IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & MURGOR, JJ,A)

CIVIL APPEAL NO. 255 OF 2016

BETWEEN

JAVAID IQBAL KHAN……………………………………1ST APPELLANT

MANIZA SHARIF JAVAID IQBAL………………….2ND APPELLANT

AND

IQBAL TRANSPORTERS LIMITED…………………1ST RESPONDENT

BANK OF BARODA (K) LIMITED……………………2ND RESPONDENT

(Appeal from Ruling and Order of the Commercial & Admiralty Division High Court Milimani at Nairobi (Ochieng, J.) delivered on 27th September 2016

in

Civil Suit No. 311 of 2015)

****

JUDGMENT OF THE COURT

This is an appeal from a ruling of the High Court wherein the court declined to issue a redemption order for ***the 2nd respondent, Bank of Baroda Limited*** *(the Bank)* to discharge and release to ***Javaid Iqbal Khan,*** the ***1st appellant and Maniza Sharif Javaid Iqbal***, ***the 2nd appellant,*** the title document over Maisonette No. 6 on **LR No. 1870/VI/52** *(the charged property)* upon payment of Kshs. 12 million in full and final settlement of the charged amount. The 1st appellant is the registered proprietor of the charged property.

In a Plaint filed on 29th June 2015, the appellants sought a permanent injunction to restrain the Bank from interfering with the appellants' ownership and occupation of the charged property; a declaration that the individual and joint guarantees dated 7th March 2009 are void and unenforceable and a declaration that the charge dated 5th March 2008 be discharged. The appellants claimed that the Bank had unlawfully sought the sale of the charged property to exert pressure upon the appellants to pay the amounts that were not due and owing under the charge, and intended to clog and fetter the appellants' rights of redemption.

The appellants' case was that following a request from ***Iqbal Transporters Limited, the 1st respondent,*** to utilise the charged property to obtain credit facilities, on 9th November 2007, the 1st appellant requested the Bank to create a legal charge over the charged property as security. On 17th November 2007, the Bank agreed to grant the 1st respondent an overdraft facility of Kshs. 12 million on the terms inter alia that; the facility was valid for a period of 12 months; the rate of interest payable would be base plus 3% totalling 16% per annum. Other conditions were that the facility would be secured by a legal charge for Kshs. 12 million over the charged property owned by the 1st appellant; a fixed debenture and chattels mortgage on trucks and vehicles from the 1st respondent and its directors; and an individual guarantee for Kshs. 12 million from the 1st appellant. The facility was payable on demand.

Pursuant to acceptance of the offer, the 1st appellant executed a Charge Instrument in favour of the 2nd respondent, as the primary parties over the charged property as security for the financial accommodation to the 1st respondent.

Simultaneously with the Plaint, the appellants filed a Notice of Motion dated 7th March 2016. In the application the 1st appellant sought orders of redemption under ***section 85*** of the ***Land Act*** to allow them to pay the Bank the guaranteed sum of Kshs. 12 million in full settlement of the amount secured by the charge, and that upon such payment the Bank should forthwith discharge and release to the 1st appellant the title document over the charged property; that accounts be taken and made under ***order 20 rules 1, 2, 3,*** and ***4*** of the ***Civil Procedure Rules*** as a preliminary question triable before the full trial herein; that the court determine the question of how much the 1st appellant should pay to the Bank for the release of the charged property; that the court issue an order for proper accounts to be taken in respect of the guarantee account and the main account; that the court issue a conservatory order restraining the Bank from proceeding with an intended auction for sale of the charged property pending resolution of the matters raised in the Plaint.

The application was made on grounds, *inter alia* that, the 1st appellant had sought and obtained an overdraft facility for an amount of Kshs. 12 million from the Bank on terms set out in the letter of offer. It was further stated that on 8th October 2012, the Bank issued a statutory demand for payment of Kshs. 12 million which the 1st appellant offered to pay; that subsequently, the Bank rejected the offer, and instead confirmed that it would discharge the charge if the appellant paid Kshs. 12,000,000 together with interest from 8th October 2012. The motion was supported by an affidavit of ***Javaid Iqbal Khan***, the 1st appellant, a director and guarantor individually and jointly with Nipti Shah, of the 1st respondent sworn on the same day, which averments largely repeated the grounds outlined in the motion.

In a Grounds of Opposition dated 22nd March, 2016 and a replying affidavit sworn on 23rd March 2016 on behalf of the Bank by ***Rajan Prasad***, the Head of the Bank's Sarit Centre Branch, the deponent relied upon the averments of a replying affidavit of Kumar Ajay Singh, the Bank's Operations Director sworn on 12th August 2016, which set out the history of the appellants' credit facilities in respect of the letter of offer dated 17th November 2007. The averments in Kumar Ajay Singh's affidavit reiterated the 1st appellant's averments in the affidavit in support, save for adding that, on 17th July 2009, following a further request from the 1st respondent, the Bank revised the credit facilities to an overdraft facility of Kshs. 30 million and a loan facility of Kshs. 22 million on revised terms of interest, where the security remained the existing charge and guarantees.

In its ruling, the High Court dismissed the appellants' application upon reaching the conclusion that the appellants did not require an order for redemption from the court to have the security discharged; that if the guarantor paid to the bank the sum of Kshs. 12,000,000 together with interest from 8th October 2012, the bank would be obliged to discharge the charge, and therefore all that the appellants were required to do was make payment to the Bank.

The court also declined to make an order for the Deputy Registrar to take accounts pursuant to ***order 20***

rule 1 of the ***Civil Procedure Rules*** as the appellants had not made out a case to warrant the taking of accounts.

Aggrieved by the ruling of the High Court, the 1st appellant lodged this appeal on the grounds that the learned judge erred in making a finding that the appellants had not established a case for granting of the orders sought; in dismissing the application; in failing to consider the appellants' submissions on the issues raised in the application; that the court was biased against the appellants; in failing to uphold the mandatory provisions of ***sections 82, 84, 85*** of the ***Land Act***; in failing to make an order for account and for considering irrelevant and extraneous matters.

At the hearing of this appeal ***Mr. King'ara***, learned counsel appeared for the appellants while Ms. Kimere was for the 1st respondent. Senior Counsel, Mr. Fraser, appeared for the Bank.

Mr King'ara filed written submissions on 22nd March 2017 wherein the issues posited for determination were, the law relating to striking out of proceedings; whether accounts ought to be taken under ***order 20 rules 1, 2, 3*** and ***4*** of the ***Civil Procedure Rules*** and the issuance of a redemption order under ***section 85*** of the ***Land Act, 2012***.

Counsel begun by faulting the learned judge for dismissing the appellants' application which he equated to the court having struck out the application without exercising caution and care. To support this submission, counsel cited the case of ***D.T. Dobie & Company (K) Limited and Joseph Mbaria Muchina, Civil Appeal No 37 of 1978.*** Counsel further submitted that the appellants had sought an order for accounts to be taken under ***order 20 rule 1*** of the ***Civil Procedure Rules,*** and for the Bank to render true, proper and accurate accounts to the appellants on the actual status of the charge and all accounts secured by the charge instrument, but which accounts the court failed to appreciate were manipulated in order to portray bank accounts that were in a state of perpetual arrears.

It was finally submitted that the appellants had sought a redemption order under the Land Act, 2012 upon payment of Kshs. 12 million, which the lower court declined to grant, yet the appellants had liquidated the concerned account in 2009; that the Bank had failed to provide accounts that were specifically limited to the sum of Kshs. 12 million; that a separate account ought to have been established for the 1st appellant as guarantor. Counsel argued that the 1st appellant had offered to pay Kshs. 12 million to redeem the charged property which offer was declined by the Bank without valid reason.

Ms. Kimere informed us that the 1st respondent did not oppose the appeal. On his part, ***Mr. Fraser*** also filed written submission on 6th April 2017. Whilst highlighting them, counsel submitted that, Kshs. 12 million was secured under the charge document and not under the guarantee instrument; that the charged debt comprised Kshs. 12 million together with interest that was to be paid from the date of demand, that being, 8th of October 2012; that to date the total outstanding amount was Kshs. 26, 696,417. Counsel submitted that though the appellants had paid and maintained the overdraft account within the required limits, the repayment sums were insufficient to liquidate the entire debt. With respect to taking of accounts, counsel submitted that ***rule 20 (1)*** of the ***Civil Procedure Rules***, required that a prayer for accounts ought to have been specified in the plaint, and as there was no such prayer, the appellants were not entitled to have the accounts taken. In any event, counsel concluded, the Bank had already supplied the appellants with the relevant accounts.

Mr. King'ara in response countered that, a party is bound by their pleadings; that it was conceded that actual payments were made into the overdraft account for which the guarantee was issued; that the 1st appellant was entitled to a complete discharge of the overdraft following the payment of Kshs. 64 million. Regarding taking of accounts, counsel argued that a prayer for accounts in the plaint was not mandatory; that since the issue turned on provision of accounts, they were deemed to have been applied for under ***order 20***; that the accounts supplied by the Bank were fictitious and merely generated to comply with the court's order.

We have considered the rival submissions by counsel and examined the record of appeal. Our mandate on

a first appeal is set out in ***rule 29 (1)*** of this Court's Rules namely, to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved the exercise of which is called for our interrogation, we will not interfere unless we are satisfied that the judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise. We remain guided by the principles enunciated in **Mbogo & Anor vs. Shah [1968] EA 93**.

It is our considered view that the following issues fall for determination;

> *i) Whether the appellants' pleadings were struck out;*
>
> *ii) Whether the trial court ought to have made an order that accounts be taken under order 20 rules 1, 2, 3 and 4 of the Civil Procedure Rules;*
>
> *iii) Whether the trial court was under an obligation under section 85 of the Land Act to issue a redemption order allowing the 1st appellant to pay to the Bank Kshs.12 million in full and final settlement of the amount secured by the charged property;*

We will begin by considering whether by dismissing the appellants' motion, the High Court struck out the appellants' proceedings. ***Order 2 rule 15*** of the ***Civil Procedure Rules*** provides that the court may at any stage of proceedings order to be struck out any pleading on the grounds that; a) it discloses no reasonable cause of action or defence in law; or b) it is scandalous, frivolous or vexatious; or c) it may prejudice, embarrass or delay the fair trial of the action; or d) it is otherwise an abuse of the process of the court.

Section 2 of the ***Civil Procedure Rules*** provides that the definition of ***"pleadings"*** includes "***a petition or summons and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant. Rule 2 is concerned with striking out of pleadings as defined by section 2. Under rule 15 (3) originating summons and petitions are also included."***

What was before the learned judge was an application seeking orders of redemption of the charged property. Therefore, an application such as the one before the learned judge was not a pleading within the meaning of ***section 2***, and consequently, ***order 2 rule 15*** was inapplicable to the circumstances of this case.

We might add that, the learned judge's ruling was limited to dismissing the appellants' application for orders of redemption. It did not strike out the appellants' claim filed on 29th June 2016 seeking a permanent injunction to restrain the Bank from interfering with the appellants' ownership and occupation of the charged property or the declarations that the individual and joint guarantees dated 7th March 2009 were void and unenforceable or the declaration that the charge dated 5th March 2008 be discharged. In our view, invoking ***order 2 rule 15*** to allege that the learned judge struck out their pleadings when the court merely dismissed the motion comprising prayers for orders of redemption was wrongful, misconstrued and ill-conceived.

The next issue is whether the appellants were entitled to have accounts taken under ***order 20 rule 1*** of the ***Civil Procedure Rules.***

In this regard, though the learned judge deemed the guarantor's request for accounts to be fair, the court declined to order that accounts be taken as the appellants had not made out a case for it.

Order 20 rule 1 stipulates;

> ***"Where a plaint prays for an account, or where the relief sought or the plaint involves the taking of accounts, if the defendant either fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is some preliminary***

question to be tried an order for the proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made."

The rule makes it clear that accounts should be taken when specifically prayed for in the plaint, or when some preliminary question is to be tried. In this case, the question of taking accounts was not prayed for in the plaint. And though it was prayed for in the application, there were no averments in the affidavit in support of the motion to demonstrate that a preliminary question in respect of the accounts and upon which a court could ascertain whether such order was merited. As a consequence, we are satisfied that the learned judge rightly declined to order the taking of accounts as prayed in the motion.

The final issue is whether the High Court ought to have ordered the redemption of the charged property upon payment of a sum of Kshs.12 million as full settlement of the debt due under the charge instrument.

In answer to this, we will begin with determining whether the learned judge rightly found that the 1st appellant was entitled to redeem the charged property.

The learned judge observed;

> ***"20. The plaintiffs do not need an order of the court to have the security discharged. The only thing that the plaintiffs need to do is to make payment to the bank.***
>
> ***21. Upon making payment of all the moneys secured by the charge, the plaintiffs will be entitled to the discharge of the charge: That is my understanding of Section 85 of the Land Act."***

Section 85 of the ***Land Act*** provides;

> ***"Subject to the provisions of this section the charger shall, upon payment of all moneys secured by a charge and the performance of all other conditions and obligations under the charge, be entitled to discharge the charge anytime before the charged land has been sold by the charge or a receiver under power of sale."***

In ***Noakes Co. Ltd vs Rice [1900-3] All ER 34,*** Lord McNaughton stated that;

> ***"Redemption is of the very nature and essence of a mortgage as mortgages are regarded in equity. It is inherent in the thing itself and it is, I think, as firmly settled now as it ever was in former times that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption."***

We will begin by observing, that the 1st appellant sought and obtained, an overdraft facility of Kshs. 12 million from the Bank on 17th November 2007 secured by a legal charge over the charged property for Kshs. 12 million, a fixed debenture and chattels mortgage on trucks and vehicles from the 1st respondent and its directors, and the 1st appellant's individual guarantee for Kshs. 12 million. In the instant application the 1st appellant seeks to discharge the charged property as a guarantor.

Needless to say, in view of the stipulations of ***section 85,*** we agree with the learned judge that, the provision is unequivocal that the 1st appellant has the right to redeem the charged property *"…upon payment of all money secured by a charge."*

But if we understand the 1st appellant correctly, his complaint is that according to the charge document, repayment of the sums due was limited to Kshs. 12 million exclusive of interest, and as such, the Bank's demand for interest was unsubstantiated. The 1st appellant referred to Recital B of the charge instrument as expressly providing for payment of Kshs. 12 million exclusive of interest.

Recital B of the charge instrument provides;

"the bank has at the request of the Charger agreed to grant IQBAL TRANSPORTERS LIMITED of P.O. BOX 22835-00400 NAIROBI (hereinafter called the "Borrower"…..) financial accommodation by way of loan, time credit, banking facilities, overdraft, advances and other financial facilities from time to time to an aggregate maximum principal amounts <u>(exclusive interest and</u> <u>other charges, costs and expenses as hereinafter provided</u>) of up to Kenya Shillings Twelve Million (12,000,000) or the equivalent in whatever currency denominated or such lower as may for the time being and from time to time fixed by the bank". (emphasis ours*)*

The Bank's position on the other hand is that clause 2.2 (ii) of the charge instrument is the applicable provision. It provides interalia;

"The total monies for which this Charge constitutes <u>security shall not</u> <u>at any time exceed the sum of Kenya Shillings Twelve Million (Kshs. 12,000,000/-) (hereinafter called "the charge debt") together with interest at the rate (s) aforesaid</u> from the time of the Charge Debt becoming payable until Actual Payment thereof …" *(emphasis ours)*

A reading of Recital B does not disclose that the provision should be construed to mean that the appellants' are liable solely for repayment of Kshs. 12 million without interest. To the contrary, reference to Kshs. 12 million is with respect to the maximum financial accommodation available from the Bank to the 1st respondent, which amount is to be computed exclusive of interest and other charges and costs.

Instead, clause 2.2 (ii), which effectively addresses the question of interest, makes provision for payment of interest on the secured principal sum of Kshs. 12 million under the charge. This is further buttressed by clause 3.1 of the charge document entitled ***"To pay interest"*** which provides at clause 3.1.1 that;

"The Charger and/or the Borrower shall pay interest on all monies, liabilities and obligations advanced to or incurred by the Charger and/or the Borrower as aforesaid (as well after as before any demand, judgment or bankruptcy of the Charger and/or the Borrower) at the rate stated in the letters of offer attached hereto or at such other rate or rates as the Bank may in its sole discretion from time to time decide."

Since clause 2.2 (ii) of the charge instrument specified that interest was payable on the sum of Kshs.12 million, when this is read together with the concerned letter of offer of 17th November 2007, that extended the overdraft facility for Kshs. 12 million to the 1st respondent, at the interest rate of plus 3% of base rate totaling 16% per annum, we find that interest was payable on the secured amount of Kshs. 12 million outstanding from time to time, and the guarantor was liable to pay the secured amount together with interest before discharge by the Bank of the charged property.

For the avoidance of doubt, we might add that, in the event of the existence of an anomaly between the Recital B and clause 2.2 (ii), of which in our view there is none, ***Halsbury's Laws of England, 4th Edition, Vol. 13 para 216 pg 145*** states that;

"In the construction of an instrument the recitals are subordinate to the operative part, and consequently, where the operative is clear, it is treated as expressing the intention of the parties, and prevails over any suggestion of the contrary offered by the parties."

Since clauses 2.2 (ii) and clause 3 stipulate that interest is payable, these are the operative provisions of the charge instrument, and it is upon these provisions that we are required to rely.

But despite the clear and unambiguous stipulations of clause 2.2 (ii), the 1st appellant has adamantly maintained that the charged property should be discharged upon payment of Kshs. 12 million in final settlement of the charged debt, yet, as guarantor of the 1st respondent's indebtedness, he was at all times aware of a letter dated 23rd August 2012 from the Bank's Advocates, Hamilton Harrison & Mathews, demanding payment of Kshs. 52 million together with further interest, and a statutory notice of 8th October 2010 issued under ***section 56*** of the ***Land Registration Act***, ***2012***, in respect of the charged

property, demanding payment of Kshs. 12,000,000 being the amount secured by the charge together with further interest from the date thereof. It is for this reason, that the learned judge concluded that, ***"…If the guarantor pays to the bank the sum of Kshs.12,000,000/- together with interest from 8th October 2012, the bank would be obliged to discharge the charge."***

In the result, we are satisfied that the learned judge appreciated that under ***section 85*** of the ***Lands Act,*** the 1st appellant has a right to discharge the charged property, but rightly declined to issue an order for discharge, upon conclusion that such discharge was inevitable once the secured amount, together with interest was paid. In view of the aforegoing, we find no merit in the appeal, which we hereby dismiss with costs to the Bank.

It is so ordered.

Dated and delivered at Nairobi this 19th day of January, 2018.

D. K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR