



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO.E049 OF 2021

MODERN TRUCKERS LIMITED1ST PLAINTIFF/APPLICANT

HAROON SHAHID BUTT.....2ND PLAINTIFF/APPLICANT

-VERSUS-

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. On **10th May, 2021**, the Plaintiffs/Applicants instituted this suit against the Defendants, **Kenya Commercial Bank Limited** vide a **Plaint** dated **26th April, 2021** seeking an order for mandatory injunction to issue compelling the Defendant to forthwith discharge the 2nd Plaintiff's piece of land referred to as **Land Reference No.MN/1/5706** and forthwith release the title document to the said suit land to the 2nd Plaintiff.
2. The Plaintiff also sought for Judgment to be entered as against the Defendant for the sum of Kshs.519,360,720.00 as compensation for lost revenues, general damages and costs of the suit.
3. The **Plaint** was filed in contemporaneity with the application subject of this **Ruling** which is a **Notice of Motion** application dated the **26th April, 2021** expressed to be anchored on the provisions of **Article 40** of the **Constitution of Kenya, 2010, Order 40 Rule 1 & 2** of the **Civil Procedure Rules, and Sections 3A and 63** of the **Civil Procedure Act**.
4. The application seeks for only one substantive prayer, namely that a temporary order of mandatory injunction be issued compelling the Defendant Bank to forthwith discharge the 2nd Plaintiff's piece of land referred to as **Land Reference No.MN/1/5706** and to forthwith release the unencumbered title document to the 2nd Plaintiff.
5. The application is premised on 33 grounds on its face and further supported by the **affidavit** of the 2nd Plaintiff/Applicant sworn on the **26th April, 2021** and further **Supplementary Affidavit** sworn on **14th June, 2021**.
6. The Defendant/Respondent opposed the application on the basis of the **Grounds of Opposition** filed on **21st May, 2021** and the **Replying Affidavit** sworn on **2nd June, 2021** by **Bonnie Okumu**, its **Director Legal Services** and filed on even date.
7. When the application came up for hearing, it was canvassed by way of written submissions which were later highlighted by counsel for the parties on **8th July, 2021**. However, as a precursor, it is important to provide an overview of each of the parties case so as to understand the background of the present dispute.

The Plaintiff/Applicants' Case

8. The 2nd Applicant who is also a Director in the first Applicant Company avers that he operates a regional long truck distance trucking system and sometimes in the **year 2017**, he was approached by the Defendant bank with a proposal to offer financial services and further that the Defendant takes over the Plaintiffs' facilities with **Imperial Bank Kenya Limited** which was then on the verge of collapse. He adds that in the meantime, the he had taken up facilities with the now collapsed **Imperial Bank Kenya Limited** which were sufficiently secured as follows;

a. First legal charge of Kshs.86,000,000.00 over properties known as:-

(a) Kilifi/Kawala "A" Kadzonzo/492

(b) Mgumoposta/Mazera/ 151;

(c) Mgumopasta/Mazera/151

(d) Mgumopasta/Mazera/160 which are all registered in the name of the 2nd Plaintiff.

b. First Legal Charge of Kshs.45,000,000.00 over L.R Number 3203 off Section 1 mainland North, Mombasa registered in the name of the 2nd Plaintiff.

c. Lien over fixed deposit reference No.027DUS3152236001 for USD1,00,000/= in the joint names of Haroon Shahid Butt & Ameera Butt.

9. According to the Plaintiffs, the Defendant had promised to take over all their exposures and liabilities in order to secure the properties held properties with market value of over Kshs.200,000,000/= held with the collapse **Imperial Bank Ltd** including monies held in a fixed account.

10. The Plaintiffs then accepted the offer and thereafter the Defendant offered to provide the Plaintiffs with further facilities if they so needed but on conditions that they provide some additional securities. The Plaintiffs then decided to execute a charge over property known as **MN/1/5706** in favour of the Defendant as security to obtaining a facility for Kshs.130,000,000.00 which he needed to expand his business. Thereafter, he handed over the title document to the Defendant and on **13th March, 2018**, the Defendant registered a charge over the suit property which to date remains in place in favour of the bank.

11. Further, the Plaintiffs have averred that the Defendant refused to and/or failed to disburse the agreed facilities and besides that it reneged on all its promises to assist the Plaintiffs access its funds in the fixed deposit account held at Imperial Bank Limited or to take over the liabilities and assets at the said bank. In the Plaintiffs' view, the Defendant was only interested in defrauding them into creating a charge for a property over a facility it never intended to release to the Plaintiffs. Nonetheless, the Defendant kept on revising the charge document and by a **letter** dated **19th March, 2019**, it unilaterally added a condition that the Plaintiffs do provide additional securities so as to access the loan facility.

12. Owing to the above state of affairs, the Plaintiffs vide a **letter** dated **28th February, 2019** demanded that the Defendant discharges the suit property and hand over the title document which letter has not elicited any response to date. The continued withholding of the title document has occasioned the Plaintiff loss and of recent, the Plaintiffs aver that they missed an opportunity to develop a joint venture apartments in the said premises.

13. In the **Supplementary Affidavit**, the Plaintiffs have reiterated that the facilities at **Imperial Bank Ltd** were fully secured and in any event the said bank is still holding securities valued over Kshs.350,000,000/=. It was denied that **Imperial Bank Ltd** has ever requested for the Irrevocable Reimbursement Undertaking from the Defendant in their favour, and in the event that such Irrevocable Reimbursements were issued, then the Plaintiff was not privy to those contracts since they were inter-bank arrangements.

The Defendants Case

14. The Defendant has submitted that the mandatory relief sought cannot issue at an interlocutory stage in the absence of some settled facts or special circumstances. It is averred that the allegations by the plaintiff were made by undisclosed employees of the Defendant which has to be established upon a full hearing. The Defendant also thinks if the court allows the instant application, then it will be re-writing the contract of the parties.

15. It is however not denied that the Plaintiffs were banking with **Imperial Bank Limited** where they obtained some credit facilities partly used to buy trucks. As a condition thereof, **CFC Stanbic Bank Ltd** insisted on being issued with an Irrevocable Reimbursement Guarantee.

16. On the request of **Imperial Bank Limited** on behalf of the Plaintiffs, the Defendant issued the Irrevocable Reimbursement Undertaking for the following amounts; on transaction **No.IBL/284/2015** for Euro527,313.60, for transaction **No.IBL/271/2015** for USD120,582.00, on transaction **No.IBL/270/2015** for USD246,036.00 and lastly, on transaction **No.IBL/269/2015** for USD243,600.00.

17. Further, that the Plaintiffs and **Imperial Bank Limited** (placed under receivership) failed to pay for the supplied goods and as a result, **CFC Bank** called for the Irrevocable Reimbursement Undertaking and thus the Defendant paid the same. The Defendant avers that it paid a total of Kshs.135,508,939.20 and despite that, the Defendant was still willing to accommodate the Plaintiff for more for more facilities as per the **letter of offer** dated **5th January, 2018**.

18. It is averred that the Plaintiffs agreed to substitute the security to be that of a lien over the fixed deposit of USD1,000,000.00 held at **Imperial Bank Limited** with a charge over **LR No.MN/1/5706** vide an **addendum** dated **23rd January, 2018**. According to the Defendant, the Plaintiffs have failed to avail securities as follows;

a. First legal charge of Kshs.86,000,000.00 over properties known as (a) Kilifi /Kawala "A" Kadzonzo/492 (b) Mgumoposta/Mazera/ 151, 152, &160 all registered in the name of the 2nd Plaintiff.

b. First Legal Charge of Kshs.45,000,000.00 over L.R Number 3203 off section 1 mainland North, Mombasa registered in the name of the 2nd Plaintiff.

19. Further, the Defendant argues that it cannot direct **Imperial Bank Limited** on what security it should release and on what terms as this is entirely a task to be carried out by the Board Credit Committee. All in all, the Defendant maintains that it is lawfully holding the charge over the suit property for the reason that **Clause 8.2** of the **letter of offer** dated **5th January, 2018** provided that any property held by the bank would only be released after all monies secured by any charge or mortgage or any letter of offer was completely paid, that the facility to be granted to the Plaintiffs was to be used partly to take over the Plaintiff's facility at **Imperial Bank Ltd** and it is on that basis the Irrevocable Reimbursement Undertakings were issued to Imperial Bank. It is also stated that **Clause 9.3** declared the security to be a continuing security and the facility could not be disbursed on insufficient security.

20. Lastly, the Defendant submitted that the plaintiffs are still indebted to them for the Irrevocable Reimbursement Undertaking and they should pay the same for the title to be released.

Analysis and Determination

21. I have carefully read through and considered the application herein, the response thereof, the annexures attached thereto, both oral and written submissions by the parties, and the authorities relied on by the parties.

22. It is trite that the grant or refusal of an injunction involves the exercise of judicial discretion. Bearing in mind that the main issue for determination is whether this court should issue a mandatory injunction directing the Defendant bank to discharge property **No.MN/1/5706** registered in the name of the 2nd Respondent and hand over the title document thereof to the Plaintiffs, it is imperative to consider whether the Plaintiffs have established a prima facie case for grant of those orders.

23. As both parties have appreciated and warned that a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases, the underlying question is whether this is a proper case for exercise of judicial discretion to grant such an order.

24. From the onset, the following pertinent facts were not in dispute: that the 2nd Plaintiff is the registered owner of the property/parcel of land known as **LR Number. MN/1/5706**; that the title to that property was handed over to the Defendant to form part of the security for the facility of Kshs.130,000,000/= which was intended to be disbursed to the Plaintiffs and that the **charge document** dated **13th March, 2018** was executed by both parties and a charge subsequently registered on the title document on event.

25. It is also not denied that the principle amount intended for the charge in the sum of Kshs.130,000,000/= was never released to the Plaintiff and now the Plaintiff aver that the Defendant was treacherous in deceiving them to believe that they would advance facilities which they never intended to.

26. On the part of the Respondent, it is contended that the Defendant is justified in holding the title document as security for monies paid for Irrevocable Reimbursement Undertaking to **CFC Bank** at the request of **Imperial Bank Limited** on behalf of the Plaintiffs. In rebuttal of those assertions, the Plaintiffs submitted that they have never asked or instructed the **Imperial Bank Limited** (under receivership) to request for the Irreversible Reimbursement Und, then the same was inter-bank arrangements not binding on him.

27. I have read through the documents annexed to the application and the **Replying Affidavit**, not once but more than two times. It is without doubt that the Defendant relies on the **letter of offer** dated **5th January, 2018** as a basis of holding charge over the subject property. It is averred that **Clause 8.2** thereof provides that the bank shall not release the property it is holding until payment of all monies secured by the charge or any other letter of offer, is paid.

28. My view is that, whilst a letter of offer may incorporate the General Terms and Conditions of a lender, once a subsequent document of contract such as a Charge is executed, it is expected that all terms and conditions contained in the Letter of Offer are expressly incorporated or they automatically merge with the Charge. Therefore when there arise a conflict between the parties, the charge document is always the first point of call and it prevails over the letters of offer. This is so because the Charge document is the later in time and it is assumed that when the parties execute the same, they are aware of the provisions of the earlier documents.

29. A similar view was adopted by the court in the case of **Muriithi Gacugo Ng'ang'a -vs- HFCJ & Anor NRB HCCC No.15 of 2005** (unreported) where the court expressed thus;

“The letters of offer executed by the parties are relevant in forming the foundation of the contract and the intentions of the parties. Of course, as between them and the charge instruments, the charge is superior and if there is any conflict, then the terms of the charge would supercede any other agreement between the parties.”

30. In view of the foregoing, I have read through the charge document dated **13th March, 2018** which was specifically for borrowing the sum of Kshs.130,000,000/= and which both parties are of consensus that it was never disbursed to the Plaintiffs. At the time the Defendant bank was executing the said charge, it was still aware that it had at some point issued the Irrevocable Reimbursement Undertakings which it was later called upon to pay.

31. I have also read through the Irrevocable Reimbursement Undertakings and they expressly show that they were made solely at the request

of **Imperial Bank Ltd.** The charge document dated **13th March, 2018**, whose existence and validity the Defendant has not rebutted and find it has not at any point made reference to the Irreversible reimbursement Undertaking.

32. The principles on contract are concerned on what the parties had agreed on in the event of a binding contract. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.

33. As already indicated, the charge document dated **13th March, 2018** is the legal document spelling out each of the party's obligations, the terms and conditions of the legal charge created on the 2nd Plaintiff's property **LR. No.MN/1/5706**.

34. Clearly, with such document in existence, it was foolhardy for the Defendant to embark on the Irrevocable Reimbursement Undertakings issued back in the **year 2015** and purport to incorporate the same to the charge document when such was not the express intention of the parties. **Moreso**, the Defendant has not rebutted that the facilities the Plaintiffs had taken with **Imperial Bank Limited** (under receivership) were sufficiently secured and I believe there are charge documents stipulating how those facilities were to be repaid or the securities to be realized in the event of default.

35. It is also unfathomable how the Defendant could have issued the Irrevocable Reimbursement undertakings without first agreeing on some terms or security to guard its interests. I believe there could be some but the Defendant has not been candid to bring the same to the attention of the court.

36. However, as regards its relationship with the Plaintiffs, this court has said enough and the charge document dated **13th March, 2018** regulates the parties' relationship in so far as the Charge created on **LR. No.MN/1/ 5706** in favour of the Defendant is concerned. The intended loan facility for the sum of Kshs.130,000,000/= was never disbursed and this court cannot change the terms of the charge document to indicate that the same was intended to secure the sum of Kshs.130,000,000/= paid under the Irrevocable Reimbursement Undertakings.

37. Clearly, the Defendant is in the wrong and cannot sneer on fact that it is possessed with the charge documents and charge in its favour is already created so as to force upon the Plaintiffs terms which were not agreed on in the first place.

38. The Court of Appeal in case of **Shariff Abdi Hassan –vs- Nadhif Jama Adan [2006]eKLR** also stated that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

39. From the foregoing, it is clearly incorrect for the Defendant to hold that the Charge over **LR. No.MN/1/5706** was intended to form part of the security for the Irreversible Reimbursement Undertaking. It cannot also be gainsaid that the charge would be a continuing guarantee for debts arising from the Irreversible Reimbursement Undertaking because they were issued way back in **2016** as nothing would have been hard for the parties to say so in the charge document had that been their intention.

40. In my view, the continuing security would only have affected transactions happening after the charge document was executed and thus the Defendant was stealing a march in purporting that the continuing charge also covered the Irreversible Reimbursement Undertaking given that the charge and the Irreversible Reimbursement Undertaking were not contemplated to be part of the same transaction.

41. In the upshot, I am satisfied that the Plaintiffs/Applicants have met the test of special circumstances and this application warrants the court exercising its discretion in the Applicants' favour.

42. Consequently, I find the Plaintiffs' application merited and accordingly allow the same with an order that:-

a. A temporary mandatory injunction be and is hereby issued compelling the Defendant Bank to forthwith discharge the 2nd Plaintiff's piece of land situated within Nyali Estate in the Mombasa County containing by measurement 0.4021 Hactares or there about and known as Land Reference No.MN/1/5706 as contained in grant Number C.R20571 and forthwith release to the 2nd Plaintiff/Applicant the encumbered title document to the said Land Reference MN/1/57076.

b. Costs of the application shall be in cause on main cause.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS ...4TH.....DAY OFNOVEMBER....., 2021.

D. CHEPKWONY

JUDGE