



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO.656 OF 2010**

**EQUATORIAL COMMERCIAL BANK LIMITED ..... PLAINTIFF**

**VERSUS**

**KEWAL CONTRACTORS LIMITED ..... 1ST DEFENDANT**

**PARMINDER SINGH MANKU ..... 2ND DEFENDANT**

**HARJEET SINGH MANKU ..... 3RD DEFENDANT**

**BALJINDER KAUR MANKU ..... 4TH DEFENDANT**

**RULING**

1. Before me, is a Motion on Notice by the Plaintiff dated 15th July, 2013 brought under Section 68 of the Land Registration Act 2012, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rules 1 (a) and 4 of the Civil Procedure Rules. The Motion seeks an order to restrain the Defendants from dealing with, alienating, disposing off or assigning the property known as LR. NO.15052 (hereafter "*the suit property*"). The Plaintiff also sought, in the alternative an order of inhibition against any dealing whatsoever with the suit property.
2. The grounds for the application were contained both in the body of the Motion as well as in the Supporting Affidavit of Brian Asin sworn on 15th July, 2013. The Plaintiff contended that upon the request of the 1st Defendant, the Plaintiff extended various facilities to the Defendant including Hire Purchase Agreements, Overdraft Facilities and Long and Short Term Facilities whose security are joint registration of vehicles, 3rd party charges over LR. NO.209/8343/155 and the suit property, a debenture and joint and personal guarantees of the 2nd, 3rd and 4th Defendants. That, the 1st Defendant admitted on 27/05/09 owing Kshs.49,332,771/= as on 01/02/09 and that as at 17/08/10, the amount outstanding thereon was Kshs.51,743,502/08 which continued to attract interest at 20% per annum. That with the knowledge of the 2nd, 3rd and 4th Defendants, the 1st Defendant had defaulted in repaying the said sum.
3. The Plaintiff further contended that when attempting to register a charge dated 27/02/07 over the suit property, it was informed at the land registry that the original title documents then accompanying the charge was suspected to be a forgery and the Chief Land Registrar had lodged a complaint with the Criminal Investigations Department to carry out investigations in respect thereof. That the Plaintiff was apprehensive that the suit property may be converted thereby permanently depriving it of its security. That the 1st Defendant had previously lied to the Plaintiff about purported VAT refunds due from the Kenya Revenue Authority ("*KRA*") that were to be applied to settle the outstandings.
4. It was further contended by the Plaintiff that a Winding Up Petition in **Winding Up Cause No.12**

- of 2010** had been presented against the Defendant, a fact the latter had failed to disclose to the Plaintiff. That apprehensive that the 1st Defendant and its directors were intent to avoid process and were about to abscond from within the jurisdiction, on application, the Court issued a warrant for the arrest of the 2nd and 3rd Defendants on 4th October, 2010. Attempts to execute those warrants have proved futile.
5. Mr. Nyaribo, Learned Counsel for the Plaintiff, referring to his clients' Supporting Affidavit submitted that the 2nd and 3rd Defendants have been avoiding arrest. That although the 2nd Defendant had been directed to be in Court at the hearing of the application, did not attend Court. That the Plaintiff had established a *prima facie* Case with a probability of success and that damages were not an adequate remedy. Counsel urged that the application be allowed.
  6. The Defendants opposed the application vide a Replying Affidavit of Parminder Singh Manku sworn on 29th July, 2013. He admitted the facilities extended to the 1st Defendant and the giving of securities as contended by the Plaintiff. He also admitted the 1st Defendant having executed the Form of Acceptance and letter dated 29/05/09 admitting owing Kshs.49,322,771/=. He however, contended that the Defendants had repaid a total sum of Kshs.20,581,960/= and that it was not true that they were not servicing the facilities. That the filing of the Winding Up Petition was beyond the Defendants' control. That the 1st Defendant had lost over Kshs.70 million due to cancellation of one of its contract by the Government and that the loan was secured by the personal guarantees of the 2nd, 3rd and 4th Defendants.
  7. The Defendants further contended that the Kenya Revenue Authority (“KRA”) had admitted to refund VAT amounting to Kshs.9,639,043/= and produced correspondence to that effect, that the Defendants hold a good title to the suit property having purchased the same from former Cabinet Minister Darius Mbela which they charged to Barclays Bank of Kenya Ltd. That the registry file for the property was not lost as alleged by the Plaintiff as the firm of Masire & Mogusu Advocates had previously admitted having found the file and carried out searches thereon. That the suit property had been variously valued and it was now worth Kshs.200 million and a sale of one (1) acre thereof would be adequate to liquidate the amount outstanding. That in the circumstances, the application was misconceived. That the Defendant were capable of servicing the loan and would clear the same within eight (8) months. That the amount due was approximately Kshs.30 million.
  8. Mr. Musundi, Learned Counsel for the Defendants submitted that the Defendants had admitted the debt and were servicing the same, that the warrants of arrest should be lifted as this was only a civil debt. It was urged that the application be dismissed.
  9. I have considered the Affidavits on record and the submissions of Counsel. This is an injunction application and the Plaintiff is expected to satisfy the requirements set out in **Giella -vs- Cassman Brown [1973] E.A.** These are that, it has established a *prima facie* Case with a probability of success, that damages are not an adequate remedy and that if in doubt, the Court will decide the matter on a balance of convenience.
  10. What is clear from the record is that, the facilities are not denied, the debt is not disputed (save for the amount due). It is also not denied that a Winding Up Petition No.12 of 2010 have been presented against the 1st Defendant which the Plaintiff has contended was in breach of a debenture dated 28th November, 2007 and which the 1st Defendant has not defended. The 1st Defendant has also admitted undergoing some difficulties in repaying the outstanding amount although Mr. Parminder Singh Manku gave an assurance in his Replying Affidavit that the same would be repaired and cleared, albeit with some difficulties, within eight (8) months from the date of his Replying Affidavit, 29th July, 2013.
  11. In my view, the only contention in this matter is whether the Defendants' conduct in respect of the alleged VAT Refunds, the position of the 4th Defendant's title to the suit property and the warrant of arrest issued in against the 3rd and 4th Defendant warrant the granting of the orders sought.
  12. The Plaintiff contended that the allegations by the 1st Defendant that, it was to receive a sum of Kshs.9,639,043/= as VAT refunds from KRA which was to be applied to settle the facilities was false. The Defendants on their part produced letters dated 14/8/09 and 19/06/09 exchanged between the 1st Defendant and the KRA to buttress its position. Having reviewed the correspondence relied on, I note that the letter dated 19th June, 2009 from the KRA to the 1st Defendant has not been challenged. In that letter, it is clear that the KRA had approved a sum of Kshs.9,639,043/= as refund of VAT to the 1st Defendant. That letter, however, did not indicate

the date when such refund was to be made. To my mind, that remained an expectation on the part of the 1st Defendant to receive the same and there was no falsehood on its part when it informed the Plaintiff that it expected to receive that sum and apply the same towards repayment of the debt.

13.As regards the title to the suit property, the 2nd Defendant swore at paragraph 8 of the Replying Affidavit:-

***“8. That in reply to paragraphs 11, 12, 13 of the Affidavit, I wish to state that we hold a good title to Land Reference Number 15052 (52294) having purchased the same and a copy of the title is annexed herewith and marked PSM 4.”***

At paragraph 15, Mr. Manku indicated that the suit property is valued at Kshs.200 million and if one (1) acre thereof was sold, it would fetch about Kshs.50 million which would settle the entire debt claimed by the Plaintiff.

14.The Defendants have not denied the existence of the letter dated 15th May, 2013 by the Chief Land Registrar to the Director, Criminal Investigations Department. In that letter, the Chief Land Registrar categorically indicated that ***“.....the original title accompanying the charge is suspected to be a forgery.”*** The Registrar urged that the title be investigated. He also indicated that the charge (which was to act as security for the Plaintiff's advances) had not been registered. The Defendants did not state in their Affidavit what steps, if any, they had taken to verify the veracity of that letter or discount that the title they held was doubtful. To mind, the fact that they purchased the property from a former Cabinet Minister or that they had previously charged the same to Barclays Bank of Kenya Ltd does not dispel the Plaintiff's apprehension. The Plaintiff is holding an unperfected charge over the suit property. The 4th Defendant has not denied having executed that charge. A letter of consent executed by her dated 3rd October, 2006 and an executed charge dated 22/02/07 were produced. To my mind, that was a clear intention that on the part of the Defendant the suit property do remain a security for the Plaintiff's advances to the 1st Defendant.

15.This brings me to the issue of the warrants of arrest of the 2nd and 3rd Defendants. It is not denied that on the 4th October, 2010, this Court issued a warrant of arrest against the 2nd and 3rd Defendants. That warrant was issued on the Court being satisfied that the Defendants were either about to abscond from the jurisdiction or were disposing off their assets in a manner that would defeat process. That warrant has not been executed to date. Although this Court had on 31/07/13 directed that the 2nd Defendant do attend Court at the hearing of the Motion, he did not attend.

16.Taking into consideration all the foregoing, I am satisfied that the Plaintiff's apprehension is not without a basis. It has advanced facilities on the strength of securities one of which is the suit property. It has not been able to perfect its security over the suit property because the original title given to it by the Defendants is doubtful. That the Plaintiff is extremely exposed cannot be in doubt. The contention by the Defendants that the debt is secured by guarantees given by the 2nd, 3rd and 4th Defendants is to say the least, spurious. The 2nd and 3rd Defendants cannot be traced even at the pain of a warrant of arrest by this Court. To my mind, those guarantees remain but worthless pieces of papers if the history of this suit is anything to go by.

17.I have agonised over the prayer for injunction. To my mind, the Plaintiff has established a case for its grant. But I have seen the Plaintiff in this suit. There was no prayer for injunction. I entertain serious doubt if an interlocutory injunction can issue in the circumstances where the principal pleading of a party has not sought a permanent injunction. Since however, what the Plaintiff seeks is to secure the suit property until the suit is determined, I am inclined to grant the alternate Order. The justice of the case requires that the security given to the Plaintiff be preserved until such time as it is able to either perfect it or is able to realise the amount secured.

18.Accordingly, I allow the application and issue an order of inhibition pending the hearing and determination of this suit or until further Orders of this Court inhibiting the registration of any dealing whatsoever with the property known as Land Reference No.15052 (L.R 52294). I also award the Plaintiff the costs of the motion.

Orders accordingly.

Dated and Signed at Bungoma this 14th day of February, 2014.

**A. MABEYA**

**JUDGE**

Dated and Delivered at Nairobi this 4<sup>th</sup> day of March, 2014.

**H. B. HAVELOCK**

**JUDGE**