REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT

CIVIL CASE 645 OF 2005

GABRIEL NDUNGU GITHUA…….....……PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD…….....……DEFENDANT

R U L I N G

The plaintiff has filed a chamber summons pursuant to the provisions of Order 39 rules 1, 2 and 3 of the Civil Procedure Rules, as read together with Section 3A of the Civil Procedure Act. The application is also said to have been brought pursuant to

"**all the enabling provisions of the law**"

Before delving into the substance of the application, I wish to make some observations about the phrase "**all the enabling provisions of the law."**

To my mind, the said phrase is so amorphous as to be meaningless. I say so because the only person who can determine the provisions of the law pursuant to which he is making any application, is the applicant himself. He moves the court on the basis of specific legal provisions, depending upon the remedies which he is seeking. Nobody else can make that determination for the applicant. Therefore, when a applicant specifies some legal provisions, such as in this case, and then adds thereto the phrase "**all the enabling provisions of the law",** it gives the impression of uncertainty on his part. Uncertainly, not about his case, but about the legal provisions he should invoke so as to reach out for the remedies he is seeking.

If an applicant is clear in his mind about the legal provisions he is invoking, he would not need to revert to that phrase.

Secondly, as the phrase is imprecise, the respondent would be taken by surprise, if the court did allow the applicant to rely on any legal provision which had not been specifically invoked.

Thirdly, the court itself would be unable to ascertain the scope of the application, if the applicant were to be allowed to rely on all other enabling provisions of the law. The reasons why applicants are required to specify the legal provisions which they are invoking, is to enable the other parties, as well as the court to appreciate the principles governing the application. For instance, an applicant who invokes only the provisions of Order 39 rule 1 of the Civil Procedure Rules would not be expected to meet the conditions laid down in Order 39 rule 2.

For the foregoing reasons, applicants should be discouraged from invoking "**all the other enabling provisions of the law**." And even where it is used, the court should not allow the applicant to proceed to cite and rely on other legal provisions, if the same have not been specified, either in the original

application or through amendment thereto.

In this application, the plaintiff has sought a temporary injunction to restrain the defendant, its agents or servants, from selling, advertising for sale or in any other manner dealing with the plaintiff's property L.R. No. NAIROBI/BLOCK 73/422.

On the face of the application, the plaintiff has given the following three substantive grounds, to support his application:-

"**(c) THAT the sums claimed in the statutory notice as outstanding are disputed for the reason that they are baseless, unjustified and exorbitant.**

(d) THAT despite several requests by the plaintiff, the defendant has adamantly refused to furnish the plaintiff with statements of breakdown of the amounts claimed and has also refused to facilitate the taking of accounts in respect of its transactions with the plaintiff.

(c) THAT the plaintiff/applicant stands to suffer irreparable loss and damage unless the orders sought are granted, as the defendant may proceed to sell the plaintiff's property in purported recovery of disputed sum of money unless restrained by this Honourable Court."

It is the plaintiff's case that in 1997, he applied for an overdraft of Kshs. 350,000/=. He says that that sum was to have been secured with the money in his fixed deposit account, which was in the sum of Kshs.600,000/=

After obtaining the overdraft, the plaintiff says that he instructed the defendant to recover the proceeds thereof from the fixed deposit. The said instructions were issued by a letter dated 21st October 1997.

Notwithstanding the foregoing, the defendant is said to have written to the plaintiff, on 19th January 2000, notifying him that his account was overdrawn to the tune of Kshs. 468,000/=. The defendant was surprised, because, in his recollection, he had not made any withdrawals between 28th October 1997 and 2nd December 1997.

Between the years 2000 and 2004, it is the plaintiff's case that he paid over Kshs. 400,000/= to the defendant. After receiving the said payments, the defendant still wrote to the plaintiff, in October 2005, demanding the sum of Kshs. 1,086,847/80. The Plaintiff strongly disputes that claim.

He points out that on 17th March 1998 he executed a legal charge of the suit property, L.R. No. NAIROBI/BLOCK 73/422. The said charge was supposed to be security for a loan of Kshs. 500,000/=. However, that sum was thereafter never disbursed to him. Therefore, the plaintiff believes that he does not owe the money claimed. If anything, it is his considered view that the defendant obtained the security, of the legal charge, through misrepresentation. The said misrepresentation is said to have been the promise to give a loan of Kshs. 500,000/=, which was thereafter never done. It is for that reason that the plaintiff feels that he has made out a prima facie case with a probability of success. He therefore asks the court to issue an injunction to restrain the defendant from selling the suit property until the suit is heard and determined.

He believes that if the injunction was not granted, the defendant would proceed to sell the suit property, and that that would occasion him irreparable loss and damage. The suit property is said to be the plaintiff's matrimonial property, so that compensation by way of damages is considered by the plaintiff to be totally inadequate.

In opposing the application, the defendant brought out a different story. It showed that on 13th June 1997, the plaintiff executed a letter of offer dated 9th June 1997, in respect of an overdraft facility for Kshs. 200,000/=. The said facility for Kshs. 200,000/= was asked for by the plaintiff, in a hand-written letter dated 28th May 1997. By the said letter of 28th May 1997, it is clear that the plaintiff offered, to the

defendant, the fixed deposit account which had Shs. 600,000/=, as well as guarantees to be executed by both the plaintiff and his wife.

It is conceded by the defendant that on 21st October 1997, the plaintiff instructed it to retire the fixed deposit, and then utilise the proceeds thereof to pay off the overdraft. The bank records demonstrate that the defendant did comply with the plaintiff's written instructions. As the fixed deposit sum was Ksh. 652,301/75, the defendant paid off the overdraft of Kshs. 400,875/85; and then credited the rest of the money, amounting to KShs. 251,372/90, into the plaintiff's current account.

Upto that point, it would thus appear that the plaintiff did not owe any money to the defendant. So how did the sums now claimed arise?

The plaintiff says that he did not withdraw any money between 28th October 1997 and 2nd December 1997. Whilst, the defendant insists that the plaintiff continued making withdrawals, as the overdraft facility was still in place.

On the one hand the plaintiff denies making any withdrawals, whilst on the other hand the defendant has produced statements of account to show that withdrawals were indeed made. In the face of the said bank statements, it is tempting to dismiss the plaintiff's contention. But I must remind myself that this is an interlocutory application. I must therefore refrain from making any final findings of fact, and allow the plaintiff the opportunity to explain himself, in the face of the statements of account.

In relation to the plaintiff's assertion that he was compelled to deposit his title documents as security, that does not seem to be borne out by the evidence before me.

The plaintiff has not denied writing the undated letter **("ZKM4"),** which was received at the bank on 14th January 1998. The said letter is, first and foremost, an application for a loan of Kshs. 500,000/=. The purpose for which the loan was required was said to be the purchase of a plot at Kariobangi South, Nairobi, which the plaintiff intended to develop as a garage and a shop for motor vehicle spares. By the said letter, the plaintiff also said:-

"**Further I am requesting the overdrawn amount in my account to be converted to a term loan, both repayable for a period of 36 months. I am offering my Nairobi house plot No. 73/422 Buru Buru Nairobi, as a security. The house has an estimated value of Kshs. 2.5 million."**

On the face of it, there does not appear to have been any compulsion exerted on the plaintiff. At least, no evidence of such compulsion can be detected from that letter.

Secondly, the plaintiff appears to have offered the suit property as security for both the loan which he was applying for, as well as for the overdraft facility.

Thirdly, the plaintiff appears to have been acknowledging the fact that he had an overdrawn account. Therefore, when he now contends that he had not withdrawn any money between October and 2nd December 1997, there are doubts about his said contention.

Why would he have acknowledged the overdraft at the material time, and then deny its existence about eight years later?

But did the defendant misrepresent to the plaintiff that it would give him a further loan of Kshs. 500,000/= over and above the overdraft which was to be converted into a term loan? That is what the plaintiff asserts.

It would appear that the two parties were then talking at cross-purposes. By a letter dated 31st March 1998, the defendant notified the plaintiff that he could only have the overdrawn account converted into a term loan, if the plaintiff first paid off the excess above Kshs. 240,000/=.

On his part, the plaintiff wrote as follows, in his letter dated 2nd April 1998:-

"**When I had agreed to secure the overdrawn amount of Kshs. 240,000/= in my current A/C 011-081-163 early March 1998, my understanding was that the Bank would have in addition to conversion of overdrawn amount and additional overdraft of Kshs. 250,000/= would have been offered to provide me with the working capital."**

From my understanding of the foregoing letter, the defendant believed that the suit property was supposed to have been used not only to secure the overdraft, but also for extra funds. It is for that reason that the plaintiff now complains of misrepresentation, because the suit property was thereafter charged, but he was not given the extra funding.

I accept as correct, the proposition by the Hon. Azangalala J. in **RUAHA CONCRETE CO. LIMITED & 2 OTHERS V. PARAMOUNT UNIVERSAL BANK LTD, HCCC NO. 430 OF 2002,** that a facility being secured by a legal charge need not always be one in which the chagor was to receive cash.

However, I do not think that the plaintiff has said that he ought to have received cash, regardless of the terms of the contract between him and the defendant. All he is saying is that in this particular instance, the defendant had misled him to believe that he would receive further funds, but thereafter the said funds were not released even after he had given security for that loan and the overdraft.

I note that the allegation of misrepresentation is not being made for the first time in this application. It is something which the plaintiff first raised on 2nd April 1998. I therefore find that it would be appropriate to afford him the opportunity to try and persuade the trial court that there was indeed a misrepresentation.

In the meantime, as the suit property is the plaintiff's only asset, as stated in his letter of 2nd April 1998, I hold the view that the interests of justice would be best served by securing it, pending the hearing and determination of the suit.

Even though the defendant may have the financial ability to compensate the plaintiff for the loss of his only asset, I hold the view that if the plaintiff lost the house, the compensation may not be adequate, considering the fact that the plaintiff had retired and had pegged his economic life thereafter on the money which he expected to receive from the defendant.

I readily accept, as was held by the Court of Appeal, in **J.L. LUVUNA & OTHERS v. CIVIL SERVANTS HOUSING CO. LTD & ANOTHER, CIVIL APPLICATION NO. NAI 14 OF 1995,** that courts should not grant injunctions to restrain mortgagees from exercising their statutory powers of sale solely on the ground that there was a dispute as to the amount due under the mortgage.

In this case, there is a dispute as to the amount due. However, that dispute is much more fundamental, as it is also pegged to the plaintiff's perceived misrepresentation by the defendant.

At the same time, there is no denying the fact that the plaintiff did acknowledge at least some indebtedness. Therefore, I do hold the considered view that even though the suit property needs to be secured pending the hearing and determination of the suit, the injunction to so secure it, should be conditional.

In accordance with the suggestion by the learned authors of "**Halsbury's Law of England**", Vol. 32, 4th edition, at paragraph 725, I hold the view that the plaintiff should pay into court the sum of Kshs.200,000/= within the next SIXTY (60) DAYS. If he pays that sum, within the period specified, the defendant shall be restrained from selling the suit property until the suit is heard and determined. However, if the plaintiff should fail to remit payment as directed, the defendant shall be at liberty to realise the security.

In the meantime, during the period of 60 days, when the plaintiff has been given the opportunity to raise

the sum of KShs. 200,000/=, there shall be an injunction in force, in any event.

Before concluding this decision, I deem it necessary to point out that the main reason why the injunction herein has been made conditional is that the plaintiff had acknowledged his indebtedness to the defendant. Therefore, to my mind, it would be iniquitous to grant an unconditional undertaking.

Finally, the costs of this application shall abide the outcome of the suit. If the plaintiff's suit should succeed, he will also become entitled to the costs of this application. But, if the plaintiff's suit should be dismissed, he would pay to the defendant, the costs of this application as well.

In the meantime, the plaintiff is directed to take steps within the next THIRTY (30) DAYS to set the suit down for hearing. This directive is intended to ensure that this case is heard and determined as early as possible, for I believe that it is only through the fast resolution of the matters in issue that the interests of both parties will be safeguarded.

Dated and Delivered at Nairobi this 29th day of .March 2006.

FRED A. OCHIENG

JUDGE