REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT KAJAIDO

CIVIL CASE NO.23 OF 2018

STEPHEN SONTO SIPALA.....PLAINTIFF/APPLICANT

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....1ST DEFENDANT/RESPONDENT

MELLECH ENGINEERING AND CONTRUCTION CO. LTD.....2ND DEFENANT/RESPONDENT

RULING

Background

1. This Court, by a ruling made on the 7th September 2018, dismissed the Applicant's application for injunction which sought to restrain the 1st Defendant from in any manner conducting any dealings with property known as **Kajiado/ Lorngusua/1449** (hereinafter the suit property) whose proprietary rights resides with the Applicant.

2. Following his dissatisfaction with the said ruling of the court, the Applicant has once again approached this court by way of an Amended Notice of Motion dated 29th January, 2019 was filed herein on 30th January, 2019. It is brought in terms of Article 159 of the Constitution of Kenya 2010, **Section 1A and IB**, 79G **section 80** and **3A** of the Civil Procedure Act, **Order 42 rule 6(3)** and **(6), order 45 Rule 1** of the Civil Procedure Rules 2010, and all other enabling Provisions.

3. The Applicant seeks a temporary conservatory order of injunction restraining the 1st Respondent from engaging in any kind of dealings with property known as Kajiado/Lorngusua/1449 pending herein and determination of the application herein as well as the appeal at the Court of Appeal.

4. In the alternative and without prejudice to the foregoing, the Applicant seeks a review of the ruling made by this court on the 17th of September, 2018. In addition, the Applicant asked the court to make such orders as may be warranted in the interest of justice and the orders as to costs be abide by the outcome of the Appeal.

Grounds of Application

5. The Application is anchored upon several grounds which are elaborately set out in the Notice of Motion. They are couched as follows: that one of the cardinal principles in Giella Vs Cassman Brown is the preservation of the subject matter of the suit, pending the determination of the disputed on the merits.

6. It is indicated therein that if the Respondents are allowed to take adverse action it would have the effect of crippling the Applicant completely thereby rendering him destitute.

7. The Applicant has filed a notice of appeal and if the sale proceeds it will thus defeat and render the intended appeal nugatory and that the Application has been filed with due speed. Further that, the Applicant is ready to comply with any orders as to security.

8. That should execution proceed, the Applicant stands to suffer prejudice and cause him substantial loss. He asked the court, in the interest of justice, to accord him an opportunity to exercise his right of appeal which necessitates the grant of stay of execution.

9. The Applicant further indicated that there is new and important matter which has been discovered that was not earlier in the knowledge of the plaintiff at the time of filing this matter. As well as an error apparent on the face of the record. It is also averred that the participation of the second defendant was not taken into account in the earlier proceedings and decision of the court.

The Applicant's Case.

10. As captured in the Applicant's supporting affidavit, he has pursued a prayer for review of the said ruling pointing out the court's failure to take into account the 2nd Defendant's position. In his humble view, this alleged error on the face of record warrants a review. He then urged the court to note that the facility that has led to the filing of this case was granted to the second defendant; without the 2nd Defendant providing any security.

11. It was averred that it was the Applicant, Stephen Sonto Sipala and Steven Kariuki who gave security; but the funds were received and utilized by the 2nd Defendant. On that note, the Applicant holds the view that it was critical for the court to have taken into account the explanation given by the 2nd Defendant and the same was not captured in the ruling. He sees it fit therefore that this court reviews the decision by taking into account the evidence of the 2nd Defendant.

12. Apart from the foregoing, the Applicant deponed that there exist substantial grounds for review as the court will confirm that the 2nd Defendant never met the terms they had agreed upon and consequently, there were no proper consideration for him to give him security. He alleged that the 2nd Defendant breached the agreement and the same must be taken into account. Further that the court should thus require for first and 2nd Defendant to deal with each other on the obligations under the contract.

The Applicant's Submissions.

13. According to the Applicant, the issues to be determined herein are whether there is an error on the face of the record to warrant a review and whether the Plaintiff/Applicant is entitled to conservatory orders.

14. On whether there is an error on the face of the record to warrant a review, Learned Counsel Mr. Makori for the Applicant cited order 45(1) of the Civil Procedure Rules which encapsulates the grounds that an application for review needs to fulfil. He placed reliance on the case of ***Muyodi vs. Industrial and Commercial Development Corporation & Another (2006) 1 EA 243*** where the Court of Appeal described error on the face of record.

15. The applicant contends that there is error on the face of record due to the fact that the court proceeded to make a determination in the said ruling without taking into consideration the evidence and submissions of the 2nd Defendant.

16. It was averred by the Applicant that the 2nd Defendant being the principal debtor, its submissions and evidence was vital in arriving at its previous decision. Counsel placed reliance on the case of **St Patricks Hill School Ltd v Bank of Africa Kenya Ltd (2018) eKLR** where this court expounded on the principle of fair hearing.

17. The Learned Counsel Mr. Makori for the Applicant contends that in the instant matter plaintiff happens to be a pawn in the game between two powerful parties, to wit, the 1st and 2nd Defendants. He further argued that the Plaintiff is the party who deserves the protection of the court, as he is not the one who received the funds.

18. It is contended further that the plaintiff/applicant was also not responsible for repayment of the loan as the same was the responsibility of the 2nd Defendant. According to him, the 2nd Defendant took advantage of the Plaintiff and never paid agreed consideration, nor repaid the loan installments.

19. The Learned Counsel Mr. Makori for the Applicant submitted that since there is still a pending dispute between the 1st and 2nd Defendant, the equity of redemption has not been extinguished and thus the plaintiff ought to be protected. He cited the case of ***Joseph Siro Mosioma v Housing Finance Company of Kenya & Others (2008) eKLR*** to bolster his argument.

20. The Plaintiff Applicant counsel further contends that the failure by the 1st and 2nd to inform him of these extended facilities was a breach of not only the guarantee contract but the fiduciary relationship between the parties. On that note, he placed reliance in the sentiments of **Justice J. Ojwang in the case of Kanyoro v Wakararwa Printers Ltd & Another (2005)eklr** rightly observed that:

> **"The governing principle of law is clearly stated in Halsbury's Laws of England, 4th ed. Vol. 30, para. 253: "any material variation of the terms of the contract between the liability by the creditor and the principal debtor will discharge the surety, who is relieved from liability by the creditor dealing with the principal debtor…."**

21. In conclusion, Learned Counsel therefore humbly prays for the Honourable court to grant the plaintiffs/Applicant the reliefs sought in the application.

The 1st Respondent's Case

22. The 1st Respondent opposed the instant application by way of a supplementary affidavit sworn by Alex Nguli, the Remedial Management Officer at Co-operative Bank of Kenya Limited. The same is dated and filed on the 18th and 19th of February, 2019 respectively through Oundo Muriuki & Co. Advocates.

23. In response's prayer for review and grounds in support thereof, the deponent holds the view that the same lacks merit for reasons that; the applicant has not disclosed any error apparent on the face of the court's ruling to warrant a review of the court's ruling and that the applicant's assertion that the court did not consider the 2nd Defendant's submissions is untrue as the court at page 12 of the ruling stated thus;

"It is the 2nd Defendant's case that the documents signed by both parties in relation to the contract created a binding agreement to pay the 1st Defendant in the event of default by the 2nd Defendant. The 1st Defendants are inviting the court to enforce this contract…"

24. Further that, the applicant has not adduced any new or important evidence at all to warrant reviewing the court's ruling of 17th September 2018. That the prayer for review is misconceived and is an afterthought reached upon the realization by the Applicant that his application lacks merit and that in any case, a decision cannot be appealed against and reviewed simultaneously.

25. It is the deponent's averment that both the original and amended application failed to disclose sufficient reasons to warrant granting the orders sought herein. Further that the instant application and the positions taken by the applicant and the 2nd Respondent reveal a well-coordinated scheme to defeat the bank's recovery efforts at all costs even after this court ruled that there is no legal basis for stopping the bank from proceeding with recovery pending the hearing of the main suit.

26. In response to the 2nd Respondent's contention that the outstanding sum is in dispute, the deponent averred that it is a settled position in law that a dispute as to the arrears cannot on its own warrant the granting of an injunctive relief. He thus reiterated that the amended application ought to be dismissed with costs to the 1st Defendant.

The 1st Respondent's Submissions

27. The 1st Respondent supported its case by way of submissions dated 18th February 2019. The Learned Counsel Mr. Makori for 1st Defendant contends that the honourable court should not issue the conservatory orders of injunction sought by the plaintiff pointing out the following reasons: that the applicant has not demonstrated that there is an arguable appeal, that the dismissal of the application is a negative order not capable of being stayed, that the issue of whether a temporary injunction should be granted stopping the 1st Defendant from selling the property was dismissed on merits thus res judicata, conservatory orders are public law remedies beyond the ambit of private law.

28. On the argument that the applicant has not demonstrated that the appeal is arguable, the Learned Counsel for the 1st Respondent argued that the application is predicated upon an intended appeal hence the applicant is duty bound to exhibit in court a memorandum of appeal to enable the court to ascertain whether the appeal is arguable.

29. It was asserted that the same has not been done in the instant case and the court is left to speculate as to the possible grounds of appeal. Further that the application in its entirety failed to point out any errors of law or fact in the ruling by this Honourable Court that the Applicant seeks to rectify at the Appellate stage. Learned Counsel cited the case of ***Abdullahi Mohamed Sheikh vs Gulf African Bank (2018) eKLR*** to advance its position.

30. It was therefore humbly submitted that the instant application is not well founded due to failure by the Plaintiff to furnish the court with a memorandum of appeal. According to the Counsel for the 1st Respondent, the instant application is only aimed at misusing the court system to delay and frustrate the 1st Respondent's recovery efforts and for this reason alone, it should be dismissed.

31. Apart from the foregoing argument, Counsel holds the view that the dismissal of the previous application is a negative order not capable of being stayed. It was contended that the instant application, though cleverly framed as seeking conservatory orders, is quintessentially an application seeking to stay the ruling delivered by the court on 17th September 2018.

32. In light of the foregoing, Learned Counsel's humbly submitted that an order of stay cannot be issued against a negative order of the court. Counsel placed guidance in the case of **Feisal Amin** ***Janmohammed T/A Dunyia Forwarders vs Shami Trading Company Limited (2014) eKLR, Milcah Jeruto Tallam T/A Milcah Faith Enterprices vs Fina Bank Limited & Another (2013) eKLR*** to advance the proposition that a negative order cannot be stayed.

33. It was also argued by the Learned Counsel Mr. Makori for the 1st Respondent that the court herein is functus officio on whether a temporary injunction should be granted hence the application is res judicata. It was asserted that the instant application was filed by the same parties in the same court and the reliefs sought are the same in substance which is to stop the 1st Respondent from proceeding with recovery pending the hearing and determination of the main suit. It was therefore submitted that the suit herein is res judicata and should be struck out.

34. On the contention that conservatory orders are public law remedies beyond the ambit of private law, the Learned Counsel pointed out that the Plaintiff has in this suit sought conservatory orders pending the hearing and determination of the intended appeal. Learned Counsel submitted that the Plaintiff has fatally misconstrued the remedy for conservatory orders.

35. Counsel resorted to the Supreme Court case of ***Gitaru Peter Munya vs Dickson Mwena Kithinji & Others 2024) eKLR,*** **and the High Court Case of** ***Milcah Jeruto Tallam T/A Milcah Faith Enterprices vs Fina Bank Limited & Another (2013) eKLR*** to advance the proposition that Conservatory orders cannot issue in private disputes like the one before this Honourable Court. He therefore urged this Court to dismiss the prayers for conservatory orders.

36. As to whether this court should issue the alternative prayer for review, the Counsel for 1st Respondent submitted that the prayer for review is an afterthought, it lacks merit and it ought to be dismissed with costs. Counsel cited the Order 45 rule 1 which lays down the grounds within which the court may exercise jurisdiction to review its decisions.

37. It was argued therefore that the applicant has already lodged a Notice of Appeal signifying his intention to appeal the decision of the court and the same renders the prayer for review incurably defective. Further reliance was placed on the case of ***Serephen Nyasani Menge vs***

Rispah Onsanse (2018) eKLR to support the above argument.

38. In addition, the Counsel for 1st Respondent contends that the application for review itself lacks merit. It was argued in that regard that the Applicant has not adduced any new or important evidence as required under order 45 rule 1. Further that the Applicant failed to pinpoint error apparent on the face of record to warrant reviewing and that the allegation that the court did not consider the position taken by the 2nd Defendant/Respondent is untrue.

39. It was also contended that the disputes on arrears cannot form basis of granting interlocutory injunctions. He referred to the case of ***Koileken Ole Kipolonka Orumoi vs Melleh Engineerinh & Construction Limited & 2 Others 2015)*** to support this argument. It was therefore humbly submitted that the application ought to be dismissed since the prayers sought are not well anchored in law. His humble prayer is that the application be dismissed in its entirety with costs as the alternative prayers have no merit.

The 2nd Respondent's Submissions

40. The 2nd Respondent responded to the application through a replying affidavit sworn by **GERALD REUBEN WAMALWA** dated 7th February 2019. The deponent holds the view that it is fair and just that this court does review its orders delivered on 17th September 2018 as the court did not consider the position of the 2nd Defendant and do grant the Applicant an order for injunction so as to preserve the Applicant's property.

41. The deponent averred that the loan arrears that the 1st Defendant claims have been defaulted by the 2nd Defendant is disputed due to the mismanaging of the 2nd Defendant's loan account held by the 1st Defendant as the same has been exaggerated and falsified by the 1st Defendant.

42. Further that the 2nd Defendant wrote several letters to the 1st Defendant informing them of the erroneous and exaggerated figures and inquired on how they came up with the said amount. ("GRW" are copies of various letters to the 1st Respondent). It was also deponed that despite the correspondences, the 1st Defendant has failed, refused and/or neglected to provide to the 2nd Defendant an explanation on how the exaggerated figures they are relying on to claim default on the 2nd Respondent came to be computed.

43. In his view, the 1st Defendant did not and has not handled the 2nd Defendant's loan account according to the stipulated law and that it made it difficult for the 2nd Defendant to service the loan by wildly exaggerated and falsifying monies allegedly owed and he believes that the overdraft facility that makes the principal sum has been repaid.

44. He also brought to the attention of the court that the 2nd Defendant has engaged the services of an expert 3rd party to reconfirm that the overdraft facility that makes the principal sum has been repaid.

45. He urged the court grant the orders sought by Applicant. His contention is that the 1st Defendant will not suffer any prejudice whatsoever should the orders be granted as prayed.

2nd Respondent's Submissions

46. He filed submission dated and filed on the 7th of February 2019, through Ongegu & Associates Advocates. The Counsel for the 2nd Respondent submitted on three issues namely: whether the Plaintiff/Applicant is entitled to conservatory orders; whether there is apparent error on the amount required by the 1st Defendant and whether the Plaintiff is entitled to Prayers sought.

47. On the first issue, the Counsel for the 2nd Respondent resorted to DR SPRY's sentiments in his book on equitable remedies 6th Edition LBC at page 447 where he states thus:

> **"Interlocutory injunctions are concerned with (a). The maintenance of a position that will more easily enable justice to be done when its final order is made and (b). An interim regulation of the act of the parties that is the most just and convenient in all the circumstances."**

48. It was contended that the Plaintiff having guaranteed his property as security for a loan borrowed by the 2nd Defendant, he will suffer irreparable loss should the execution process commence. Further that the 2nd Defendant is willing to repay the loan, however what is in dispute is the erroneous and exaggerated amount by the 1st Defendant thereby hampering the repayment process.

49. Counsel submitted that since the conservatory orders as sought by the Plaintiff are meant for the preservation of the suit property pending the hearing of the intended appeal, the 1st Defendant will not suffer any prejudice if the same is granted. Counsel cited the cases of ***Madhupaper International Ltd vs Kerr (1985) eKLR 840; Butt vs Rent Restriction Tribunal (1982) KLR 417 and Thomas Edison Ltd v Bathock 1912 15 C.L.R 679*** to support the proposition that conservatory orders ought to be granted in favor of the Plaintiff pending hearing and determination of the appeal.

50. It was submitted that the Applicant has a prima facie case with high chances of success as there is new discovery and pertinent matters, and more so the fact that the evidence of the 2nd Defendant was not taken into consideration during the determination of the ruling in question. He further states that the court's failure to take into account the 2nd Respondent's defense constitutes a mistrial as it was not accorded a chance to be heard.

51. Counsel cited the case of **African Safari Club vs Safe Rentals Ltd**, Civil Appeal No. 52 of 2010 in support of his position. He holds the view that the court's failure to consider the 2nd Defendant's side of the story was prejudicial to the Plaintiff. Further that the failure to consider the 2nd Defendant's defence means that the issues it raised were not adjudicated upon.

52. On whether there is apparent error on the amount required by the 2nd Defendant, Learned Counsel brought to the attention of the court that the 2nd Defendant has hired an auditor who is currently going through the books of accounts to find out how the said amounts were arrived at from the date of offer.

53. Further that the 2nd Defendant will show to the court how the 1st Defendant exaggerated the figures once he is provided with the report on the same. Counsel holds the view that if the property is sold, the suit will be rendered nugatory and ends of justice will not be met. That the court failed to take note that despite repeated request to defendant bank how the amount came to be, the 1st Defendant has declined to regularize the said account nor given an explanation.

54. He cited the case of ***Sunrise Homes Limited v National Bank of Kenya & another*** *HCCC No.17 of 2014 (unreported),* to advance his view of the matter. In light of the foregoing, Counsel took the view that the 1st Defendant has failed to show utmost good faith; it has failed to explain to the 2nd Defendant on how the loan amounts has been arrived at and exact arrears.

55. Counsel resorted to the maxim that say *"equity does not assist rule breakers",* and prayed that this court is not inclined to assist wrong doers. It was stated that the Plaintiff's property is at stake and should it be sold; no amount of monetary compensation will be adequate in the circumstances. Counsel further relied on the case of ***Panari Enterprice Limited vs Lijoodi & 2 Others (2014) eKLR*** where the court took a similar position.

56. Learned Counsel therefore urged this court to find that the 1st Defendant has not acted in good faith in calculating the loan arrears and that the 1st Defendant presented an exaggerated amount to the 2nd Defendant which is disputed and the Court should order the 1st Defendant to explain how they arrived at the figures.

57. On whether the plaintiff is entitled to the prayers sought, Counsel holds the view that plaintiff was able to demonstrate a prima facie case warranting the grant of the orders sought. He cited article 23(1) of the Constitution and went on to assert that this court has the jurisdiction to hear and determine the Plaintiff's Application and grant the prayers sought.

58. He placed reliance on the case of ***Nakuru Steros Services Co. Ltd vs National Bank of Kenya (2014) eKLR*** *(by Justice Omondi)* where the court granted relief in a case similar to the instant case. It was therefore submitted that the Plaintiff has met the conditions as required for conservatory orders to be granted.

The Law, analysis and determination.

59. This court's jurisdiction to review its decisions under the laws of Kenya is derived from section 80 of the Civil Procedure Act which stipulates as follows:

> **"Section 80. Review**
>
> **Any person who considers himself aggrieved—**
>
> **a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
>
> **b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**

60. Further, Order 45 encapsulates the grounds upon which this court may endeavor to review its own previous decision or judgement. It states as follows:

> **[Order 45, rule 1.] Application for review o**f decree or order.
>
> **1. " Any person considering himself aggrieved—**
>
> > **a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
> >
> > **b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**
>
> **2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"**

61. Therefore, in terms of Order 45 of the Civil Procedure Rules, 2010, it abundantly clear that a court can only review its orders if the following grounds exist: -

a. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

b. There was a mistake or error apparent on the face of the record; or

c. There were other sufficient reasons; and

d. The application must have been made without undue delay.

62. The position for setting aside or modifying a court's judgements would appear to be no difference in both Zimbabwe and South Africa even though both countries apply Roman-Dutch Law with a rubric of common Law Principles. Some helpful comments to that effect by the **Court of Appeal of Tanzania in the Transport Equipment Case (supra)** which quotes the leading textbook by **HERBSTEIN & VAN WANES:** ***The Civil Practice of the Superior Courts in South Africa, 3rd Edition:***

"A final judgement being res judicata is not easily set aside, but the Court will do so on various grounds such as fraud, discovery of new documents, error and irregularities in procedure."

63. The same seems to be the case in India. The above position for judicial review has also been upheld in numerous court cases. I shall take just a random sampling of a decision rendered by the Supreme Court of India: ***Aribam Tuleshwar Sharma v Ariban Pishak Sharma (1979) 45CC 389, 1979(11) UJ 300 SC,*** which held that:

"The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercise on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

64. As regards error on the face of the record in Kenya, I associate myself with the case of in ***Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243***, the Court of Appeal described an error apparent on the face of the record as follows:

"…In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it *cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us." (emphasis mine)"*

65. In view of the above provision of law, there can therefore be no room for argument concerning the authority or power of this court to review its own judgements within the scope and ambit of **section 80** of the Civil Procedure Act and **Order 45(1)** of the Civil Procedure Rules.

66. In the instant motion the applicant submitted that the right to a fair trial as envisaged under Article 50 0f the constitution was Limited in its application to the ruling delivered by this Court. The applicants argued that the requisite fair hearing was not accorded the parties as the 2nd defendant affidavit was never considered in the final outcome of the notice of motion. A fair trial under **Article 50(1)** is generally defined as a trial by impartial court or tribunal in accordance with the laid down statutory process and procedures. The right to a fair trial is further entrenched vide **Article 2(5)** of our constitution 2010. This is by virtue of its recognition as a fundamental human right in both regional and International treaties and conventions which forms part of our Laws applicable in Kenya. The purpose and intent of the following treaties and documents is to proclaim the right to a fair trial in both Criminal and Civil Cases... **Universal Declarations of Human Rights of 1948 Article 10 International Covenant** on **Civil and Policing Rights in Article 14. The African Charter on Human and Peoples Rights (1981) Banjui of the Charter in Article 7.**

67. Talking all the relevant provisions in the above cited instruments. The constitutional right to a fair hearing applies to both Criminal and Civil Cases. From my reading of the constitution, together with the regional and International treaties. I see the following as comprising right to a fair trial in civil cases.

a. The right to due process of the law.

b. The right of access to a court

c. The right to be heard by a competent, Independent and Impartial Tribunal.

d. The right to a public hearing

e. The right to equality, of arms, the right to be heard within a reasonable time.

f. The right to legal representation

g. The equality before the law

h. The right to substantive justice.

i. The right to procedural guarantees in handing the adjudication of a Civil Case.

68. One of the complains in the present application was that of the second defendant evidence not being accorded usual reference as a component of the broader final decision in the impugned ruling. The right to a fair hearing under **Article 50** of the constitution though geared towards criminal justice system, the provisions also mirrors minimum basic elements of the right to a fair administration of justice. The jurisprudence therefore on a right to a fair hearing is such that a parties right to ventilate his case should be impaired in a manner likely to cause substantial prejudice or injustice.

69. In the instant case essential the 2nd defendant had an opportunity to present his case however in the final outcome no findings of fact and law were made by this Court. Most specifically, the interest on the right of equality demanded of the court to ensure that the evidence submitted under arguments by each party is scrutinized a determination made to that effect.

70. Taking all the preceding considerations together it follows that the court thus reached a conclusion without reference to the claim by the 2nd defendant. Certainly it is therefore apparent by that key omission the 2nd defendant entitlement to a fair hearing was substantial prejudiced. Further in the case **Baker v Canada Minister of Citizenship and Immigration 1999 CANLI 699 SCR 817;**

> **"The court set out a list of non-exhaustive factors that would influence the content of the duty of fairness, including the nature of the decision being made and the process followed in making it, the Statutory Scheme under which the decision maker operates, the importance of the decision to the person challenging it, the person's legitimate expectations and the choice of the procedure made by the decision maker."**

71. It is therefore well settled that the right to be heard is a fundamental procedural rights necessary in a legal proceedings as a dialogue between the two disputants from which the court evaluates the factual and legal basis of the decision.

72. The purpose of **section 80** of the Civil Procedure Act and order **45 (1)** of the Civil Procedure Rules therefore does explicitly define the circumstances in which a party whose right to be heard has been violated can raise a complaint for review of the court is guilty of any of the grounds stated in the Act and Rules.

73. In regard to this issue the court's obligation was to take the parties statements into consideration when deciding the case consequently refraining from doing so constituted a violation of the rights to a fair hearing on the part of the 2nd defendant.

Discussion and Analysis

74. The grounds for the instant application were largely limited to the area of mistakes or errors of law apparent on the face of record as well as discovery of new facts. Basically, the Applicant sought an order that the ruling made by the court on 7th September 2018 on the basis of the aforementioned grounds be reviewed. It must be noted that the purpose of review is not to provide a backdoor method by which unsuccessful litigants can seek to re-argue their cause. The error must be evident; it must not be one that has to be detected by a process of reasoning. The applicant must demonstrate that there was some mistake, omission, error apparent on the face of the record. On the other hand the applicant has the burden to proof that some other sufficient reason exists to warrant an entry by the court through a review of the order or decision.

75. I concur with the Applicant and the 2nd Respondent that during determination of the impugned ruling, the court did not notice that the 2nd Defendant had filed a replying affidavit and submissions in response to the Applicant's previous Application. Consequently, it is indeed true that the 2nd Respondent's case was not taken into consideration as the court only captured the Applicant and the 1st Defendant's Case only. There would be no doubt that there existed a mistake or an error apparent on the face of record.

76. My view of the foregoing is that this court ought to determine whether the said error apparent on the face of record prejudiced any of the parties in the in instant case. In doing so, I shall interrogate that, had the evidence of the 2nd Defendant been taken into consideration by the court, would it have arrived at the same decision as it did.

77. In my view, the mistake or error apparent on the face of record herein goes to the core of the right to a fair trial. Fair trial does not concern itself with the correctness or propriety of the decision but rather the procedure followed in the trial and determination of the case. It is when all the parties who may be affected by the decision have been accorded an opportunity to be heard that the court would be seen to have discharged the duty of an unbiased umpire.

78. Any violation of the *audi alteram partem perse rule* is within the ambit of breach of fundamental human rights to a fair hearing. Once the right is violated, it is irrelevant whether the decision made subsequently thereto is correct. In law and trial procedure, the same constitutes a

mistrial.

79. In the instant case, the parties entered into the contract of guarantee where 1st Defendant agreed to advance financial accommodation to the 2nd Defendant and the Applicant agreed to stand as its guarantee for the maximum amount of Kshs. 100,000,000/=. The agreement between the applicant and the 2nd Defendant was that the said guarantor was to be in form of a legal charge over the suit property.

80. In view of the foregoing, it is clear that the 2nd Defendant was privy to the said contract of guarantee. Consequently, any decision to be made in respect of the security for the loan facility would directly affect all the parties to the contract of guarantee in different ways. Thus, I take the view that as a matter of law and procedure, the 2nd Defendant's case ought to have been put into consideration upon the determination of the previous ruling.

81. The question to ponder is as to whether the court would have arrived at the same decision if it had taken the 2nd Defendant's into consideration. I refer to the 2nd Respondent Affidavit filed on the 7th of February, 2019. It raises a contention in terms of the exact outstanding amount that is owed to the 1st Defendant. It is indicated that the amount in arrears as per the Defendant's accounts is erroneous and exaggerated thereby hampering the loan repayment process. It is alleged that the 1st Defendant mismanaged the 2nd Defendant's loan account as the same does not bear correct amount in arrears.

82. There is evidence tendered by the 2nd Respondent by way of annextures to replying affidavit to the Plaintiff amended Notice of Motion Application. In the annextures marked as "GRW", the 2nd Defendant wrote several letters to the 1st Defendant informing them of the erroneous and exaggerated figures and inquired on how they came into being. I note that the Defendant Bank responded vide a letter dated 14th February, 2017 in which it is indicated that the accounts were accurate.

83. In paragraph 9 of the 2nd Defendant's affidavit, it is deponed that despite having made such efforts, the 1st Defendant has failed or neglected to provide the 2nd Defendant with an explanation on how the alleged exaggerated figures were arrived at. I'm alive to the trite law that a dispute touching on interest payable on a loan facility or of accounts cannot suffice on its own to warrant granting of an injunctive order. That is the 1st Defendant's contention on this limb.

84. In view of the foregoing, I note that this case has unique and exceptional circumstances which I'm inclined to put into consideration in the determination of this matter. A perusal of the evidence on record shows that prior to the initiation of these proceedings and even to the issuance of the 90 days statutory notice dated 15th March, 2019, the 2nd Defendant had already protested in writing to the 1st Defendant regarding the accounts which it believed were somehow erroneous. The 1st Defendant proceeded to issue the said notice without settling the dispute on accounts.

85. The computation of interest on the loan account is within the ambit of the Defendant Bank and not the 2nd Defendant. Thus, if a request has been made regarding the loan account, it is incumbent upon the Defendant bank to furnish the 2nd Defendant with the accounts as well as the explanation if also required.

86. In my view, in appropriate cases like instances where a dispute arises between the Bank and the borrower in respect of the interest payable and where there is credible evidence that the borrower sought a reconciliation of the same prior to any court proceedings or issuance of the requisite statutory notice, should be considered sufficient to warrant an interim injunction pending hearing and determination of the suit.

87. In this case, there is genuine dispute touching on accounts, specifically the exact outstanding amount in arrears. I take the view that this is a dispute that ought to have been settled before the Defendant Bank commenced its statutory power of sale under section pursuant to **section 90** of the Land Act, 2012. The 2nd Defendant brought to the attention of the court that it is willing to rectify the debt. According to the 2nd Defendant, they have already sought the services of an accounting expert to analyze the accounts in question.

88. There are also alleged fraudulent transactions that took place between the 1st Defendant and the 2nd Defendant which were unknown to the Applicant. It is indicated that the Applicant had initially agreed to stand as the 2nd Defendant's guarantee for the maximum amount of Kshs. 100, 000,000/-. Further that the 1st and 2nd Defendant breached the contract by entering into further agreements without informing the Applicant. According to the Applicant, the same is outside what he had consented to when signing the guarantee of indemnity agreement.

89. In the premises, if the foregoing evidence had been considered and with the knowledge of the court, it would have arrived at a different decision. There are serious triable issues which warrant this court to grant an interim injunction pending the hearing and determination of the Application. I'm of the view that the matter should proceed to full trial and all the parties be accorded an opportunity to ventilate the issues raised herein on the merits.

90. The concern of this Court is to render justice in a matter, when faced with competing interest and rights of the contestants in a dispute. After giving careful and anxious consideration to the variety of issues presented before me I am persuaded that the interlocutory ruling dismissing an injunction against the applicant ought to be reviewed. Although the applicant is seeking a re-hearing of the claim the exceptional circumstances under **section 80** of the Civil Procedure Act and **order 45 Rule 1** of the Rules confers upon this court jurisdiction to be exercised for furthering the ends of justice. The extent of this power is no doubt a constitutional recognition in terms of **Article 50** on the right to a fair hearing and due process.

91. That in the examination of the evidence and the ruling there is an error apparent on the face of the record and discovery of a new matter as it relates to a pleading on fraud, that specifically requires further interrogation. On the opposite edge there is no need for orders to be granted in terms of **order 42 rule 6** of the Civil Procedure Rules for stay of execution pending the filing and determination of the intended

appeal. As a result of the applicant success on the ground of review the court has a chance to have a second look at the issues raised in the plaint.

92. The court has authority under **section 80** of the Act and order **45 rule 1** to recall its own decision and take a recourse to procedural review so as not to occasion prejudice or failure of justice, arising out of the impugned orders.

93. Consequently, the amended notice of motion application dated 29th January 2019 succeeds on the basis of review. There is no doubt the 2nd Defendant was not accorded an opportunity to put its case across which in my view violated its fundamental human right to a fair hearing.

The earlier orders of injunction in favour of the 1st defendant be varied to that extent.

The cost of this application to abide the outcome of the main suit. Leave to apply granted.

It is so ordered.

Dated, signed and delivered in open Court at Kajiado this 7th day of June 2019.

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REUBEN NYAKUNDI

JUDGE

<u>Representation</u>:

Mr. Kimemia h/b for Muriuki for the 1st Defendant