



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO 373 OF 2016**

**WARDY COMMUNICATIONS LIMITED .....1<sup>ST</sup> PLAINTIFF**

**ABDIFATAH ADAN GEDI .....2<sup>ND</sup> PLAINTIFF**

**MOHAMED ADAN GEDIBOSS .....3<sup>RD</sup> PLAINTIFF**

**-VERSUS-**

**CHASE BANK (KENYA) LIMITED (under receivership)...DEFENDANT**

**SAMWEL ARTHUR WEYA.....INTERESTED PARTY**

**RULING**

1. It must never be forgotten that an application for an interim injunction proceeds on the basis of the cases presented by the parties. The prospects of the Notice of Motion dated 25<sup>th</sup> February 2021 has been helped by the Counterclaim framed by Chase Bank (Kenya) Ltd (the Bank or Defendant). In the Motion, the Plaintiffs seek for an order restraining the Bank from advertising, selling, alienating, transferring or otherwise dealing or exercising the remedies of a chargee over the properties Nairobi Block 104/358 belonging to the 2<sup>nd</sup> Plaintiff and Block 104/347 belonging to the 3<sup>rd</sup> Plaintiff.

2. By a charge made on 6/4/2009, the 2<sup>nd</sup> Plaintiff charged LR. No. 104/358 to secure repayment of a debt of Kshs.7,000,000/ advanced by the Bank to Wardy Communications Ltd. (Wardy or the 1<sup>st</sup> Plaintiff). By a charge of the same date, the 3<sup>rd</sup> Plaintiff charged his property LR. No 104/347 to secure repayment of a debt of Kshs.15,000,000/= advanced to Four Winds Communications Ltd (Four Winds). By a charge made on 14/12/2016, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs charged their property LR. No. 7785/215 to secure borrowing to Four Winds for Kshs.10,000,000 with profit.

3. It is the case of the Plaintiffs that Safaricom Ltd called up guarantees to the tune of Kshs.25,000,000/= and the Defendant paid the said sum from fixed deposits held leaving a balance of Kshs.17,600,000/= which the Plaintiffs converted, with the concurrence of the Defendant, to a term loan. By a facility letter of 13/2/2015, the Defendant converted the debt of Kshs.17,600,000/= into a Murabaha Finance Facility. The Plaintiffs read the effect of this facility as being to clear the debts of Four Winds and to transfer them to Wardy.

4. The trigger of this suit was the Bank's demand of Kshs.50,530,640.31 and threat to sell the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs' properties, in default. The 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs argue that the Bank does not hold any or valid security over their properties in regard to this debt. In a Plaint dated 15<sup>th</sup> September 2016 the Plaintiffs seek, *inter alia*, a permanent order of injunction restraining the Bank from selling the two properties and an order for their discharge.

5. The Bank filed a Defence to the Plaintiffs claim and mounted a Counterclaim. The Bank gives its own version of the relationship between it and Wardy. That at the request of Wardy, the Bank on 20<sup>th</sup> August 2014(the august facility), issued to Wardy a conditional offer of banking facility restructuring and consolidating the loans of Wardy and those of Four Winds.

6. Subsequently, in a supplemental letter of offer dated 7<sup>th</sup> October 2014, the terms of the august facility were varied so that, *inter alia*, the two properties would continue to be held as security for the restructured and consolidated facility. That the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs signified

acceptance of the terms set out in the letters of 20<sup>th</sup> August 2014 and 7<sup>th</sup> October 2014 by executing them.

7. In regard to the creation of the Murabaha facility, the Bank maintains that the two existing charges continued to be held as security for the facility as signified by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs' acceptance of the terms set out in the letter dated 13<sup>th</sup> February 2015.

8. The Bank contends that the Plaintiffs owe it a sum of Kshs.50,530,640.31 as at 30<sup>th</sup> October 2016. And in the Counterclaim the Bank asserts that the restructuring and consolidation of the facilities and advancement of the subsequent facilities were on condition that the titles held by the Bank form part of the security and thereby created an informal charge over the subject properties.

9. The Bank's plea to Court is for an order for vacant possession and an order to sell the two properties and LR No. 7785/215 pursuant to the provisions of section 79 (7) of the Land Act. As an alternative it lays a claim for the sum of Kshs.50,530,640.31 plus interest thereon.

10. Before dealing with the merit or otherwise of the present application, the Court considers the Bank's contention that the application is *res judicata*. Counsel for the Bank submits that the Court made a ruling on 13<sup>th</sup> October 2020 with regard to the two suit properties when it discharged the interim orders of injunction earlier granted. It argues that the application is in contravention of section 7 of the Civil Procedure Act.

11. It is true that the provisions of section 7 of the Civil Procedure Act is a codification of the *res judicata* doctrine. Equally true is that the rule applies to applications as it would to main proceedings. So what is the merit of the Bank's argument?

12. At the time of presenting their suit, the Plaintiffs filed a Notice of Motion dated 15<sup>th</sup> September 2016 whose substantive prayers were similar to those in the present application. On 22<sup>nd</sup> September 2016, the Court granted interim orders of injunction in regard to three properties, which included the two.

13. On 11<sup>th</sup> October 2018, parties agreed that the application be disposed of by way of filed submissions and the Court reserved its ruling for 7<sup>th</sup> December 2018. Having considered the application, the Court took a view that the interests of all the parties may be better served if the matter went straight to main hearing. Counsel representing the parties were in agreement and so the application was not determined. Parties then prepared themselves towards hearing of the matter and the interim orders that were then existing were extended.

14. After many false starts (which included giving the Bank an opportunity to amend its Counterclaim), the matter was fixed for hearing on 13<sup>th</sup> October 2020. On that date the Plaintiffs' counsel sought an adjournment which was resisted by the defence. In granting the adjournment, the Court discharged the interim orders in respect to the two properties. That being a censure for the Plaintiffs delaying the hearing.

15. I would think that the effect of the agreement of counsel for the parties of 7<sup>th</sup> December 2019 that this Court need not render a ruling on the application of 15<sup>th</sup> September 2016 and instead the matter proceeds to main hearing was that the application was abandoned. The truth therefore is that the application was never determined on merit.

16. As regards the ruling of 13<sup>th</sup> October 2020 discharging the interim orders, the orders that had been granted were to preserve the status quo and were not in answer to the substantive application. This Court does not perceive the discharge of those orders as barring the Plaintiffs from again seeking substantive orders of injunction if the need arose. The Court declines to accept that the current application is *res judicata* the ruling of 13<sup>th</sup> October 2020.

17. As to the merit of the application, the Court has considered the respective arguments by counsel. At the heart of the matter before Court is whether the two properties continue to constitute security for the debt that Wardy may owe to the Bank. The debate arises because of the restructuring of the original facilities and the consolidation of Wardy's debt with that of Four Winds.

18. While the Plaintiffs are emphatic that any debt owed by Wardy are not secured by way of existing charges, the position of the Bank as to whether there exists formal charges over the two properties is somewhat ambivalent. I say so because in the Bank's Counterclaim it contends that the restructuring and consolidation process created an informal charge (charges) over the properties. Indeed, its main prayer in the Counterclaim is for an order of vacant possession and an order to sell the properties pursuant to the provisions of section 79(7) of the Land Act.

19. Section 79(6) of the Land Act provides the circumstances under which an informal charge is created. It reads:-

“(6) An informal charge may be created where—

(a) a chargee accepts a written and witnessed undertaking from a chargor, the clear intention of which is to charge the chargor's land or interest in land, with the repayment of money or money's worth, obtained from the chargee plus interest as agreed by the chargor and the chargee;

b) the chargor deposits any of the following—

(i) a certificate of title to the land;

(ii) a document of lease of land;

(iii) any other document which it is agreed evidences ownership of land or a right to interest in land.”

20. If the Bank takes the position that the circumstances surrounding the restructuring and consolidation of the facilities led to the creation of informal charges over L.R. No. 104/358 and Block 104/347, then it cannot proceed to sell the properties without the sanction of the Court. Subsection 7 of the section 79 is explicit on that and reads:-

“(7) A chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect.”

21. It must be in salutation of those statutory provisions that the main prayer sought by the Bank in its Counterclaim is for vacant possession and sale of the properties. The Bank cannot seek to sell the properties as though it holds formal charges when it is seeking orders of Court to sell the properties because it holds informal charges. The Bank cannot have it both ways. It is either one or the other.

22. In so far as the sale proposed for 6<sup>th</sup> April 2021 by the Bank is inconsistent with the Defence and Counterclaim it has presented, it should not be allowed to proceed. For this reason, I grant prayer 3 of the application of 25<sup>th</sup> February 2021. Costs to the bank.

**DATED, SIGNED AND DELIVERED IN COURT AT ELDORET THIS 6<sup>TH</sup> DAY OF APRIL 2021**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>TH</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

PRESENT:

Ms Achieng holding brief for Ojiambo for the Plaintiffs.

Ms Mudibo holding brief for Akello for the Defendant.