



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 1361 OF 2016

KUNDAN SINGH UBHI.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED.....DEFENDANT

RULING

Introduction

1. On 2/11/2016, the plaintiff, Kundan Singh Ubhi, brought a notice of motion of even date seeking orders restraining the defendant against selling, disposing, offering for sale, alienating or interfering with the plaintiff's use and possession of Land Reference Number 20203 (**the suit property**) pending the hearing and determination of this suit. The application was supported by two affidavits sworn by the plaintiff on 2/11/2016 and 21/3/2017. The defendant opposed the application through two affidavits sworn on 20/2/2017 and 10/3/2017 respectively. That application is the subject of this ruling.

Applicant's Case

2. The case of the applicant is that he is the registered proprietor of the suit property. He is also a shareholder and director of **KSC International Limited**, formally known as **Kundan Singh Construction Limited (the company)**. By a charge dated 20/7/2011 and registered on 5/1/2012 (**the charge**) he charged the suit property to the defendant for a sum of Kshs 50,000,000 (fifty million) to secure banking facilities extended to the company by the defendant. It is his contention that the charge was only intended to secure the existing banking facilities and it was never his intention that the charge should secure any further or additional facilities or advances that may be given or made to the company as no such further or additional facilities were contemplated. The applicant contends that the banking facilities secured by the charge were fully settled, paid and/or discharged and replaced by fresh facilities and advances made to the company vide subsequent banking facility letters dated 9/12/2011, 17/2/2012, 19/10/2012 and 14/3/2013. His position is that the effect of the fresh facilities and advances made under the subsequent facility letters was to settle and pay off all the banking facilities hitherto secured by the charge which accordingly became spent.

3. In February 2015, the company was placed in receivership and in December 2015 the defendant demanded from the plaintiff various amounts of money under different limbs and threatened to exercise the chargee's statutory power of sale in default of payment of the moneys by the plaintiff.

4. The applicant contests the defendant's right to exercise the chargee's statutory power of sale on several grounds: (i) the charge is incurably defective, unenforceable, null and void for want of compliance with the mandatory provisions of the law; (ii) the charge is spent as the facilities and advances secured by the charge have been fully settled, paid and discharged by the fresh advances and facilities made and given under fresh facility letters; (iii) the statutory power of sale has not arisen; (iv) no valid statutory notices have been served by the defendant; (v) the sums demanded by the defendant are grossly in excess of and bear no relation to the sums secured under the charge and; (vi) the defendant's demands constitute a clog and fetter on the applicant's equity of redemption and are unlawful and not maintainable.

Defendant's Case

5. The case of the defendant is that the charge was not tied to any specific facility letter and was to be a continuing security to secure the amounts owing at the time it was created or that may thereafter become due or owing. The defendant contends that clause 2.1 of the charge covered this feature of the charge. The defendant contends that the facility was reviewed from time to time through the subsequent facility letters and the plaintiff was privy to the review and duly executed the facility letters. The defendant's position is that the charge is valid and enforceable and the defendant is entitled to exercise the chargee's statutory power of sale in the manner provided under the law.

Applicant's Submissions

6. The applicant filed his submissions on 5/10/17 through M/s Desai, Sarvia & Pallan Advocates. The applicant submitted that the plaintiff

had met the threshold for grant of interim injunction as spelt out in the case of **Cassman vs Giella**. He further submitted that the charge is subject to and must be construed in accordance with the provisions of Part VII of the Land Act. He relied on the case of **Jimmy Wafula Simiyu V Fidelity Commercial bank Ltd (2013) eKLR**.

7. The applicant further submitted that the charge is spent because it was only intended to secure the facilities availed to the company under the first facility letter and that there is no evidence that at the time the applicant executed the charge the company and the defendant had agreed on any other facility other than the initial facility. He argued that Exhibit SM2 to the further replying affidavit demonstrated that as at the date of the charge on 20/7/2011 there were no monies owing by the company to the defendant hence there was no existing charge.

8. He argued that the second facility letter was not a mere review of the facility but a grant of a fresh facility and that there is no mention in the subsequent facility letters that those facilities were being reviewed. He relied on the case of **Gurbux Singh Bhoghal V Fina Bank Ltd & others (2016) eKLR** and argued that the facilities for which the charge had been given as security were terminated with no indebtedness. He submitted that it is mandatory that a memorandum be signed and endorsed or annexed to the charge if any further advances are to be tacked onto it. He relied on the case of **Kisimani Holdings Limited & Another V Fidelity Bank Limited (2013) eKLR** and **Stephen K Melly & 2 others V Ecobank Kenya Ltd & Anor (2016) eKLR**.

9. The applicant submitted that the purported statutory notices are invalid because they did not comply with the mandatory requirements of Section 56 (2) of the Land Registration Act and Sections 90 and 96 of the Land Act. He relied on the case of **Alfred Osanya V Giro commercial Bank Ltd & Anor (2014) eKLR, David Gitome and Kisimani Holding case (supra)**.

10. He further submitted that deprivation of property through unlawful means constitutes irreparable loss and damage and the defendant's action in trying to sell the charged property demonstrates that he will suffer irreparable loss if the injunction is not granted. He relied on the case of **Stephen K Melly & 2 others V Ecobank Kenya Ltd & Anor (2016) eKLR, Manasseh Denga Vs Eco Bank Kenya limited (2015), Peter Kuria Munyira Vs Housing Finance Co. of Kenya Ltd & Anor HCCC No 457 of 2006, Lucy Waitthaka Vs ICDL**. He added that the balance of convenience tilts in granting the injunctive orders sought in the application.

Respondent's Submissions

11. The respondent filed its submissions through M/s Hamilton, Harrison & Mathews Advocates on 15/11/2017. The respondent argued that the charge was intended to secure past, present and future advances. It was submitted that the intention of parties is to be ascertained from the words they have used and the material words in the charge show that the charge was a continuing security for any amount due. Counsel submitted that it is not open for the court to rewrite the charge. He relied on the case of **Jiwaji and others V Jiwaji & Anor (1968) EA 547, Chitty on contracts, General Principles, Thirty First Edition Volume 1 at page 22** and **National Bank of Kenya V Pipeplastic Samkoit (K) ltd & Anor (2001) eKLR 112**. He argued that under **Section 120 of the Evidence Act**, the Plaintiff is estopped from alleging that the charge is spent as the Plaintiff executed the charge knowing the charge was to be a continuing security.

12. The respondent further submitted that the charge is not invalid because provisions of Section 80(3) of the Land Act cannot be used to invalidate a charge that was valid before the Land Act 2012 came into force and that the case of **Jimmy Wafula Simiyu and Alfred Osaya** cited by the plaintiff was decided before the amendment in Section 78 of the Land Act. It further submitted that Section 82 of the Land Act deals with the right of a chargee to tack further advances into a prior security and is meant to give a chargee a right to jump over any other charge that is created after the prior charge. It distinguished Section 82 and 84 of the Land Act which provides for variations of the amount secured under a charge and relied on **Cieni Plains Company Limited & 2 others V Eco Bank Kenya Limited (2017) eKLR**.

13. The respondent further submitted that the notices served were not defective and there is no requirement that a statutory notice must be served personally to the plaintiff. It submitted that the plaintiff complained that the amount in the notice is higher than the amount secured yet **Section 104(2) (d) of the Land Act** provides that the court has the power to allow a chargee to exercise the remedies in the Act notwithstanding any defect in the statutory notice and relied on the case of **Re A Debtor (No 1 of 1987) Ex parte. The Royal Bank of Scotland (1989) 1 WLR**. It submitted that the plaintiff is not genuine in saying there has been a fetter in his equity of redemption. It stated that the plaintiff has never offered to pay the amount secured by the charge and he has not demonstrated that he will suffer prejudice hence he has failed to demonstrate a prima facie case.

14. It submitted that the plaintiff has not demonstrated that he will suffer irreparable harm and his sole reliance on the alleged unlawfulness of the realization process cannot suffice. It argued that the balance of convenience tilts in favour of not granting the injunctive order because of money is owed to the defendant. It relied on the case of **Andrew Muriuki Wanjohi V Equity Building Society Ltd & 2 others (200) eKLR**.

Determination

15. I have considered the application together with the parties' respective affidavits and submissions. I have also considered the relevant statutory provisions and jurisprudential principles. The broad question falling for determination in the application is whether the applicant has satisfied the criteria for grant of an interim injunction. The criteria was laid down in **Giella v Cassman Brown & Co Ltd (1973) E.A 358**. The applicant was required to demonstrate a *prima facie* case with a probability of success. Secondly, he was required to demonstrate that he stood to suffer injury that cannot be indemnified through an award of damages if the interim injunctive order is not granted. Lastly, if the court were to be in doubt, the application would be determined on a balance of convenience. At this point, the court does not make definitive findings and/or pronouncements on the key issues in the dispute. The focus of the court is on whether the applicant has placed before the court materials that constitute a *prima facie* case and demonstrated the probability of irreparable injury.

16. There is common ground that the charge dated 20/7/2011 was duly executed and duly registered. The applicant's key gravamen is that the defendant is treating the said charge as security for banking facilities advanced to the principal debtor subsequent to the charge and on subsequent letters of facility. On its part, the defendant contends that the material charge was a continuing charge which secured both current and future banking facilities.

17. Recital clause number 2 of the said charge provides thus:

“The chargee has at the request of the chargor and the borrower agreed not to call in or require the immediate repayment of the existing charged debt or any part thereof and to grant such financial accommodation, time credit, banking facilities and advances from time to time as hereinafter referred to in a maximum principal amount of up to Kenya Shillings Fifty Million (Kshs.50,000,000) (this sum shall hereinafter be referred to as the “maximum principal amount”) or such lower limit as may form time to time and for the time being be fixed by the charge in its sole and absolute discretion subject to inter alia the chargor creating by way of security a first fixed legal charge over the charged property in favour of the chargee.”

18. One key feature of the above clause is that the material charge was security for both the existing debt and future banking facilities which would be granted to the company by the defendant. A second key feature of recital clause 2 is that the parties agreed on a ceiling of a maximum principal amount of Kshs 50,000,000 (Kenya Shillings Fifty Million) Only.

19. A perusal of the letters of offer relating to subsequent facilities extended to the company show that the facilities extended to the company may have exceeded the sum of Kshs 50,000,000 which was the maximum principal amount contemplated in the charge. Similarly, the statutory notices dated 5/11/2015 and 18/7/2016 allude to figures in excess of Kshs 50,000,000 denominated both in Kenya Shillings and United States Dollars. For instance, the amount demanded on Account Number 0104012095200 is Kshs 271,674,284.50 plus interest on KBRR plus 6.13% p. a. The amount demanded on Account Number 8704012095200 is USD 3,001,949.28 with interest of 7% p.a (translating to over Kshs 300,000,000).

20. At this point, it does appear that the defendant seeks to exercise the chargee’s statutory power of sale to recover principal sums in excess of the sum of Kshs 50,000,000, some of which are denominated in United States Dollars. This appears to be beyond the maximum principal amount under the material charge.

21. The plaintiff contends that there is a danger of the defendant irregularly depriving him of his property through irregular means and in violation of the law. The court has considered the applicant’s grievances and is in agreement that there is a prima facie case calling for a full hearing. The court is also satisfied that there would be real danger of illegal deprivation of property if the chargor were to exercise its power of sale in pursuit of recovery of facilities granted outside the agreed limit of Kshs 50,000,000.

22. The court is, however, not persuaded that the defendant’s obligation to repay the maximum principal maximum debt of Kshs 50,000,000 together with interest and related costs has been discharged by any facilities subsequently extended to the company beyond the ceiling of Kshs 50,000,000. In the absence of repayment, the plaintiff remains liable to repay the principal debt of up to Kshs 50,000,000 together with interest and related costs.

23. In light of the foregoing, I will grant the plaintiff an appropriate interim order but allow the defendant the leeway to exercise the chargee’s statutory power of sale in relation to the maximum principal sum of Kshs 50,000,000 together with interest and related costs.

Disposal Orders

24. Consequently, the Notice of Motion dated 2/11/2016 is disposed in the following terms:

(a) Pending the hearing and determination of this suit, the defendant is hereby restrained against exercising the chargee’s statutory power of sale over Land Reference Number 20203 to recover banking facilities extended to the principal debtor in excess of the agreed maximum principal amount of Kshs 50,000,000.

(b) The defendant is however at liberty to issue fresh statutory notices and proceed to recover unpaid facilities extended to the principal debtor in tandem with the agreed maximum principal amount of Kshs 50,000,000.

(c) Because the key dispute in this suit relates to the commercial liability of the plaintiff more than it relates to title to the suit property, I order that this suit be transferred to the Commercial and Admiralty Division of the High Court at Nairobi. Upon transfer, the File shall be placed before the Presiding Judge of the Division for directions.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Sebastian holding brief for Sarvia Advocate for the plaintiff

Ms Kiriba Advocate for the defendant

June Nafula - Court Clerk