



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 208 OF 2016

MIMOS CONSORTIUM LIMITED.....PLAINTIFF

AND

**HFC LIMITED (FORMERLY HOUSING
FINANCE COMPANY OF KENYA LTD).....DEFENDANT**

AND

QUINTECH CONSTRUCTION LTD.....INTERESTED PARTY

RULING

1. The plaintiff's application dated 10th May 2016 was for an Interlocutory Injunction to restrain the defendant and the Interested Party from displaying misleading information and/or notices on the suit property or in any other form or interfering with the plaintiff's right to the suit property.
2. Secondly, the application seeks a Mandatory Injunction, to compel the defendant to unconditionally discharge and release to the plaintiff, the Certificate of Lease for the suit property.
3. Thirdly, the application seeks a Mandatory Injunction to compel the defendant to unconditionally re-activate the plaintiff's bank account at **HOUSING FINANCE COMPANY (HFC)**, Thika Branch.
4. It is common ground that the plaintiff had executed a Charge in favour of the defendant, and the said Charge was to secure a loan facility of Kshs. 160,000,000/-.
5. It was a term of the Agreement between the parties that the plaintiff would raise the sum of Kshs. 41,000,000/- as the "Sponsors' Equity".
6. The plaintiff was unable to raise the said Sponsors' Equity and therefore the defendant did not disburse the loan amount of Kshs. 160,000,000/-.
7. However, in anticipation of the loan, the plaintiff had already handed over to the defendant the title documents for the suit property, **L.R. No. THIKA BLOCK 8/183**.
8. Later, when it became apparent that the plaintiff was unable to raise the Sponsors' Equity, and that therefore the defendant would not disburse the loan, the plaintiff asked the defendant to discharge the

charge which had been registered against the suit property. The plaintiff also asked the defendant to release to it, the original documents of title.

9. Subsequent to the institution of these proceedings, the defendant released the documents of title. However, the defendant had declined to release to the plaintiff, the discharge of Charge.

10. The defendant insists that it was entitled to continue withholding the discharge of charge because there is an outstanding facility which is secured by the plaintiff, as contemplated in the charge instrument.

11. The said facility was not accorded to the plaintiff, **MIMOS CONSORTIUM LIMITED**, but had been advanced to the Interested Party, **QUINTECH CONSTRUCTION LIMITED**.

12. At this point it is essential that the relationship between the 3 parties is spelt out.

13. Mimos Consortium Limited is the registered proprietor of the suit property. It was desirous of constructing 42 apartments on the said property. As it did not have the funds needed to put up the apartments, the plaintiff approached **HOUSING FINANCE**, the defendant, for a loan.

14. Meanwhile, the plaintiff had entered into a contract with the Interested Party, **QUINTECH CONSTRUCTION LIMITED**, who were to undertake the task of putting-up the apartments.

15. In paragraph 6 of the Plaint, the particulars of the Letter of Offer dated 20th September 2013 are set out. One of the conditions was that the plaintiff would make an;

“Injection of Kshs. 41 M into the project.

Kshs. 25 M upfront and the balance to be evidenced as works on site and sundry costs prior to disbursement”.

16. According to the Interested Party, it was asked by the plaintiff to request the defendant for a loan of Kshs. 25 Million, which was to be used exclusively for the construction of the 42 apartments.

17. As a part of the security for the loan of Kshs. 25 Million, which the defendant gave to the Interested Party, there was an Irrevocable Undertaking granted by the plaintiff to the defendant.

18. It is the plaintiff’s case that the said Irrevocable Undertaking had no connection with the charge in respect to the loan of Kshs. 160 Million.

19. On the other hand, the defendant says that there was a direct connection between the Charge instrument and the Irrevocable Undertaking. The defendant drew the court’s attention to clause (B) of the Charge Instrument, which reads as follows;

“The Chargee has at the request of the Chargor agreed not to call in or to sue for or require the immediate repayment of any existing indebtedness due to it from the Chargor or others to whom the Chargor is a surety and has agreed to grant to the Chargor and/or to others for whom the Chargor is or may from time to time be surety such further financial accommodation by way of loan, time credit, financial facilities, overdraft, advances and other financial facilities from time to time to an aggregate maximum principal amount (exclusive of interest and other charges, costs and expenses as hereinafter provided) of up to Kenya Shillings One Hundred and Sixty Million (Kshs. 160,000,000/-) (hereinafter referred to as the “Maximum Principal Amount”) or such lower limit as may for the time being and from time to time be fixed by the Chargee”.

20. Mr. Ogunde, the learned advocate for the defendant, submitted that the charge was created in consideration for, *inter alia* not calling up the plaintiff’s debt or such advances as the defendant may have given out to the Third Parties, and for whom the plaintiff was a surety.

21. On a *prima facie* basis I find that the plaintiff was a surety for the loan of Kshs. 25 Million which the defendant advanced to the Interested Party. The surety status is expressly spelt out in the Irrevocable Undertaking, pursuant to which the plaintiff promised to remit to the defendant the sum of Kshs. 3,335,088/- every month.

22. Pursuant to that undertaking, the monthly remittances were to be made directly to the account of the Interested Party.

23. It is the contention of the defendant that the Interested party had not repaid the term loan of Kshs. 25 million. Therefore, the defendant has lodged a counter-claim against the Plaintiff; the Interested Party and two other persons who had executed guarantees to secure the loan of Kshs.25 M illion.

24. Mr. Juma, the learned advocate for the Interested Party submitted that the Charge which was executed by the plaintiff, in favour of the defendant, was the security for the sum of Kshs. 25 Million which the defendant had loaned to the Interested Party.

25. Therefore, in the considered opinion of the Interested Party, the deposit of the title documents, coupled with the Charge which was executed by the plaintiff, had created an Informal Charge over the suit property.

26. The Interested Party pointed out that it had received no payment from the plaintiff, even after presenting a Certificate for payment of Kshs. 59 Million.

27. Therefore, the Interested Party felt that the plaintiff's failure to honour its Irrevocable Undertaking to the defendant was exposing the Interested Party to liability for sums which had been used exclusively for the plaintiff's benefit.

28. But Mr. Odoyo, the learned advocate for the plaintiff, holds the view that the circumstances prevailing were so clear that the court should not hesitate to order the defendant to discharge the charge.

29. The plaintiff's view is that the Charge which was executed by the defendant and the plaintiff, has no relation to the Irrevocable Undertaking by the plaintiff to the defendant.

30. Having given due consideration to the pleadings, the submissions made by all the parties and the relevant law, I find, on a *prima facie* basis that;

a) The Charge anticipated that it would be a security for both debts payable by the plaintiff and debts due from other persons for whom the plaintiff was a surety.

b) The plaintiff was a surety by virtue of the Irrevocable Undertaking it executed in favour of the defendant, to cover the loan of Kshs. 25 Million which was advanced to the Interested Party.

c) The plaintiff has not demonstrated a *prima facie* case with a probability of success.

d) However, the standard of proof for the award of an Interlocutory Mandatory Injunction was higher than that for an Interlocutory Restraining Injunction. The plaintiff has not met the threshold for the grant of a Mandatory Injunction.

e) The plaintiff has quantified the losses and damage which it attributes to the actions or omissions of the defendant. In effect, it appears that such loss and damage is quantifiable.

f) The plaintiff has not asserted that the defendant would be unable to pay compensation, if any, should the case against the defendant ultimately succeed.

g) The Defence raises issues of law which are arguable, and against which it cannot be said

that the claims have a probable chance of success.

h) The counter-claim raises issues of law and of fact which are arguable. My said finding is influenced, inter alia, by the fact that the parties have provided the court with information which indicates that the plaintiff had, whilst reserving its rights, involved itself in negotiations aimed towards paying the Kshs, 25 Million loan, that was advanced to the Interested Party.

i) Of course, I appreciate that the plaintiff's case is also arguable, especially on the issue whether or not the Charge for Kshs. 160 Million was intended or was contemplated to also be security for the much smaller sum of Kshs. 25 Million which the defendant disbursed to the Interested Party.

j) There is already an ongoing case, between the defendant and the interested party. That other case is Hccc No. 255 of 2016. The issue of the loan of Kshs. 25 Million which the defendant advanced to the interested party, is at the centre of that case. It would thus be prejudicial if this court were to make any peremptory orders such as to compel the defendant to discharge the charge, at this stage of proceedings.

k) In the final analysis, I find no merit in the plaintiff's application. It is therefore dismissed, with costs to defendant and the interested party.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of February 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Odoyo for the Plaintiff

Kamau for Ogunde for the Defendant

No appearance for the Interested Party

Collins Odhiambo – Court clerk.