



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil 84 of 2003

AUGUSTINE WANG'OMBE WAMBUGU
PLAINTIFF/APPLICANT

VERSUS

1. NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT/RESPONDENT

2. JAMA COMMERCIAL & GENERAL AGENCIES LTD. 2ND
DEFENDANT/RESPONDENT

R U L I N G

Augustine Wang'ombe Wambugu (hereinafter referred to as the applicant) has come to this court by way of a Chamber Summons under Order XXXIX Rules 1 & 3, section 3A of the Civil Procedure Act and section 44 of the Banking Act Cap 488 seeking inter alia that the 1st Defendant its agents servants and or anybody else acting under its instructions be barred by an injunction from in any way alienating, selling or otherwise dealing with parcel No. Thegenge/Karia/31 pending the hearing and determination of this suit. The 1st Defendant who is the 1st Respondent to this application is National Bank of Kenya Ltd.

There is also a 2nd Defendant who is Jama Commercial & General Agencies Ltd. Filed contemporaneously with the application is a suit in which the applicant (as per amended plaint filed on 19th May 2005) sought judgment against the Respondents jointly and severally for:-

- (a) *A permanent injunction against the 1st Defendant from in any way selling, alienating and or dealing with land parcel Thegenge/Karia/ 31 and on unconditional discharge of the land parcel by the 1st Defendant.*
- (b) *A declaration that the interest and other charges charged on account by the 1st Defendant is illegal and unlawful and that no debt exists as between the Plaintiff and the 1st Defendant capable of being enforced by way exercise of charges statutory power of sale.*
- (c) *An account by the 1st Defendant for all monies received by it pursuant the lending contract the cause of action herein, into account Number 30 1 0004 897 and 30 1 074 274 and therefore against the 2nd Defendant for sums so accounted.*
- (d) *Costs of this suit as against the Defendant jointly.*
- (e) *Interest on (c) and (d) at court rates.*

As per the Chamber Summons dated 11th September 2003 the application is grounded on the following:

- (a) *No debt exists on the guarantee as more money than limited in the guarantee has indeed been paid.*
- (b) *That the plaintiff is entitled to unconditional discharge from the Guarantee and charge by virtue of conduct by the Defendants herein.*
- (c) *That the plaintiff shall suffer irreparable loss if the 1st defendant goes on to auction the land parcel herein.*
- (d) *That it is in the interest of justice that the order do issue.*

The application was also supported by an affidavit sworn by Augustine Wang'ombe Wambugu in which he explains that he is the registered owner of land parcel Thegenge/Karia/31 (hereinafter referred to as the suit property) and that he had executed a guarantee with the 1st Respondent in favour of the 2nd Respondent which guarantee was secured on the suit property. The applicant contended that the limit of his liability was Kshs.300,000/= but that the overdraft facility to the 2nd Respondent was increased by the 1st Respondent to Kshs.400,000/ without the applicant being consulted and the same having been done without his authority, he was entitled to an unconditional discharge, and that the 1st Respondent had no power to encumber his land or auction his property on a debt signed by someone else.

The applicant further maintained that he had already repaid the 1st Respondent an amount which exceeded the limit of his guarantee.

The 1st Respondent has filed a statement of defence in which it has strenuously denied the Applicant's claim, specifically that the Applicant's liability under the personal guarantee was not limited to Kshs.300,000/= but included amounts accrued in respect of interest and other Banking charges and costs arising out of or in connection with the recovery of the moneys due under the guarantee. The 1st Respondent maintained that although the 2nd Respondent applied for a further overdraft of Kshs.100,000/= the same was not granted to it. The 1st Respondent maintained that the applicant had executed a legal charge over the suit property and since a sum of Kshs.548,264/60 was due and owing, and the applicant had admitted its indebtedness to the 1st Respondent, and the applicant had been served with an appropriate notice, the 1st Respondent's right of sale had accrued.

The 1st Respondent contended that although it had entered into a consent judgment with the applicant in respect of the debt in Nakuru High Court Civil Case No. 191 of 1991, the applicant had failed to pay the decretal sum as agreed. The applicant's suit should therefore be dismissed.

In response to the application the 1st Respondent filed grounds of opposition contending:

- *That it could not be restrained from exercising its statutory right of sale due to a dispute as to accounts.*
- *That the applicant had not shown that he would suffer irreparable damages and that an award of damages would not adequately compensate him.*
- *That the applicant has not shown that he has a prima facie case with a probability of success.*
- *That the applicant executed a charge over the suit properties and was therefore bound to repay all sums arising therefrom.*
- *That the applicant has admitted his indebtedness to the 1st Respondent in various correspondences.*

- *That the applicant has not paid the sums due in full.*

The 1st Respondent further relied on a replying affidavit sworn by its advances Manager Joshua P. Nauwankas who deponed that the applicant guaranteed banking facilities by the 1st Respondent to 2nd Respondent and executed a charge over the suit property for that purpose. The 2nd Respondent defaulted in the repayment of the debts and appropriate statutory notice was forwarded on 14th December 1990. That at the request of the applicant, the overdraft facility in respect of 2nd Respondent was converted to a term loan on the applicant's account to enable him repay the debt.

That the 1st Respondent filed Nakuru High Court Civil Case No. 191 of 1991 against the applicant and 2nd Respondent for recovery of the sum of Kshs.412,,015/40 together with compound interest and that a consent judgment was recorded between the 1st Respondent and the applicant in which the applicant agreed to pay the decretal amount, interest and costs of the suit in instalments of Kshs.20,000/= per month but defaulted. That statutory notices having been served on the applicant on 6th October 1998 and 8th January 1999 the suit property was advertised for sale at public auction which was held on 22nd January 1999 but was unsuccessful due to low bids.

It was maintained that all statutory requirements for the auction intended for 18th September 2003 were adhered to and the applicant has not shown sufficient reasons to warrant the court restraining the 1st Respondent from proceedings with the exercise of its statutory right of sale over the suit property.

Mr. Karweru who appeared for the applicant submitted that the 1st Respondent had not served the applicant with a valid notice as required under section 74 of the Registered Land Act (Cap. 300) as the notice dated 14th December 1990 was effective from the date of the notice and the statutory period was thereby shortened. Relying on the case of Trust Bank Ltd v/s Eros Chemist Ltd. & Whitestone Auctioneers CA 133 of 1999, Mr. Karweru submitted that the right of sale had not accrued to the Respondent as the notice did not expressly state that the sale would take place after the 3 months period.

It was also submitted that the 1st Respondent had varied interest rate contrary to section 44 of the Banking Act as there was no prior approval from the minister, therefore the variations were illegal. In this regard Mr. Karweru relied on the case of Prof. David M. Ndeti v/s Daima Bank Limited High Court Civil case No. 2198 of 2000 (Nrb) in which it was held that such amounts are not recoverable.

It was submitted that the 1st Respondent having opted to file Nakuru High Court Civil Case No. 191 of 1991 against the applicant and 2nd Respondent pursuant to the charge and guarantee and having obtained judgment, it could not go back and exercise its statutory powers of sale based on the same instruments and that the 1st Respondent was foreclosed from exercising its statutory powers of sale.

It was further submitted that the 1st Respondent having extended a further facility to the 2nd Respondent without the consent of the applicant, the applicant as guarantor was entitled to be discharged. Mr. Karweru submitted that the applicant stands to suffer irreparable loss if the injunction is not granted. He urged the court to find that the non-disclosure relating to the Nakuru suit did not go to the root of the dispute but was in fact in favour of the applicant.

Mr. Mureithi who appeared for the 1st Respondent submitted that the statutory notice was properly served on the applicant under certificate of posting on 14th December 1990 and that section 74(2) of the Land Registered Act Cap 300 provided for compliance with notice within 3 months and that the chargee only sought to exercise its powers of sale after failure to comply with the notice.

Relying on the case of Habib Bank AG Zurich v/s Pop in (K) Ltd. & 3 others Mr. Mureithi submitted that the issue of interest could not affect the 1st Respondent's exercise of his statutory powers of sale.

Mr. Mureithi further submitted that the Nakuru High Court Civil Case No. 191 of 1991 being a suit between the same parties and arising from the same subject matter raises the issue of res judicata. He submitted that as long as the decree in the Nakuru High Court civil case remained unsatisfied the 1st Respondent could not be prevented from exercising its statutory powers of sale. It was submitted that the applicant had come to this court with unclean hands as he had not revealed the existence of the Nakuru case. It was submitted that the applicant had not satisfied the test laid down in the case of *Giella v/s Cassman Brown & co. Ltd* [1973] EA 358.

It was submitted that no irreparable loss is likely to be suffered by the applicant as the 1st Respondent would be able to pay damages if required and that it was in fact the 1st Respondent who was suffering loss due to the failure by the applicant to pay the amount owed.

As regards the variation in the interest rate it was submitted that the charge instrument provided for a minimum interest of 14% with sole discretion to the 1st Respondent to adjust the rate, and the applicant having signed the charge and accepted the terms could not turn round and challenge the same. The court was therefore urged to dismiss the application and allow the 1st Respondent to proceed with the sale.

In response to Mr. Mureithi's submissions, Mr. Karweru maintained that the statutory notice served on the applicant was less than 3 months. That the 1st Respondent has not shown that it met the legal responsibility imposed upon it by section 44 of the Banking Act. Mr. Karweru further maintained that the present suit was not res judicata as it concerned issues which have arisen after the judgment in the Nakuru suit and it arose from the advertisement of the applicant's property for sale and was therefore a new cause of action.

From the pleadings the following issues arise:

1. *Whether the Bank guarantee signed by Plaintiff was limited to principal amount of Kshs.300,000/=*
2. *Whether the 1st Respondent increased the overdraft facility to Kshs.400,000/= without authority from the applicant.*
3. *Whether the 1st Respondent unilaterally closed the 2nd Respondent's loan account and converted the same into the applicant's loan account.*
4. *Whether the 1st Respondent illegally applied interest rates not approved by the minister as required under the Banking Act.*
5. *Whether the statutory notice served on the Plaintiff was defective.*
6. *Whether the 1st Defendant's statutory right of sale has accrued.*
7. *Whether the applicant is discharged from liability under the charge by the 1st Respondent's action of unilaterally increasing the principal amount to 2nd Respondent without authority from the applicant.*
8. *Whether the Plaintiff was discharged from the contract of charge by the judgment entered into in Nakuru High Court Civil Case No. 191 of 1991.*
9. *Whether Plaintiff's suit is res judicata.*

The court must however be careful not to delve into most of these issues as they are issues to be determined at the main trial. For the purposes of this application the issues that needs to be determined are as follows:-

- *Whether the applicant has satisfied the court that the applicant has established a prima facie case with*

a probability of success that the 1st Respondent intends to sell his property in exercise of his statutory powers of sale either contrary to the charge agreement or in contravention of the law.

- Whether the applicant has satisfied the court that unless the interlocutory injunction is granted the applicant will suffer irreparable loss.*
- If still in doubt, where does the balance of convenience lie?*

The parties appear to be in agreement that the applicant did guarantee an overdraft facility to be granted by the 1st Respondent to the 2nd Respondent and that the applicant offered the suit land as security and signed an appropriate charge. The 2nd Respondent having been granted a loan pursuant to this arrangement failed to repay the money and the applicant was therefore called upon to meet this obligation. The applicant failed to meet this obligation which resulted in the 1st Respondent filing Nakuru High Court Civil Case No. 191 of 1991 against the applicant. It is the 1st Respondents contention that although a consent judgment was recorded in favour of the 1st Respondent and a further consent entered into for payment of the decretal amount in instalments. The applicant has to date failed to pay the decretal sum. In effect this means that the judgment against the applicant in Nakuru High Court Civil Case No. 191 of 1991 remains unsatisfied whilst the applicant has also to date not discharged his obligation under the charge. It is not clear why the 1st Respondent opted to sue the applicant for recovery of the monies when it had the option of exercising its statutory power of sale. Section 74 (3) of Registered Land Act provides for the circumstances under which a chargee is entitled to sue for the money secured by a charge. I cannot at this stage determine whether any of these circumstances had arisen. Suffice it is to state that a fundamental issue arises as to whether 1st Respondent having sued and obtained judgment in respect of the secured amount is entitled to fall back onto his statutory powers of sale or whether he is foreclosed from doing so.

The applicant has not come to this court with clean hands since it is evident that he has not paid the amount secured by the Charge. Nevertheless, it is appropriate that this court exercises its discretion in preserving the suit premises as this is the substratum of this suit. I find that the applicant has established a prima facie case with a probability of success and on this ground I will grant the interlocutory injunction sought as per prayer (2) of the chamber Summons dated 11th September 2003.

In order to ensure that this matter is brought to a speedy conclusion, I order that the interlocutory injunction shall expire 9 months from the date hereof. It is therefore upon the applicant to ensure that his suit is heard and determined within that period.

Costs of the application shall be in the cause. Orders accordingly.

Dated signed and delivered this 8th day of November 2006.

H. M. OKWENGU

JUDGE