



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 297 of 2012

WOODCRAFT INDUSTRIES LTD..... PLAINTIFF/APPLICANT

VERSUS

ECOBANK KENYA LIMITED DEFENDANT/RESPONDENT

RULING ON DIRECTIONS

1. By an Originating Summons dated 16th May, 2012 under **Order 37 Rule 4** of the *Civil Procedure Rules*, **Sections 1A, 1B, 3A and 38** of the *Civil Procedure Act* and **Section 19 (1)** of the *Limitation of Actions Act*, the Plaintiff seeks for a declaration:
 - (a) that it is not obliged, in law, to pay the principal sum of the amount secured by a Charge over L.R No. 209/9541;
 - (b) that it is not bound to pay any arrears of interest on any money under the charge registered as I.R No. 35290/1 against L.R No. 209/9541;
 - (c) that the Defendant is obliged to execute a Discharge of Charge in respect of L.R No. 209/9541 without any conditions whatsoever;
 - (d) that in the event that the Defendant fails to execute a Discharge of Charge within fourteen days that the same be executed by the Registrar of the High Court of Kenya and that an Order that the made directing the Registrar of Titles to register the said Discharge and to re-issue a new title to the Plaintiff/Applicant
 - (e) that there be an Order restraining the Defendant from exercising any statutory power, executing any sale agreement or entering into any sale negotiations or issuing any letters of offer or letters of commitment and that the same be declared null and void if they are executed during the pendency of the suit.
 - (f) that an enquiry been made into the damages that are payable to the Plaintiff/Applicant in the event of non-compliance of the aforesaid Order by the Defendant/Respondent.
2. The Application is supported by the Affidavit of Edwin Muriithi Njiru sworn on 16th May, 2012. It was contended that there was a Charge over the suit premises i.e. L.R No. 209/9541 made on 8th October, 1998 between the Plaintiff and Defendant formerly known as the East African Building Society and that

the Charge was registered as I.R No. 35290/1. The Defendant was estopped by operation of law from relying on the Charge and holding the Plaintiff's title document pursuant to the Charge and that the Defendant had been indolent for a long time as it did not execute the Statutory Power of Sale after issuing the Plaintiff with a notice on 27th September, 1999.

3. The Defendant is opposing the Application. During the hearing of the Application for Directions on 24th September, 2012, Mr. Luseno, learned counsel for the Defendant, opposed the Application on the grounds that the deponent of the Supporting Affidavit therein, Mr. Njiru, was not a Legal officer of the Plaintiff but an associate at the Plaintiff's firm, Lawrence M. Mbaabu & Associates. He further argued that he needed to verify the capacity in which the deponent had sworn the said Affidavit; that the advocates for the Plaintiff had not shown any authority for the firm to act on their behalf; that the advocate Mr. Mbaabu was keen on getting his hands on the suit property i.e. L.R No. 209/9541 without paying for the same as it was still charged to the Defendant and that there was an allegation against Mr. Lawrence M. Mbaabu which related to his professionalism as an officer of the court.

4. On his part counsel for the Plaintiff, Mr. Njiru, in responding to the allegations by Defendant's counsel, confirmed that he was the deponent of the Supporting Affidavit and that Defendant counsel needed to make a formal application for him to be cross examined on his affidavit.

5. Mr. Luseno questioned as to what directions the court would make given the allegations raised by him on matters of professionalism and the capacity of the Plaintiff's counsel to act as advocate on behalf and/or represent the Plaintiff. The court expressed the opinion that there is more than meets the eye in this instance. The court would have to examine the rights of a Chargor under the Charge entered between the Plaintiff and Defendant, whether such rights have been extinguished under the Limitations of Actions Act and whether the court could order the cross examination of Mr. Njiru on the contents of the Supporting Affidavit and the allegation raised by counsel.

6. In exercising its discretionary authority, however, the court has to look at the circumstances of the issues at hand and whether the Defendant is warranted in calling for cross-examination of the deponent on the Affidavit filed in support of the Application. The Defendant has to show that there are special circumstances that warrant for the deponent to be cross examined. This was reiterated in the case of **Mohamed Koriow Nur v A.G & 2 Others (2008) eKLR** where Wendoh, J held, *inter alia*;

"...If an affidavit offends provisions relating to the swearing of affidavits i.e. if it contains information that is irrelevant, hearsay, scandalous or oppressive the court can strike it out or expunge the offending paragraphs and not necessarily call for cross examination in a Judicial Review application that does not normally allow for that process. Besides, as pointed out, the Applicant makes a blanket application for cross examination of the said deponent, but does not lay the basis for the said cross examination, what the Applicant intends to establish or achieve by the said cross examination. That is why the court is of the view that the Applicant has not made a case for cross examination on the affidavit nor has he shown any special circumstances that warrant the cross examination of the deponent."

The Defendant herein, has to establish special circumstances in which the court would then exercise its discretionary authority to allow for the cross examination of the deponent. Consequently, I direct that if the Defendant wishes to cross-examine Mr. Njiru as to the Supporting Affidavit to the Application, then it had better make formal application so to do giving its reasons therefore.

7. Under the provisions of **Order 37 Rule 16**, the court makes direction as follows:

- (a) the Defendant do file and serve a Replying Affidavit to the Plaintiff's Application dated 16th May, 2012 by 19th October 2012
- (b) the Plaintiff do have liberty to file and serve a Further Affidavit by 31st October 2012 if need be;
- (c) the Plaintiff will file and serve its written submissions as regards the Originating Summons dated

16th May 2012 by 14th November, 2012;

(d) the Defendant will file and serve its written submissions in reply by 28th November 2012;

(e) there will be a Mention of this matter before court on 30th of November 2012 for compliance purposes and the fixing of a Ruling date.

DATED and delivered at Nairobi this 1st day of October 2012.

**J. B. HAVELOCK
JUDGE**