REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 407 OF 2015

JOHN NGUNJIRI MWANGI T/A EBENEZER

AUTOSPARES & MOTORCYCLES.....1ST PLAINTIFF/RESPONDENT

ERIC MUCHINA KIMANI.....2ND PLAINTIFF/APPLICANT

VERSUS

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

RULING

1. The Ruling relates to a Notice of Motion application dated 27th June 2018, brought under the provisions of Order 45 Rule 1 and 2 Order 51 Rules (1) of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A and 80 of the Civil Procedure Act, (Cap 21) of the Laws of Kenya, all other enabling provisions of the law and the inherent powers of the Court.

2. The Applicant is seeking for Orders that; -

(a) spent;

(b) that the Court do review its Order of 12th April 2017, to the extent that a temporary injunction be issued restraining the Defendant/Respondent whether by itself, officers, directors, servants and/or its agents; Messrs Nguru Auctioneers or whomsoever is acting on its behalf from selling, advertising for sale, transferring and/or dealing with the Plaintiffs Title Number Nairobi/Block 97/387, in any manner whatsoever pending the hearing and determination of the suit; and

(c) the costs of these proceedings be met by the Defendant/Respondent.

3. The Application is based on the grounds thereto and an affidavit sworn by the second Plaintiff (herein *"the 2nd Applicant")*, dated 27th June 2018. From the outset it suffices to note that the Applicant filed an earlier Notice of Motion application dated 25th August 2015, seeking for similar Orders as herein. In that regard, most of the factual matters relied on by the Applicant have already been summarized in the resulting Ruling dated 31st January 2016.

4. Be that as it were, in a nutshell, the 2nd Applicant avers that, he guaranteed the first Plaintiff a loan of Kshs.12,000,000/= advanced to it, the Defendant (herein *"the Respondent").* The facility was secured by his property registration number Nairobi/Block 97/387. Subsequently, he executed a one-page document entitled *"affidavit"* drawn by the firm of *Muiruri & Company Advocates* and was informed the purpose was to verify his marital status. The document did not indicate that the Respondent was advancing the loan and/or the amount of thereof.

5. That it was agreed once all the documents including the charge document were ready, he would be given to scrutinize. However, unknown to him a charge document dated 24th September 2014, was prepared between the 1st Plaintiff and the Respondent and executed by two persons namely; *Joseph Kariuki Njoroge* and *David Kimani Njoroge*, alleged on the strength of a power of Attorney granted to them by the 2nd Applicant, which he never executed.

6. Further, the 1st Plaintiff and Respondent did not disclose to him that his property secured antecedent debts from the year 2012 and 2013 through execution by third parties unknown to him. That in less than five (5) months, the Defendant sent him a Statutory Notice to sell his property claiming a sum of Kshs.34,266,371.45. The Applicant argues that, it is impractical for a loan of Kshs.12,000,000/= to shoot up to Kshs.34,266,371.45 in less than five (5) months considering that the rate of interest in the purported charge at Clause 3.1.1. was expressed to

be 20.5% per annum.

7. Be that as it were in the months of August 2015, the 1st Plaintiff informed him that he was having problems with the Respondent and that both Plaintiffs should file a case to protect the 1st Plaintiff. The 1st Plaintiff supplied all documents towards the filing of the case without his input. It is only after this case was filed and the Court made its Ruling on 31st January 2017, directing the Respondent and the 1st Plaintiff to file statement of accounts on how the sum of Kshs.34,266,371.45 had accrued and stood at Kshs.43,440,225.07, was arrived at.

8. That the Applicant discovered from the documents produced by the Respondent that: -

(a) the 1st Plaintiff had five bank accounts with the defendant;

(b) all these accounts were in default and not being serviced;

(c) the statement in these accounts indicated that they are debts arising from the year 2012 before the 2nd Plaintiff's purported charge of 24th September 2014;

(d) that the 2nd Plaintiff signed affidavit was attached to a charge document dated 24th September 2014 executed by some two persons Joseph Kariuki Njoroge and David Kimani Njoroge as representing the Applicant without a valid power of Attorney actually registered;

(e) that the statutory notice served upon the 2nd Plaintiff dated 13th February 2015 was a combination of the total debts the 1st Plaintiff owed to the Defendant and not necessarily the amount expressed in the purported charge to be secured by the 2nd Plaintiff's property;

9. The Applicant averred that Statutory Notice served upon him dated 13th February 2015, is premature, illegal and irregular as the law requires the Respondent to first serve upon him a notice of intention to sell of at least forty (40) days, before the Statutory Notice is served pursuant Section 96 (2) of the Land Act No. 6 of 2012, therefore the alleged Statutory Notice amounts to a clog on his equity of redemption enshrined in law, even though, he did not execute the charge instrument in the first place.

10. Further, the statements filed by the Respondent and the 1st Plaintiff pursuant to the Court Order indicates that, the total sums claimed in the Statutory Notice dated 13th February 2015, consists of sums not secured by the suit property. That as a result of collusion and fraudulent non-disclosure of material facts from the 1st Plaintiff and the defendant, he is destined to lose his property unfairly, unlawfully and inequitable.

11. The Applicant avers that, had this information which was not within his knowledge and which he could not discover even through exercise of due diligence, been made available to the Court, the Court could not have arrived at the Order made on 12th April 2017.

12. That he has brought this application timeously and whereas he filed a Notice of Appeal on the basis of the Court Ruling, he has since withdrawn the said notice on discovery of this new and important evidence to warrant this application for review. Finally, he stands to suffer irreparable loss and damage should the illegal, unlawful and un-procedural sale be allowed to proceed since it is his lifetime investments.

13. However, the Respondent filed a replying affidavit dated 20th July 2018, sworn by its legal officer, by *Lawrence Karanja,* in response to the Application. He deposed that, the Applicant is not honest in his pleadings and has made material non-disclosures of facts in a bid to impede it's justified exercise of their statutory power of sale as ordered by the Honourable Court. The suit was instituted by way of a plaint filed on 25th August 2015, together with a Notice of Motion application under certificate of urgency, whereby the Plaintiffs/Applicants sought for an injunction Order pending the hearing and determination of the suit.

14. That on 31st January 2017, the Honourable Court directed the parties herein to file and serve updated statements on the amounts advanced, repaid and outstanding. The Respondent duly filed the updated statement of accounts in compliance with the Order. On 12th April 2017, the Honourable Court issued an Order in the presence of counsel for both parties, to the effect that the Applicant should deposit the sum of Kshs.15,000,000/= within thirty (30) days of the said Order and the matter be set aside for hearing on a priority basis.

15. The Plaintiffs/Applicants ignored the said Order and went to "slumber" until when the Respondent's agents, *Nguru Auctioneers* issued a notification of sale of the property and a forty-five (45) days Redemption Notice, that the 2nd Plaintiff/Applicant moved the Honourable Court claiming that, he neither executed a charge nor issued a power of attorney to any individuals to execute the charge on his behalf. The Respondent averred that, those averments are in contradiction to his averments in paragraph 18 of the supporting affidavit; where he admits having knowledge of the suit being filed, as confirmed by the duly sworn verifying affidavit.

16. Similarly, he admits at paragraphs 24, 25, and 26 of the Plaint, that his property was charged and does not state and plead that he never signed or issued a power of attorney to 3rd parties to execute on his behalf. That it is evident that the Applicant is attempting to amend the suit through the instant application, which attempt is intended to mislead the Court to grant interlocutory Orders and amounts to a clear abuse of the Court process.

17. In summation thereof the Respondent argued that: -

(a) if indeed the 2nd Plaintiff never executed the charge or issued a power of attorney to another person to execute the charge on his

behalf as alleged, then the 2nd Plaintiff has perjured himself, by swearing a false affidavit verifying the correctness of a plaint, which he knew the contents thereof were false, and the Honourable Court ought to reprimand him;

(b) it is in bad faith for a party who is represented by a firm of Advocates in this case, the firm of Koceyo & Company Advocates to allege that he is aloof of the proceedings herein which in essence is tantamount to pleading ignorance;

(c) it is not in dispute that at all times during the pendency of the suit, the Defendant served all pleadings in relation to the suit to the address of the Advocates on record for both the 1st and 2nd Plaintiffs;

(d) the 2nd Plaintiff/Applicant is still represented in this current application by the same firm of Koceyo & Company Advocates;

(e) it is a blatant misrepresentation of the facts in this matter for the 2nd Plaintiff/Applicant to claim lack of knowledge of the contents of the charge document in relation to L.R. No. Nairobi/Block 97/387 (hereinafter "the Nairobi Property") as the same was in possession of his Advocate on record, both then and now and all the matters being raised now were apparent to the Court when issuing its Orders on 12th April 2017;

(f) the Honourable Court in making the Order of 12th April 2017 considered the updated statements as filed and duly proceeded to exercise its discretion by ordering that the Plaintiffs deposit the sum of Kshs.15,000,000/= and the matter proceeds for hearing.

18. The Respondent averred that the Plaintiffs/Applicants being aggrieved by the Court Order, duly filed a Notice of Appeal on 24th April 2018, which Notice of Appeal has since been withdrawn. Therefore, this is yet another attempt to plead ignorance. That the 1st Plaintiff stopped servicing the loan and it is evident that the Plaintiffs have decided to take turns in filing frivolous applications to frustrate the Respondent from exercising their right to statutory power of sale as provided by law.

19. It was argued that lack of vigilance from a litigant is not aided by the Courts and in this circumstance, the Honourable Court should consider the inexcusable delay by the 2nd Applicant of over a year and deny to him audience.

20. That the Court should direct the Plaintiffs to comply with the Orders of 12th April 2017, forthwith or the Respondent be at liberty to sell the property, in that, a party that comes to Court with unclean hands is undeserving of the Court's mercy. The Applicant has not made a case for the Orders sought as required by law and therefore the application lacks merit and should be dismissed with costs to the Respondent.

21. The Respondent also filed grounds of opposition dated 9th July 2018, stating that the application has been filed after inordinate delay and after the expiry of the thirty (30) days period granted by the Honourable Court in a Ruling in this case dated 12th April 2017. Further, the Applicant has not satisfied the legal requirements for a review as stipulated under Order 45 of the Civil Procedure Rules, 2010.

22. The Respondent further averred that, all notices issued to the 1st and 2nd Plaintiffs were issued in full compliance with Section 90 (1) and 96 of the Land Act, No. 6 of 2012 and all other applicable provisions of the law. The 2nd Applicant's claim can be adequately compensated in damages, if the injunction Order is not issued.

23. The Respondent further filed a Notice of Preliminary Objection dated 9th July 2018, seeking that the application dated 28th June 2018, be struck out with costs on the basis that, it is *res judicata*, because the question of account balances was finally and conclusively determined by the Honourable Court in a Ruling in delivered on 12th April 2017.

24. The parties disposed of the Application by filing submissions which I have considered. The 2nd Applicant submitted that under Section 80 of the Civil Procedure Act, the Court has the unfettered power to review its decision. The Application is grounded on discovery of new and important materials, which after the exercise of due diligence was not within his knowledge at the time the Order was made or the application for temporary injunction dated 25th August 2015 was filed.

25. However, the Respondent invited the Court to determine whether the Application is *res judicata* and/or the Applicant has met the test for review of the Orders of 12th April 2018. The Respondent referred the Court to the provisions of Section 7 of the Civil Procedure Act (Cap 21) of the Laws of Kenya. Further reference was made to the case of *Pop-In (Kenya) Ltd & 3 Others v. Habiv Bank AG Zurich (1990) eKLR*, where Court observed that, the *locus classicus* the concept of *res judicata*; is the judgment of *Wigam VC* in *Henderson v. Henderson (1843) Hare 100, 115*, where the Judge says: -

> *"where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case."*

26. The Respondent submitted that the Applicant is required to demonstrate due diligence to prove that there has been a discovery of new material facts. Reference was made to the case of; *Afapack Enterprises Limited v. Punita Joyant Acharya (suing as the Administrator of the Estate of the late Suchila Anantrai Raval (2018) eKLR* quoting the case of; *Francis Origo & Another v. Jacob Kumali Mungala (2005) 2 KLR 307.*

27. However, the Applicant filed further written submissions in response to the Respondent's preliminary objection and argued that, the

substantial issues as raised herein relates to discovery of new evidence a basis for review, therefore, *res judicata* does not apply. The case of *Willie v. Michuki & 2 Others (2004) K.L.R. 357*, was cited where the Court held that, for the doctrine of *res judicata* to apply, three basic conditions must be satisfied, namely; that there was a former suit or proceeding in which the parties are the same parties as in the subsequent suit, litigated the matter in issue in the latter suit must have been directly and substantially in issue in the former suit and lastly that a Court competent to try it had heard and finally decided the matter in controversy between the parties in the former suit. The case of *Abubakar Ahmed Abdulrahman v. Muzahim Salim Mohamed Bajaber & Another (2016) eKLR*, was also cited.

28. Finally, the Applicant argued that the earlier Application was for a temporary injunction Order brought under Order 40, while the current Application is for review under Order 45 of the Civil Procedure Rules. Therefore, the reliefs sought in the former Application are not substantially similar, as the law and facts relating to review are very different from the law and facts relating to temporary injunction. Finally, the issues raised in the earlier application for temporary injunction are not the same as the issues being raised in the instant application.

29. I have considered the Application in total and I find the issues that have arisen for determination are whether; the application is *res judicata* and whether the Applicant has satisfied the criteria for grant of the Orders sought. On the first issue, I find that the guiding principles are stipulated under Section 7 of the Civil Procedure Act which states that: -

> *"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and …."*

30. In relation to the subject matter herein, I find that the Notice of Motion application dated 25th August 2015, was seeking for Orders *inter alia* that, the Defendant/Respondent be restrained from selling, advertising for sale, transferring and/or dealing with the 2nd Plaintiff's properties; Title Number Thika Municipality Block 19/196 and 1st Plaintiff's property L.R No. Loc 2/Kangari/2786 and Nairobi/Block 97/387 for the 2nd Plaintiff. The 2nd Plaintiff/Applicant instant Application, is seeking for an Order of temporary stay of the advertisement of the sale of his property and review of the Orders made on 12th April 2017, and a temporary injunction be issued to restrain the Defendant /Respondent and its agent Messrs Nguru Auctioneers be restrained from selling, advertising for sale, transferring and/or dealing with his said property.

31. It is therefore clear that the 2nd Plaintiff/Applicants property is a subject of both application and in essence what the 2nd Plaintiff/Applicant is seeking for is to restrain Defendant/Respondent from selling the property. Although the 2nd Plaintiff/Applicant argues that the two applications are brought under different provisions being; Orders 40 and 45 of the Civil Procedure Rules 2010, but with due respect, the end result is to stop the sale.

32. Be that as it were, it suffices to note that, upon hearing the Application dated 25th August 2015, the Court raised the following issues for determination, whether;

> *(a) the Applicants had concealed material facts;*
>
> *(b) the 1st Applicant owes the Defendant the sum sought;*
>
> *(c) there was a breach of contract entered into by the parties;*
>
> *(d) the charges registered over the suit properties are valid; and*
>
> (e) *the Applicants had met the threshold of grant of an Order of injunction prayed for.*

33. The 2nd Plaintiff/ Applicant in the instant Application revisits the issue of Statutory Notices, the validity of the charge and the amount owed to the Defendant/Respondent. Therefore, it is clear that most of the issue raised herein were substantially dealt with in the elaborate Ruling delivered by the Court on 31st January 2017. It also suffices to note that, the 2nd Plaintiff/Applicant is represented by the firm of Koceyo & Co. Advocates and the same firm which also represents the 1st Plaintiff has prosecuted both Applications. Thus the Applicant and indeed both Plaintiff are well versed with all the facts in relation to this matter and therefore know issue that are *res judicata.*

34. Be that as it may, the next issue is whether the Plaintiff has satisfied the criteria for grant of review Order under Order 45 of the Civil Procedure Rules. These provisions provide that,

> *"(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."*

35. The Applicant tabulates the alleged new information discovered under paragraphs 11, 12, 13, 16, 17 of the affidavit in support of the application. In a nutshell, he avers that, although it is alleged that he executed the charge document at page 33 (which he denies) as the charge itself was executed by strangers, it did not secure the subject sum of Kshs.12,000,000. Further, the 1st Plaintiff/Respondent and the Defendant/Respondent did not actually disclose to him that no funds were to be disbursed to the 1st Plaintiff, and that his property secured antecedent debts from the years 2012 and 201, which the 1st Plaintiff had accumulated. However, the Defendant/Respondent argues that the 2nd Plaintiff/Applicant has not denied that he has been privy to all pleadings exchanged by the parties, and therefore his allegation of new matters is an afterthought.

36. In my considered opinion, the issue as to whether funds were disbursed or not is a substantive issue between the borrower and the creditor, the 1st Plaintiff and the Defendant, parties to underlying contract, that gives rise to the contract of guarantee between the creditor and the guarantor; the Defendant and the 2nd Plaintiff/Applicant.

37. Apparently the 1st Plaintiff is not raising the issue of lack of consideration, yet it is represented by the same law firm. Even if the Court were to agree with the Applicant that no funds were disbursed, this issue can only be resolved through the hearing of the main suit. Finally, the issue cannot have arisen only upon the issuance of Court Orders on 12th April 2017 in that, throughout the hearing of the matter, the Respondent has maintained that it advanced the Kshs.12,000,000/= to the 1st Plaintiff. If the 1st Plaintiff therefore did not receive the said sum, they would have refuted the same and/or sought for particulars thereof from the Defendant at the earliest.

38. Even then, in the normal banker-customer relationship, the customer, (in this case the 1st Plaintiff), is entitled to a bank statement as a matter of right and generally, unless otherwise proved, it will be assumed that the bank supplied the customer with the statements. It is therefore, clear that the 1st Plaintiff had that information and if the Applicant with due diligence sought for the same from the 1st Plaintiff/Principal debtor they would have knowledge thereof.

39. The other issue raised by the Applicant relates to antecedent debts. I hold the view that, the issue can only be fully determined by hearing of the main suit and establishing *inter alia* whether;

> *(a) there were any existing debts prior to the grant of the facility that is subject of the guarantee by the 2nd Plaintiff/Applicant;*
>
> *(b) the debts (if any) were fully repaid or are a subject of recovery by the Defendant/Respondent vide pursuant to the statutory notice served upon the Plaintiffs; and*
>
> *(c) the terms and/or clauses of the charge document relied on by the Defendant/Respondent stipulates for inter alia; the consolidation of charges or the extend of liability of the guarantor.*

40. Finally, as already stated, the issue as to whether there is a valid charge or not was the subject of the Court's ruling delivered on 31st January 2017 and dealt with at length under paragraph 29 of the said Ruling. Indeed, under paragraph 31, the Court made a finding that, the issue of *"non-availability of the copies of the charge documents to the Applicants and the charges being null and void would require proof at the full hearing."*

41. The last issue to determine is, whether the Applicant will suffer any loss and/or irreparable injury if the Orders sought for are not granted. To answer this question, the Court has to consider the interest of both parties. It is clear from the Order the Court made on 12th April 2017, that the sum of money ordered to be paid was based on statement of accounts filed by both the Defendant/Respondent and the Plaintiffs/Applicants. Although the Plaintiffs/Applicants disputed the sum of Kshs.43,440,225.07, indicated by the Defendant/Respondent, the Court ordered the Plaintiffs/Applicants to pay 50% of that sum to wade off the intended sale. The Court further ordered that the matter be set down for hearing on priority basis.

42. The 2nd Plaintiff/Applicant has not appealed against that Order. The Order was made on 12th April 2017 in the presence of his lawyer. He did not move the Court immediately until one year down the line on 27th June 2018, when he filed this current application. There is no indication that this Order has been complied with, yet it remains a valid Order on the Court file. There is no evidence that indeed the Plaintiffs/Applicants have complied with the Court Order to set down the suit for hearing on priority basis as ordered. The suit has been pending from 25th August 2015 for a period of four (4) years to date. Had the Plaintiffs set down the suit for hearing, all the issues raised in this application would have been dealt with by now.

43. In my considered opinion the alleged new information relied on by the Applicant are matters that would have been within the knowledge of the Applicant had due diligence been carried out, and as stated neither are all of them new issues.

44. Further, the law of guarantee is clear that, when the creditor acquires, as against the guarantor, a right to immediate payment of the debt, the guarantor is entitled to call upon the principal debtor to pay the amount guaranteed, so as to relieve him from his obligation even though he has, as yet, paid nothing under the guarantee and even though the creditor has not demanded payment from him or from the principal debtor *(see Ranelaugh v. Hayes (1683) 1 Vern. 189).* The guarantor may ask the Court for a declaration that he has a right in equity to require the principal debtor exonerate him from his liability under the guarantee by paying off the debt *(see Thomas v. Notts Incorporated Football Club Ltd (1972) Ch. 596).* Similarly, as soon as the guarantor pays anything under his guarantee, he has an immediate right of action against the principal debtor. *(see Davies v. Humphreys (1840) 6 M. & W. 153).*

45. Further although the Applicant accuses the by the Defendant/Respondent of non-disclosure of material facts, it suffices to note that, although the guarantor should enter into a contract as a free agent with adequate knowledge of the nature of his liability, it is not part of the duty of the bank to volunteer a full disclosure of the debtor's dealing with him. The bank is not bound, as per the words of Lord Chancellor Chelmsford in *Wythes v. Lobouchere, 1858, "to inform the intended guarantor of matters affecting the credit of the debtor or of any*

circumstances unconnected with the transaction in which he is about to engage which will render his position more hazardous."

46. However, though the banker is not bound to disclose all that he knows about his customer's dealings, he must not conceal from the guarantor any fact materially affecting the transaction between the banker and his customer. In the same vein, if the guarantor questions the banker with reference to such matters, the banker must give a straightforward reply and one not capable of being misconstrued.

47. As a great judge once put it, *"the avoidance of a contract of guarantee by the non-disclosure of a material fact depends in each case upon whether, having regard to the nature of the transaction, and the relations of the parties, the fact not disclosed is impliedly represented not to exist."* To quote again from the same authority, as summarized in the head note: *"very little said which ought not to have been said and very little omitted which ought to have been said, will suffice to avoid the contract." Sir Edward Fry* in *Davies v. London & Provincial Marine Insurance Company, 1878.* Similar principles received approval in the case of *Cooper v. National Provincial Bank (1965).*

48. In conclusion, I find that in view of the fact that the Defendant/Respondent alleges that the loan has not been fully repaid and the fact that the Order made by the Court on 12th April 2017 has not been complied with, it is not in the interest of justice to review the said Orders and grant an injunction Order to restrain the Defendant/Respondent from exercising its rights. If the Applicant wants to restrain the sale of his property, he should comply with the Orders the Court gave on 12th April 2017.

49. In the given circumstances, the application is dismissed with Orders that the costs thereof abide the outcome of the main suit.

50. Those then are the Orders of the Court.

Dated, delivered and signed in an open Court this 14th day of October 2019.

GRACE L. NZIOKA

JUDGE

In the presence of:

No appearance for the Applicants

Mr. Otieno for the Respondents

Dennis ----------Court Assistant