



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E539 OF 2020

BETWEEN

KINGDOM BANK LIMITED.....PLAINTIFF

AND

SAMUEL NJUGUNA KIMANI.....DEFENDANT

RULING

Introduction

1. There are two applications before the court for consideration. The first one is a Notice of Motion dated 14th December 2020 filed by the Plaintiff (“the Bank”). The second one is the Notice of Motion dated 4th January 2021 filed by the Defendant. The Bank was previously known as Jamii Bora Bank Limited. At the time material to this suit, the Defendant was its managing director.

2. The Bank’s application is made, inter alia, under **Order 40 Rule 1 and 2** the **Civil Procedure Rules**. It seeks an order of injunction restraining the Defendant from selling or in any way dealing with the property known as LR NO. 13646/2 (LR 81180) (“the suit property”) pending the hearing and determination of this suit and an order compelling the Defendant to deposit the original certificate for the suit property with the Deputy Registrar of this court. It is supported by the affidavits of Jackson Kimathi, the Bank’s Head of Legal Department, sworn on 14th December 2020 and 18th January 2021 respectively. It is opposed by the Defendant through his replying affidavit sworn on 4th January 2021.

3. The Defendant’s application is made under, inter alia, **Orders 40 and 45** of the **Civil Procedure Rules** seeks to discharge, vary, set-aside and/or vacate the ex parte orders this court issued on the 18th December 2020. It also seeks to strike out the Bank’s Notice of Motion dated 14th December 2020 for non-disclosure of material facts and an injunction restraining the selling, interfering or otherwise dealing the suit property. The application is supported by the Defendant’s affidavit sworn on 4th January 2021 and opposed by the Bank through the replying affidavit of Jackson Kimathi sworn on 18th January 2021. I consolidated both applications. They were canvassed by oral and written submissions.

The Pleadings and factual background

4. The facts in issue are apparent from the pleadings; namely the Plaint dated 14th December 2020 and Defence and Counterclaim dated 14th January 2021 and the various depositions sworn on behalf of the parties.

5. By a Letter of Offer dated 23rd January 2015 (“the Letter of Offer”), the Bank agreed to extend an investment loan facility of KES 75,000,000.00 to Asterisk Holdings Limited (“the Company”). Under the Letter of Offer, Faida Investment Bank was to provide a Corporate Guarantee for the same amount. In due course, the Defendant, as one of the Company’s directors and shareholders, provided the suit property as security by way of a First Legal Charge dated 23rd May 2016 (“the Charge”) for a sum of up to a maximum of KES. 70,000,000.00 and a First Further Charge dated 23rd May 2016 (“the Further Charge”) securing an additional KES. 19,000,000.00 making the total charge debt KES. 89,000,000.00.

6. The Bank states that on or about 19th June 2018, the Defendant requested and the Bank released the original title to the suit property to him based on representations that he would substitute the suit property with an alternative security of equal value but he never provided the security. The Bank therefore claims that the Defendant obtained the title to the suit property by misrepresentation, bad faith and abuse of

officer as he was the Bank's Managing Director. It therefore claims that despite releasing the original title to the Defendant, the Charge and Further Charge remain in force as they were never discharged.

7. The Bank states that the Company, as the borrower, has defaulted in repayment of the loan facility and owes it KES 73,840,981.7966 due as at 27th August 2020 which amount continues to accrue interest at a contractual rate until payment in full. It therefore seeks to exercise its statutory power of sale over the suit property and in that regard seeks a mandatory injunction compelling the Defendant to deliver up the original title deed for the suit property.

8. The Defendant denies the claims of misrepresentation, bad faith and abuse of office. In its Statement of Defence, the Defendant admits the Letter of Offer but states that the facility to the Company was to be secured by Corporate Guarantee provided by Faida Bank only. It avers that the Bank was under a duty to procure the Corporate Guarantee from Faida Bank before granting the facility to the Company. The Defendant denies that the Letter of Offer required him to offer the suit property or any other property as security as alleged. He also denies that he provided a personal guarantee for the Company as a security.

9. The Defendant contends that while the suit property was not contained in the Letter of Offer, he only offered it as security for anticipated additional advances to be made to the Company under the Charge but the Bank never made the advances as represented and that there was no consideration for the Charge and it is therefore discharged.

10. The Defendant also claims that by the Letter of Offer dated 3rd May 2018, the Bank extended to him a personal loan facility of KES 19,000,000.00 secured by the Further Charge over the suit property. The Defendant states that he has been paying the facility advanced to him personally. He further states that by a Supplemental Letter of Offer dated 3rd May 2018, the Bank accepted his proposal to substitute the suit property which was collateral for his facility with his own property; Land Reference No. 12952/19 in order to secure KES 25,000,000.00. The Defendant states that the Bank accepted this proposal and on 3rd May 2018, the Bank acknowledged receiving the substituted property as collateral and released the original title to the suit property to the Defendant. He further states that the Bank through its officers executed a Discharge of Charge dated 15th November 2018 ("the Discharge of Charge"). He therefore avers that as a result, the Bank cannot purport to exercise its statutory power of sale on the ground that the suit property is no longer charged to it. Further, the Defendant denies that he owes the Bank KES 73,840,981.79 purportedly advanced to the Company.

11. Based on the facts pleaded in its Defence, the Defendant also raised a Counterclaim seeking declarations, inter alia, that the Bank does not have any valid statutory power of sale and that he is not liable for the Company's debt. He also seeks permanent injunctions restraining the Bank from exercising its purported statutory power of sale over the suit property.

The Bank's Application

12. The Bank submits that it has established a prima facie case with a probability of success. Its application is grounded on the fact that it now wishes to exercise its statutory power of sale. It has issued to the Defendant, statutory notice dated 28th August 2020 under **section 90(1)** of the **Land Act, 2012** evincing its intention to exercise its statutory power of sale in respect of the suit property. It therefore requires possession of the original title released to the Defendant on the strength of his fraudulent misrepresentations and which the Defendant has failed to deliver despite the demand letters dated 1st October 2020 and 26th November 2020.

13. The Bank is apprehensive that should it sell the suit property by public auction, it may not be in a position to effect the transfer to the purchaser since it is not in possession of the original title. It is also apprehensive that owing to the Defendant's previous position in the Bank, he may proceed to register the Discharge of Charge and dispose of the suit property, which was still charged to the Bank according to official search as at 28th August 2020, to its detriment.

14. The Bank contends it is likely to suffer grievous loss as there is no evidence that the Defendant is capable of repaying the outstanding amount. That the amount is not only colossal but it also compromises depositors' money which was secured by the title to the suit property. It argues that even on a balance of convenience, it is in the interests of justice that the application is allowed.

15. The Bank denies that it failed to disclose material facts. It states that it disclosed all material facts in its Complaint including the Letter of Offer, the fact that the condition requiring the Company to provide a Corporate Guarantee never materialized that the Defendant, as one of the majority shareholders of the Company, offered the suit property as security through the Charge. It adds that at the material time, the Defendant, as Managing Director, was aware that under CBK Prudential Guideline 4.2.7, the Bank was restricted from making advances without any or any sufficient security hence without the security the Defendant offered, the Bank would not have advanced the money to the Company.

16. The Bank further reiterated that the subject charges were executed between the Defendant as the Chargor, the Bank as the Chargee and the Company as the Borrower in accordance with the Letter of Offer. It rejects the Defendant's argument that there was no consideration for the Charge and contends that in as much as the Charge and Further Charge secured the Defendant's personal Loans, the Bank's suit is geared towards recovering the outstanding loan advanced to the Company in accordance with the Letter of Offer. It asserts that the Defendant's personal loan is separate and not an issue in this case. The Bank maintains that the suit property secured the Company's and the Defendant's personal loans as the Defendant offered the suit property as security leading to the creation of the Charge and Further Charge with the Defendant as the Chargor.

17. The Bank holds that the circumstances leading to release of the title to the suit property and execution of the Discharge of Charge is suspicious and amounts to abuse of office and breach of fiduciary duties. The Bank contends that at the time of execution of the discharge, the Defendant abused his position as the Managing Director of the Bank as he facilitated issuance of a loan to the Company, in which he was a director and shareholder, in circumstances where his interests and that of the Company were in conflict with those of the Bank. It accuses the Defendant of misusing his position to procure the Bank's Security Document Release Form that formed the basis of the alleged substitution of the title of the suit property and its subsequent release to the Defendant. The Bank further submits that the Defendant misused

his position to procure the Discharge of Charge over the suit property while misrepresenting that the loans secured under the Charge and Further Charge had been fully paid which was not the case.

18. The Bank further alleges that the Defendant used his position to facilitate approval of significant loan amounts to the Company, which was associated with him, without proper due diligence and supporting documentation despite the fact that at all material times when the loan facilities were advanced, it was within public knowledge and his own knowledge that the Bank was not doing well financially and at the brink of collapse/restructuring. Finally, the Bank contends that the Defendant misused his position to procure the Discharge of Charge but lodged it for registration on 2nd October 2020 just a month after the Bank served him with statutory demand notice; a period of over two years.

19. The Bank contends that as the suit property is still charged to it, the alleged substitution with title LR. No. 12959/19 is for no effect to the Charge and Further Charge since LR No. 12959/19 secures the Defendant's other personal loan of KES 25,000,000.00. The Bank adverts to the fact that the loan facilities extended to the Company have not been settled as evidenced by the statements of account. It argues that the Defendant cannot claim to be servicing a loan yet rely on a discharge indicating that all monies due to the Bank have been paid. It argues that it beats logic for the Defendant to claim that he substituted the suit property with the property L.R No. 12952/19 on 3rd May 2018 yet in October 2020, he purports to discharge the suit property. That one would expect that if at all the Defendant substituted the suit property title with property title no. L.R No. 12959/19, there ought to be a new charge registered over LR. No 12959/19.

20. The Bank submits that the Defendant's claims are laced with half-truths, distortion of facts and contradictions and in the premises, it is only fair and just that the court maintains the interim orders of 18th December, 2020 to preserve the suit property.

The Defendant's Response

21. The Defendant rebuts the Bank's case and submits that the Bank cannot exercise a non-existent statutory power of sale over the suit property. He states that under terms of the facility to the Company, he did not offer his property as a security. His position as regards the Charge, is that it is void for want of consideration as the Bank did not make the advances secured by the Charge to the Company. He further submits that the Further Charge over the suit property was to secure a facility advanced to him in his personal capacity and which he had been servicing regularly without default.

22. The Defendant submits that the original title to his property; LR No. 12592/19, which he handed over as a substituted security, is still being held by the Bank while he is in possession of the title to the suit property. He states that he has commenced the process of discharging the suit property by lodging the Discharge of Charge at the Land Registry. The Defendant thus submits that the Bank cannot purport to exercise a non-existent statutory power of sale over the discharged suit property when it had already waived any rights to obtaining any collateral by failing to procure the Corporate Guarantee from Faida Bank.

23. The Defendant denies that he abused his office. He submits that he submitted the property substitution form which the Bank prepared and executed the Discharge of Charge. He avers that all insider loans were considered by the Board's Credit Committee, the full Board and then reported to the Central Bank as the regulator and that at all stages, he did not participate in deliberations. The Defendant therefore blames the Bank for its own failure to procure a security from the Company before granting the facility.

24. The Defendant submits that the Bank concealed the fact that although it issued Demand Notices to the Company, its directors and to Faida Bank, it has chosen to selectively and discriminately institute these proceedings against the Defendant in order to deny him the right to enjoy his fundamental right to property. The Defendant accuses the Bank of failing to disclose that it purported to call up a Guarantee purportedly issued by him in favour of the Bank and yet he is not a guarantor of the Company. He contends that the Bank failed to disclose that all the loans were considered by the its Credit Department, Board Credit Committee and the Board of Directors without his participation and submits that if these facts were disclosed to the court, it would not have issued an ex parte injunction.

Analysis and Determination

25. From the pleadings, depositions and submissions, the issue for resolution is whether the court should restrain the Defendant from dealing with the suit property in order for the Bank to exercise of its statutory power of sale. In considering this issue, the court will have to determine whether the Bank has a valid security and whether the Bank should be restrained from interfering with the suit property. Further, and in respect of the Defendant's application, the issue of disclosure or non-disclosure of material facts is germane.

26. The principles guiding in determining whether or not to grant an injunction are now commonplace. In the seminal case of **Giella v Cassman Brown [1973] EA 358**, it was held that for a plaintiff to succeed in obtaining an interlocutory injunction, it must demonstrate that it has a prima facie case with a probability of success, that it will suffer irreparable loss which cannot be compensated by an award of damages if the injunction is not granted and if the court is in doubt regarding the nature of injury, determine the matter on a balance of convenience. More recently, in **Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR**, the Court of Appeal reiterated those condition and added that the they are to be considered as separate, distinct and logical hurdles a plaintiff is expected to surmount sequentially.

27. The Court of Appeal in **Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR** explained that a prima facie case is, "a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter." It also observed in **Nguruman Case (Supra)** that:

We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner

as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

28. In this case, the Bank must demonstrate that it has a right to the suit property which it wishes to sell and that this right is likely to be violated by the Defendant's continued possession of the title of the suit property.

29. The Defendant denies that the Bank advanced the Company KES 75,000,000.00 secured by the suit property. It contends that the Letter of Offer did not require any charge to be created over the suit property and he was neither a surety or guarantor of the Company as borrower. I agree that the Letter of Offer did not refer to the suit property, it stipulated that the Defendant ought to have provided, inter alia, a "Duly executed corporate guarantee of Kshs. 75,000,000/- by Faida Bank supported by a board resolution to guarantee the said facility," as a condition precedent.

30. Despite the failure by the Defendant to comply with the terms of the Letter of Offer, the Defendant offered the suit property as security. Under the First Legal Charge dated 23rd May 2016, the Defendant was the Chargor and the Company as borrower leaving no doubt that the Defendant did provide the suit property as security for advances to the Company. Clauses (B) and (C) thereof reads as follows:

(B) The Bank has at the request of the Chargor and the Borrower agreed not to call in or to sue for or require the immediate repayment of any existing indebtedness due to it from the Chargor and/or the Borrower or others for whom the Chargor is a surety and has agreed to grant to the Chargor and/or the Borrower to others for whom the Chargor is or may from time to time be surety such further financial accommodation by way of loan, time credit, banking facilities from time to time to an aggregate maximum principal amount (Exclusive of interest and other charges, costs and expenses as hereinafter provided) of up to Kenya Shillings Kenya shillings Seventy Million Only (Kshs. 70,000,000.00/-) (hereinafter referred to as the "Maximum Principal amount") or such lower limit as may for the time-being and from time to time be fixed by the Bank.

(C) The Chargor in consideration of the Bank granting the Borrower financial accommodation referred to Recital B above has agreed to create a first legal charge (being this charge which is also referred to as "this security" over the Charged Property on the terms and conditions contained herein and in the Bank's Facility Letter/Letter of Offer to the Borrower dated 23rd January 2015 made between the Borrower and the Bank and as may be amended, supplemented varied or reviewed from time to time

31. The above provisions demonstrate the clear intention of the Company and the Defendant to be bound by the Charge. Once the Charge was executed, it was binding on the parties and is evidence that the Company and the Defendant agreed to charge the suit property as a security for the amount already advanced to the Company by the Bank in accordance with the Letter of Offer. I therefore find and hold that the Defendant cannot escape from the fact that he gave up the suit property as a security merely because it was not included in the Letter of Offer. The Charge, as I have set out above, incorporated the Letter of Offer and indicated that the security was a continuing security for amounts already advanced to Company and to which the Company was already indebted at the time of creating the said Charge.

32. The fact that the Defendant acknowledged that advances were made to the Company and the suit property offered as security issued is further acknowledged by the Defendant in the Discharge of Charge which states in part that, "By a Charge and a First Further Charge made between the Chargor of the first party and the Chargee of the second part registered at the Land Titles Registry was charged to the Chargee to secure the aggregate sum of Kenya Shillings Eighty Nine Million Only (Kshs. 89,000,000.00) advances to the Borrower together with interest and other costs and expenses."

33. Having established that the Defendant offered the suit property as security, what I must consider is whether the Company and the Defendant are indebted to the Bank. Indebtedness by the Company to the Bank is a condition precedent for the Bank to exercise its statutory power of sale. In the face of the claim of indebtedness by the Bank is the Discharge of Charge executed on behalf of the Bank by its authorized attorney and which states as follows:

1. The Chargee hereby acknowledges that the Chargee has received all principal monies and interest secured by the Charge payment having been made by the Borrower.

2. The Chargee HEREBY RELEASES AND DISCHARGES the Mortgage Property TOGETHER WITH the building and improvement erected thereon from all principal monies and interest secured by and from all claims and demands by the Charge.

3. The Chargor acknowledges receipt of the title documents and this Discharge and confirms that the Chargor has no claims whatsoever against the Chargee in relation to the Charge and/or redeemed accounts.

34. The Defendant contends that once the Bank executed the Discharge of Charge it cannot purport to exercise a non-existent statutory power of sale. In light of the Discharge of Charge can the Bank assert that it is entitled to original title document for the suit property which it has discharged by deed? While there is a dispute as to the circumstances under which the title document was released to the Defendant, the Bank does not challenge the Discharge of Charge which is a material document in so far as the Charge it relies on is concerned. In fact, the Bank has not prayed for or sought an order that the Discharge of Charge be declared null and void.

35. As a legal document, the Discharge of Charge is conclusive on its contents and extrinsic evidence cannot be received to prove the object for which it was executed or that the intention of the parties, was other than that appearing on the face of the document. This is the import of the rule against parole evidence encapsulated in **section 98 of the Evidence Act (Chapter 80 of the Laws of Kenya)**. The Court of Appeal in **Twiga Chemical Industries Limited v Allan Stephen Reynolds NRB CA Civil Appeal No. 300 of 2006 [2014] eKLR**, explained the basis of the rule as follows:

The parole evidence rule is a well-grounded rule in law, the circumstances prevailing in this case, however, exclude its application. The general rule is that the intention of the parties to an agreement should be ascertained from the document as it is deemed that what the parties intended is what was stated in the agreement. [Emphasis mine]

36. I accept that the relationship between the Bank and Defendant having been consummated in the Discharge of Charge ought to be given full effect as the Court of Appeal stated in **National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR**, “*The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.*”

37. While the Bank has pleaded particulars of misrepresentation, bad faith and abuse of office as a ground for the impugning the Defendant’s conduct of representing that he would provide alternative security upon receipt of the title to the suit property, it does set out any basis or seek specific relief to invalidate the Discharge of Charge. In any case, the Bank does not deny that it has received and is in possession of the alternative security; LR. No. 12952/19. The Bank contends that the alternative security was in respect of the Defendant’s personal loan this cannot be the case because the Bank’s suit is grounded on the fact that the suit property was offered as security for the aggregate loan sum of Kshs. 89,000,000.00 as per the Letter of Offer and the First Legal Charge. In addition, the Supplemental Letter of Offer dated 3rd May 2018 by the Bank clearly refers to substitution of security. It states, “*The purpose of this Supplemental Letter of Offer is to substitute the collateral proposed earlier with property Land Reference 12952/19.*” Further, the email correspondence produced by the Defendant namely an email dated 3rd May 2018 from one Dickson Njeru from the Bank addressed to the Defendant confirms that the Bank received the substituted title document. All this shows that the substituted security was consideration of the Discharge of Charge.

38. I therefore find and hold that without challenging the validity of the Discharge of Charge, the court cannot issue an order restraining the Defendant from dealing with the suit property. In other words, the Bank has not established a prima facie case with a probability of success. Further, there would be no reason to compel the Defendant to hand over the title to the suit property to the court while he holds an otherwise valid Discharge of Charge. In light of the evidence, it would also be inequitable for the Bank to insist on delivery up of the title to the suit property while it holds the title to the substitute property which it called for.

39. Since I have, in effect, dismissed the Bank’s application, the Defendant’s application is successful to the extent that the interim orders in force are automatically discharged. It follows that the it is unnecessary to grant the other orders sought by the Defendant in its application.

40. For the reasons, I have set out above, I now make the following orders;

(a) The Notice of Motion dated 14th December 2020 be and is hereby dismissed.

(b) The Notice of Motion dated 4th January 2021 is allowed on terms that the interim orders issued on 18th December 2020 be and are hereby discharged.

(c) The Plaintiff shall bear the costs of both applications.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MARCH 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Munyalo instructed by Waweru Gatonye and Company Advocates for the Plaintiff.

Mr Issa with him Mr Ochieng instructed by Ochieng Oginga and Company Advocates for the Defendant.