it has set in place, for the recovery of the debts allegedly owed to it, there is a real danger that the defendants will be seriously prejudiced. In my considered view, once the plaintiff chose to appoint receiver managers to run the 4th defendant's business, it would be incumbent on the said receiver managers to provide accounts to the defendants, so that it can become clear as to whether or not there was still some outstanding balances.

So also after the plaintiff, caused the seizure of the motor vehicles belonging to the 4th defendant herein, it would only be fair that the plaintiff first disclose how much was realised from the sale of such vehicles, before the plaintiff can take steps to realise the security, if there should still be some outstanding balance.

As regards the statutory notice, I hold the view that the service by Mr. Samuel Omondi is of doubtful integrity. I say so because the said Mr. Omondi has not demonstrated the nexus, if any, between the 2nd defendant and the person named John, who signed the delivery book, to acknowledge receipt of the notice.

Meanwhile the certificate of posting attached to Mr. Omondi's affidavit indicates that the letter to Mrs. Kirit Shah was dispatched to P. O. Box 1042, Nyeri. It has not been demonstrated to the court why the letter was dispatched to that address, whereas the 2nd defendant's well known address was P.O. Box 48969, Nairobi. I say that that is the well known address because the plaintiff's advocates had had occasion to use it on their letter dated 6th February 2006.

Therefore, there are serious doubts about the Plaintiff's assertion that the statutory notice was served. That being the position, I hold that it was therefore irregular for the plaintiff to put in place steps to realise the security.

In the circumstances, the application for an injunction is merited. I therefore grant an injunction to restrain the plaintiff from selling off the suit property L.R. No. 209/12143/3. NAIROBI, whether by public auction or otherwise howsoever. The said order shall remain in force until the issue of whether or not the 4th defendant herein owes money to the plaintiff, is determined either in this suit or in the Nyeri case.

To that end, I strongly suggest to the parties herein to consider how to harmonise the two cases, because I believe that the best thing is to have the issues determined by the same court.

The costs of this application are awarded to the defendants.

Dated and Delivered at Nairobi, this 23rd day of October 2006.

FRED A. OCHIENG

JUDGE