



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

COMMERCIAL CASE NO. 07 OF 2019

BETWEEN

OCHOLA KAMILI HOLDINGS LIMITED..PLAINTIFF/APPLICANT

AND

GUARDIAN BANK LTD.....DEFENDANT/RESPONDENT

RULING

Background

1. **OCHOLA KAMILI HOLDINGS LIMITED** (*Guarantor*) is the registered owner of all that property known as **KISUMU/MUHORONI/1293** (*the suit property*) which is an agricultural land.
2. Sometimes on 12th October, 2010, the Guarantor **charged the suit property to the GUARDIAN BANK LTD** (*Bank*) to secure a loan facility in favour of **Excel Logistics Ltd** and **Guardforce Security (K) Ltd** (*borrowers*) for the sum of up to an aggregate of Kshs. 4,500,000/- and Kshs. 2,000,000/- respectively.
3. By a further charge dated 25th April, 2012, the Guarantor **charged the suit property to secure a loan facility and overdraft facilities in favour of the borrowers up** to an aggregate sum of Kshs. 7,500,000/- and Kshs. 9,000,000/- respectively.
4. The borrowers defaulted in repayment and by a Statutory Notice of Sale dated 30th July, 2019 served on the Guarantor **on 08th August, 2019, the Bank** issued a 42 days' notice for repayment of the outstanding sums failure to which it would sell the suit property in a public auction in exercise of its statutory power of sale.
6. The notice which the Guarantor argues was allegedly served and /or not served prompted it to commence this suit by way of a plaint filed on 16th September, 2019. The plaint was subsequently amended on 11th November, 2019.

Application

7. Subsequently on 02nd October, 2019, the Guarantor filed a notice of motion dated 18th September, 2019 which is the subject of this ruling, seeking 5 prayers. The pending prayers are for orders **THAT**: -

1. Pending the hearing and determination of this suit, an interlocutory injunction be and is hereby issued restraining the Respondent, its servants, advocates and/or agents from advertising for sale, selling, completing any contract for sale, entering into, accessing, alienating, transferring, interfering with and/or in any other manner whatsoever KISUMU/MUHORONI/1293

2. Costs of this application be provided for

8. The application is based on the grounds among others **That**:

i. The charges dated 12th October, 2010 and 25th April, 2012 are void for want of Consent to Charge Issued by the Land

Control Board.

ii. The Defendant does not hold any statutory power of sale and the purported Notice to Sell the suit property is unlawful and invalid

iii. Requisite demands, statutory notices and valid notice to sell in terms of Section 90 and 96 of the Land Act, 2012 have not been served

iv. The Respondent has not conducted any forced sale valuation of the suit property in terms of Section 97(2) of the Land Act, 2012

v. The Applicant will suffer irreparable loss if the order sought is not granted

vi. The balance of convenience tilts in favour of granting an interim injunction.

9. The application is supported by an affidavit sworn on 18th September, 2019 by **POLYCARP OCHOLA OKUMU**, a director of the Plaintiff/Applicant in which he reiterates the grounds on the face of the application. Annexed to the affidavit is a copy of title deed for the suit property, charge and further charge dated 12th October, 2010 and 25th April, 2012 respectively, Notice to Sell dated 30th July, 2019 received by the Applicant on 08th August, 2019 and a letter of response by Applicant's advocate dated 21st August, 2019 all marked **POO-1** to **POO-5** respectively.

10. The **Bank** opposed the application by way of a replying affidavit sworn on 06th November, 2019 by **MARY OMULLO**, its legal manager. Deponent avers that at the request of the Guarantor by a letter of offer dated 12th August, 2010 marked **MO-1**, the Guarantor offered to charge the suit property to secure a loan facility of Kshs. 4,500,000/- and Kshs. 2,000,000/- respectively to **Excel Logistics Ltd** and **Guardforce Security (K) Ltd**.

11. That subsequently, a legal charge dated 12th October, 2010 was prepared and registered on 26th October, 2010 after the necessary compliance with the provisions of the Land Act relating to consents by the Land Control Board and in support thereof is annexed an application for Land Board Consent, Consent Letter dated 30th September, 2010, the legal Charge and certificate of registration of the Mortgage dated 15th March, 2011 and debenture marked **MO-2 (a)** to **(d)** respectively.

12. The deponent avers that the credit facility was reviewed on 06th March, 2012 to provide a further charge of Kshs. 16,500,000/- **making the aggregate of Kshs. 23,000,000/- the loan and overdraft facilities** secured by **the suit property in favour of the borrowers as evidenced by the further charge marked MO-3**.

13. It is averred for the Bank that the borrowers defaulted in the payments which prompted the Bank to issue a 90 Days Statutory Notice to the borrowers, their directors and guarantors which notice together with the certificates of postage are annexed and marked **MO-4 (a)** to **(c)** respectively.

14. The default persisted and the sums due stood at Kshs. 45,702,674.27 as at 22nd July, 2019 which prompted the Bank to issue a 40 days' Notice to Sell to the Borrowers and the Guarantor. The Notice to Sell dated 30th July, 2019 and certificate of postage are attached and marked **MO-5 (a)** and **(b)** respectively.

15. Additionally, the deponent avers that contrary to the applicant's assertion, the application for Consent of the Land Control Board as shown by the application and consent marked **MO-6 (a)** and **(b)** respectively.

16. Concerning the value of the suit property, the Bank has filed two valuation reports by M/s Legend Valuers Ltd and Dansal & Associates Limited dated 18.08.2010 and 26.03.2014 respectively prior to the advancement of the facility marked **MO-7 (a)** and **(b)** respectively.

17. Additionally, the deponent avers that the Guarantor who has not denied being indebted has come to court with unclean hands and is abusing the court process having obtained another injunctive order vide **Nairobi HC COMMERCIAL CASE NO. 547 OF 2014** which was dismissed on 18th October, 2018 for want of prosecution as demonstrated by a ruling of the said date marked **MO8 (a)** to **(b)**.

18. In conclusion, the Bank contends that the suit and the application are fatally defective having been supported by an affidavit sworn without the express authority from the Guarantor company.

19. In response to the Bank's assertions, the Guarantor through its director **POLYCARP OCHOLA OKUMU** on 12th November, 2019 filed a supplementary affidavit in which he conceded that he signed the application form for consent marked **MO-2 (a)** but argues that the consent marked **MO-2 (b)** and **MO-6 (b)** are fraudulent for the reason that the suit land falls within the jurisdiction of Muhoroni Land Control Board and not Nyando Land Control Board that allegedly gave the consent.

20. The deponent further avers that the institution of this suit and appointment of the advocate were authorized by the Guarantor's Board of Directors by way of a Board Resolution dated 21st August, 2019 marked **PO-SA-1**.

Analysis and determination

21. I have carefully considered the affidavit evidence on record and the submission on behalf of both parties. The issues in question are: -

i. Whether this suit complies with order 4 rule 1 (4) of the Civil Procedure Rules

ii. Whether a demand notice under Section 90 (1) of the Land Act was effectively served

iii. Whether the 2nd defendant/respondent's Statutory Power of Sale under Section 90 (3) of the Land Act had arisen

iv. Whether an injunction should issue

i. Whether this suit complies with Order 4 rule 1 (4) of the Civil Procedure Rules (Rules).

22. Order 4 rule 1 (4) of the Rules

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

23. Whereas it is on record that the Guarantor filed its Board of Directors Resolution dated 21st August, 2019 marked **PO-SA-1** authorizing the institution of this suit and appointment of the advocate long after the issue was raised by the Bank, I have no doubt that the Guarantor has duly complied with Order 4 rule 1 (4) of the Rules and that this suit and the application are properly before the court.

ii. Should an injunction issue

24. The Guarantor does not deny the existence of the legal charge and further charge dated 12th October, 2010 and 25th April, 2012 respectively but raises various complaints against the charge as follows:

a. Consent is invalid, irregular and a nullity

25. Concerning its first complaint the Guarantor through its director **POLYCARP OCHOLA OKUMU** conceded that he signed the application form for consent marked **MO-2 (a)** but argues that the consent marked **MO-2 (b)** and **MO-6 (b)** do not comply to Section 6(1) of the Land Control Act (Cap 302 Laws of Kenya) and are fraudulent for the reason that the suit land falls within the jurisdiction of Muhoroni Land Control Board and not Nyando Land Control Board that allegedly gave the consent.

26. In support of its assertion, the Guarantor relied on **Witerose Radio Alarms (K) Ltd v Guardian Bank Limited [2018] eKLR** where the court in granting an interlocutory injunction stated:

“in the circumstances, I find that the plaintiff has demonstrated a prima facie case with probability of success. I so find because in the absence of a consent by the land control board, the charge instrument, which is the foundation upon which the bank would have derived its statutory power of sale would be a nullity.....”.

27. Further to the foregoing, the Guarantor contends that the consent by the Nyando Land Control Board does not comply with Section 8 (1) of the Land Control Act and was a nullity since the application had been made to Muhoroni Land Control Board.

28. In response, the Bank argues that consent was properly obtained and that the Guarantor who alleges fraud has a duty to prove that the consents are fraudulent. Further, the Bank asserts that it is too late in the day for the Guarantor to challenge the validity of charge from which it has benefitted.

29. There is no dispute that consents by the Land Control Board were granted, one by Muhoroni Land Control Board and the other by Nyando Land Control Board. The Guarantor attacks the latter one on the ground that no application had been made to that Board. I have considered the submission by both parties and I find that consent having been granted by the Nyando Land Control Board, the presumption unless the contrary is proved, by the Guarantor, is that such an application was indeed made. The Guarantor was under a duty to demonstrate that the consents were fraudulently obtained a duty that it has failed to discharge.

30. But even supposing that the consents are a nullity, is the Guarantor entitled to avoid the transaction upon which it has benefitted? My answer to this question is to be found in the persuasive decision in **John Olago Aluoch V Standard Chartered Bank Limited Kisumu High Court Civil Case No. 94 Of 2005** (unreported) where the court is considering whether a transaction was valid for failure to obtain the consent of the Land Control Board stated as follows:

“After taking financial advantage from such a transaction the plaintiff is precluded from saying that it is invalid because consent to charge had not been obtained. It is contrary to good faith and equity to deliberately derive a benefit or accept a benefit granted as a result of a charge and subsequently attack its validity. It is my position that once a benefit has moved from the said transaction, a party would not be allowed to disregard the condition on which the benefit was based in the charge to be conferred.....No debtor would be allowed to go behind a contractual document in which a beneficial and financial benefit was derived from.”

31. The Guarantor does not deny that a benefit was conferred to the borrowers and that they are in default. I am persuaded that the Guarantor is acting contrary to good faith and equity in attacking the validity of charges from which the borrowers that it guaranteed have benefitted.

This court would not be acting in the interest of justice if it allows a party such as the Guarantor to disregard the conditions of the charge from which a benefit has been conferred and this court and indeed any other court should not allow a debtor to go behind a contractual document in which a beneficial and financial benefit was derived from.

b. Has the Bank's Statutory Power of Sale arisen

32. The Guarantor challenges the Bank's Statutory Power of Sale only on further charge where it argues that the said charge does not contain a special acknowledgment that the charger understands the effect of Section 74 of the Registered Land Act. The Guarantor specifically refers to clause 12 which he says does not define the Act to which it was referring to.

33. Clause 12 of the further charge stated above provides as follows:

The above named chargor hereby acknowledges that I understand the effect of section 74 and 79 of the said Act.

34. As rightfully pointed out by the Guarantor, the said acknowledgment does indeed not specify which Act it was referring to. The Guarantor has not demonstrated that the said sections referred to any other Act other than the Land Act or that it was prejudiced by the omission, in the acknowledgment, on the further charge, of the words **LAND ACT**. Based on the foregoing finding, I find that the Bank dutifully complied with Section 65(1) of the Registered Land Act and the holding in **Kenya Commercial Finance Company Ltd v Kipng'eno Arap Ngeny & Another [2002] eKLR** and **John Didi Omulo V Small Enterprises-Finance Co. Ltd. & Another [2005] eKLR** cited by the Guarantor are not suited to this case.

35. I have also considered the provisions of Section 90 of the Land Act which provides for the remedies of a chargee. It is to be remembered that under section 90 aforesaid, the operation of the statutory notice is triggered by service of the same upon the chargor. There is evidence that service was effected not only to the guarantor but also to its directors and the borrowers thereby triggering the operation of the Bank's Statutory Power to Sell.

c. Should a temporary injunction issue

36. Any discussion on temporary injunctions is not complete without reiteration of the requirements for grant of injunctions as set-out in the **Giella vs Cassman Brown [1973] EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

37. The principles on which courts will grant an injunction were restated by the Court of Appeal in **Nguruman Limited V. Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012**, together with the mode of their application as follows:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

38. These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86**).

39. The Court of appeal in the **Mrao Ltd Vs First American Bank of Kenya and 2 others [2003] eKLR** interpreted the condition as to prima facie case as follows:

"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which on the material presented to court; a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter."

40. In this case there's undisputed evidence that the borrowers that the Guarantor guaranteed are truly and surely indebted to Bank. On the material presented to court therefore, and in view of the default on the part of the borrowers, I find that the Guarantor has not demonstrated that it has a *prima facie* case with a probability of success nor has it been demonstrated that the Bank's action to realize the security on account of unpaid debt will apparently infringe on the right of the Guarantor.

41. On the second principle of irreparable injury and the third principle of balance of convenience, the court in **Nguruman Limited** (above) stated as follows:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”

42. I have however taken the liberty to consider the two principles as hereunder. From the evidence on record, it has not been demonstrated that the Bank would be unable to compensate the Guarantor in damages should this case succeed and the application thus fails on the nugatory principle of the matter. The balance of convenience therefore tilts in favour of not granting an injunction.

43. In conclusion, it is on record that on the basis of the similar facts before this court, the Guarantor had previously filed Nairobi HC COMMERCIAL CASE NO. 547 OF 2014 and obtained a temporary injunction against the Bank. That suit was dismissed on 18th October, 2018 for want of prosecution as demonstrated by a ruling of the said date marked MOB (a) to (b). The Guarantor did not to apply for reinstatement of that suit but on 16th September, 2019, exactly one year after the order of dismissal filed this suit and application mainly seeking an order of injunction as in the previous suit.

44. Clearly, the Guarantor has not come to court with clean hands and is abusing the court process by filing multiple suits on the same grounds which is in my considered view detrimental to the Bank. In arriving at this decision, I am fortified by the decision by Kwach J.A. (as he then was) in Mrao Limited (above) that: **"Courts will not allow debtors to avoid paying their just debts – otherwise banks will be crippled out of business altogether, and no serious investors will bring their capital into a country whose courts are a haven for defaulters."**

DISPOSITION

45. From the foregoing analysis, it is apparent that the Guarantor has not raised any genuine and arguable case on which it would be entitled to the exercise of court's discretion in its favor. In the end, the Preliminary Objection is overruled. On the other hand, the notice of motion dated 18th September, 2019 and filed on 02nd October, 2019 fails and is dismissed with costs to the Bank.

DELIVERED AND SIGNED AT KISUMU THIS 06th DAY OF February 2020

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For Applicant/Guarantor - Mr. Ochola hb for Mr. Kiplagat

For Respondent/Bank - Mr. Maganga