



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL SUIT NO. 2 OF 2016

ALFRED KIPKORIR MUTAL.....1ST PLAINTIFF/RESPONDENT

KIPSIGIS STORES LIMITED.....2ND PLAINTIFF/RESPONDENT

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT/APPLICANT

RULING

1. The Applicant herein, Kenya Commercial Bank Limited filed a Notice of Motion Application dated 26th August 2020. The same was brought under Order 40, rule 6 and 7, Order 51 rule 1 of the civil procedure rules. It sought the following Orders:-

i. Spent.

ii. Spent.

iii. THAT the injunctive orders issued by the Honourable Court on the 30th day of May 2017 be deemed to have lapsed and consequently vacated as a period of more than 12 months has lapsed since they were issued.

iv. THAT the instant suit cannot stand as the issues on which the instant suit is anchored on have since been admitted by the plaintiff under paragraph 4 of the Court Order in Re Kipsigis Stores Limited (2018) eKLR.

v. THAT the instant suit be dismissed with costs to the plaintiffs.

vi. THAT the costs of this application be costs in the course.

The Applicant's case.

2. The Applicant's case was premised on the grounds on the face of the Application and the Supporting Affidavit sworn by Francis Kiranga on the 26th day of August 2020.

3. It was the Applicant's case that they extended a credit facility to the Plaintiff to the tune of Kshs 241,187,662.96. That this facility was secured by registered Charges to all the properties known as LR No. Sotik Township 152,153,161.107,212,249,268,421 and 469.

4. It was the Applicant's case that the Plaintiff defaulted in terms of repayment and the Applicant subsequently issued all relevant Notices to the 2nd Plaintiff but it has continued to default to date.

5. It was its case that the Plaintiffs filed a Notice of Motion Application dated 26th July 2016 where it sought an interlocutory injunction that would restrain the Defendant from realizing the security. The interlocutory injunction was granted on 30th May 2017. It was its further case that the Plaintiffs/Respondents had been surviving on the said Orders at the expense of the Defendant. The Applicant averred that the said Orders had been in place for more than 12 months which was contrary to the legal provisions pertaining injunctions.

6. The Applicant averred that the 2nd Plaintiff had been placed under receivership pursuant to a Court Order in Re Kipsigis Stores Limited (2018) eKLR and that this Order had the overall effect of transferring all the affairs under an appointed liquidator. It was its further case that by dint of that Order, the firm of Kiplangat and Associates ceased to have instructions to proceed on behalf of the 2nd Plaintiff.

7. The Applicant averred that the 2nd Plaintiff admitted to its indebtedness under the subject herein and that the instant suit ceased to exist.

8. It was the Applicant's case that they filed an Application dated 20th November 2018 that sought to have the injunctive orders vacated. That the Application has neither been heard nor determined due to reasons well elaborated in the court file. It was its further case that the Plaintiff continued to unjustifiably survive on injunctive orders which continually exposed the Applicant to massive economic loss and non-timely realization of security.

The Applicant's submissions.

9. The Applicant submitted that the injunctive orders that the Plaintiffs had been enjoying had been in existence for more than 12 months which was contrary to the legal provisions on injunctions of that nature. It relied on the cases of **Barclays Bank of Kenya Limited Vs Henry Ndungu Kinuthia & Another (2018) eKLR** and **David Wambua Ngii Vs Abed Silas Alembi & 6 Others (2014) eKLR** to support this submission.

10. The Applicant submitted that it was not in dispute that the 2nd Plaintiff was indebted to the Defendant. That the Respondents did not dispute this fact in their Grounds of Objection and paragraph 4 of the Replying Affidavit on record.

11. The Applicant submitted that there was an Insolvency Petition based on admitted debt against the 2nd Plaintiff/Respondent i.e. Insolvency Cause No. 14 of 2016 where the Petitioner M/S Mea Limited petitioned the court that a Liquidation Order be made against the 2nd Plaintiff/Respondent. The Applicant submitted that it was one of the supporting creditors in the Petition. It was the Applicant's submission that the 2nd Plaintiff/Respondent has been placed under receivership.

12. It was the Applicant's submission that the insolvency Order had the effect of transferring all the affairs of the 2nd Plaintiff to an appointed Liquidator. It was their further submission that the firm of Kiplangat & Associates had no locus standi and automatically ceased to have instructions to proceed on behalf of the 2nd Plaintiff. The Applicant relied on the case of **Serah Nyambura T/A Crayfish Camp Vs Twiga Roses (2018) eKLR** to support their submission.

13. It was the Applicant's submission that the suit was referred to the Judicial Service Commission (JSC) by its counsel in respect to how the Judicial Officer handled the Plaintiff's Notice of Motion dated 27th July 2016. That the complaint was heard by the JSC and determined and the file returned to Bomet Court's registry for further action. It was the Applicant's further submission that since the file was returned to the Court's registry and parties being informed of the same on 5th March 2020, the Plaintiffs had not taken any steps to move the court.

14. Further the Applicants submitted that the Plaintiffs had failed to give sufficient reasons in their Grounds of Objection and the Replying Affidavit as to why they have not prosecuted their suit within the period which the injunctive orders were issued. That the contents of the Grounds of Objection were centred on facts and not points of law as required by the law and that the same should be struck out. It relied on the case of **Katar Singh Dhupar & Co. Ltd Vs Lianard Holdings Limited (2017) eKLR** to support its submission.

15. The Applicants submitted that the injunctive orders issued by this court on 30th May 2017 had lapsed and are of no effect. That the same ought to be vacated as more than 12 months had lapsed since they were issued.

16. It was the Applicant's submission that the Plaintiffs were abusing the temporary reprieves afforded by the court and this was meant to deny the Applicant its right to foreclose on the properties LR No. Sotik Township 152,153,161,107,212,268,421 and 469. That the Plaintiffs refusal to prosecute their suit while enjoying the injunctive orders was meant to stop execution and drag the Applicant through unnecessary litigation.

17. The Applicant submitted that a Security cannot be taken away where it has been pledged in favour of a company for a loan. That the Applicant had a right to the pledged securities via its right of foreclosure and it relied on the case of **First Choice Mega Store Limited Vs Ecobank Kenya Limited (2017) eKLR**. It was the Applicant's further submission that the court does not rewrite contracts and any invitation to do so is strange and that such a request ought to be declined at all costs. That in any case, the contract herein is neither illegal nor oppressive.

18. It was the Applicant's submission that the continued existence of the injunctive orders posed a real risk of the debt outstripping the value of the suit properties and this would expose the Applicant to potentially irrecoverable losses if the injunctive orders were not vacated.

19. The Applicants submitted that it had been more than 3 years since the injunctive orders were granted and that the Plaintiffs had benefited from them to the extent of not prosecuting their suit. The Applicant relied on the case of **Machakos HCCC NO. 215 OF 2008 – Jopa Villas LLC Vs Private Investment Corp & 2 Others** to support its submission. It was its further submission that an injunction is an equitable remedy and one of the maxims of equity was that delay defeats justice.

20. In conclusion, the Applicant prayed that the injunctive orders be vacated and the Application dated 26th August 2020 be allowed.

The 1st Respondent's case.

21. The 1st Respondent filed a Replying Affidavit and Grounds of Opposition both dated 31st August 2020. It was the 1st Respondent's case that the prosecution of the case was hampered by factors beyond the control of either party. That a complaint was made to the JSC about Muya J regarding this file. That the JSC called for the entire file and this slowed down the progress of the case. It was the 1st Respondents further submission that it was the Applicant's advocate who actively pursued the complaint against the judicial officer. That it was unfair to

blame the Respondents for stalling the case.

22. It was the 1st Respondent's submission that the Applicant had not come to court with clean hands as they participated in the delay.

23. The 1st Respondent submitted that he had valid reasons as to why his charged properties should not be sold. He further submitted that he should be allowed to ventilate his case against the Applicant in a full hearing.

24. It was the 1st Respondent's submission that since the file had been returned to Bomet High Court registry, the lapsed injunctive orders should be reinstated and the both Applications dated 9th October 2018 and 26th August 2020 be dismissed.

25. The 1st Respondent submitted that the existence of a Liquidation Order against the 2nd Plaintiff did not amount to an admission on the part of the 1st Plaintiff and it did not affect his case against the Applicant.

26. It was the 1st Respondent's submission that there has been no judicial officer in Bomet High Court and as it should exercise restraint in striking out the injunctive orders. That it should set the case for hearing so that parties can lead evidence and a decision made based on principles of fair trial.

The 1st Respondent's submissions.

27. The 1st Respondent submitted that this case was hampered by peculiar challenges that neither party could control. It was his further submission that the Defendant's advocate actively participated in the complaint against the judicial officer at the JSC.

28. It was the 1st Respondent's submission that the ends of justice demanded that a matter be dealt with on merit. That the court should breathe life to the injunctive orders to allow parties to litigate without any party having undue advantage due to factors beyond their control. It was his further submission that there were special circumstances to justify the extension of the interim orders. That there were serious triable issues raised by the 1st Plaintiff and denying him the opportunity to prosecute his case would be giving an undue advantage to the Defendant. He relied on the case of **Maxam Limited & 2 Others Vs Heineken East Africa Import Co. Ltd & 2 Others (2017) eKLR** to support his submission.

29. It was his submission that when a court is unable to sit, no party can be faulted. That the court file and the judge were not present or sitting for an extended period of time. He relied on the case of **Mavoloni Company Limited Vs Land Registrar, Thika & 14 Others (2012) eKLR** to support his submission.

30. The 1st Respondent submitted that the discretion of this court has to be exercised judiciously. That there was need for just determination of proceedings, efficient disposal of the business of the court, the efficient use of available judicial and administrative resources and timely disposal of proceedings. It was his further submission that the same was to be attained for justice to be seen to be done for all parties. He further beseeched this court to apply the provisions of Section 1A of the Civil Procedure Act.

31. I perused the entire file for background purposes. With respect to this Ruling, I also considered the Notice of Motion Application dated 26th August 2020, the Replying Affidavit and Grounds of Opposition both dated 31st August 2020, the Applicant's Written Submissions dated 29th October 2020 and the Respondent's Written Submissions dated 14th December 2020 and they raise one issue for determination being whether the injunctive orders issued on 30th May 2017 already lapsed by operation of the law and if not, whether the court should vacate them.

Whether the injunctive orders issued on 30th May 2017 lapsed by operation of the law and if not, whether the court should vacate them.

32. Order 40 Rule 6 of the Civil Procedure Rules provides that:-

"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise".

33. In the case of **Barclays Bank of Kenya Limited Vs Henry Ndungu Kinuthia & Another (2018) eKLR**, the Court of Appeal stated thus:-

"A plain reading of Order 40 Rule 6 shows that the rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not lapse."

34. In a Ruling dated 30th May 2017, Muya J granted the Plaintiffs/Respondents a temporary injunction. The import of that Ruling was that it restrained the Applicant herein, its servants, employees and/or agents from selling, transferring, disposing or interfering with and/or in any manner whatsoever altering or dealing with the properties known as L.R No's Sotik Township/152, 153, 161, 197, 212, 249, 268, 421 and 496. He later on gave his reasons for the Ruling on 17th October 2017.

35. Being dissatisfied by the Ruling, the advocate for the Applicant herein filed a Notice of Appeal dated 31st May 2017.

36. The Applicant also filed a Notice of Motion Application dated 9th October 2018 where he sought the same order as the current application. They prayed that the orders issued on 30th May 2017 be vacated as more than 12 months had lapsed.

37. I have perused the proceedings in the file and I note that the Ruling was delivered on 30th May 2017. As earlier stated, counsel for the Applicant filed a Notice of Appeal intending to appeal the Ruling by Muya J. It is not clear to the court at this point what happened to the intended Appeal as parties have not submitted on it.

38. It was clear from the proceedings that the Plaintiffs/Respondents failed to prosecute their case after being granted the injunction. The record shows that on 18th December 2017, counsel for the Applicant herein visited the registry in a bid to fix the matter for mention. Counsel for the Defendant was absent. The case was to be mentioned on 14th February 2018. On that day, the court directed that fresh dates be taken at the registry.

39. The matter took a lull before the Applicant herein filed an Application dated 9th October 2018. Between 30th May 2017 and the time that the Applicant filed his Application, the Plaintiffs had not prosecuted their suit. Guided by the decision in the **Barclays Bank of Kenya Limited (supra)**, the injunction granted by Muya J on 30th May 2017 lapsed by operation of the law on 30th May 2018.

40. From the proceedings, no attempt was made by the Plaintiffs to have the injunction extended by the court and therefore the court had no opportunity to consider whether there was any sufficient reason to extend the injunction beyond the stipulated 12 months. The Plaintiffs had a duty to explain or convince the court as to why the injunction should continue.

41. In the case of **Nguruman Ltd Vs Ian Bonde Nielsen & 2 Others (2014) eKLR**, the Court of Appeal held that:-

“Without going into the details, we with respect agree with the submissions of all learned counsel that the object of introducing Rule 6 in the 2010 rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various mechanization to delay the disposal of the suit.”

42. In the case of **Erick Kimingichi Wapang’ana & Another Vs Equity Bank Limited & Another (2015) eKLR**, the Court of Appeal held that:-

“Order 40 Rule 6 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months “unless”, as the Rule provides, for any sufficient reason the court orders otherwise.In this case, there was no subsequent order extending the injunction.”

43. The Plaintiffs averred that the delay in prosecuting the suit was caused by the disciplinary process initiated by the JSC against Muya J and that they could not be held responsible or blamed for the delay in prosecuting their suit. Additionally, they stated that there was no sitting Judge in Bomet for an extended period of time. A perusal of the file shows that from 30th May 2017 when the injunction was granted and the application determined, no effort was made by the Plaintiffs to prosecute their suit. Additionally, Muya J’s disciplinary hearings did not commence at that time.

44. From the record, Muya J continued handling this file after the expiry of twelve months (from 30th May 2018) as he dealt with it on 22nd October 2018, 20th November 2018, 13th March 2019, 25th April 2019 and 22nd May 2019. The Plaintiffs’ claim for non-prosecution of their suit after getting an injunction is therefore unsatisfactory. Muya J’s disciplinary proceedings with the JSC came long after the expiry of the 12 months. In any case, this did not prevent the Plaintiffs from applying for an extension of the injunctive orders.

45. I associate myself with the finding of Gikonyo J. in the case of **David Wambua Ngii Vs Abed Alembi & 6 Others (2014) eKLR**, where he stated that:-

“It is important to first deal with the scope and purpose of Order 40 Rule 6 of the Civil Procedure Rules on lapse of an injunction. Order 40 rule 6 of the Civil Procedure Rules could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous Applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure.”

46. The Applicants had prayed by virtue of the Respondents admitting their indebtedness to the Applicant in **Re Kipsigis Stores Limited (2018) eKLR**, the instant suit be dismissed with costs to them. The applicant made reference to paragraph 4 of the Judgment which stated:-

“In this petition, it has been submitted that the Petition is based on admitted debt. The creditor made a statutory demand dated 5th January 2006. M/s Kipsigis Stores Limited made admission of the debt in the sum of Kshs.99,458,143.90/= through a letter dated 8th September 2015.”

47. The Applicant stated that it was a supporting creditor in the suit and the same was captured in paragraph 5 of the Judgment which indicated the Applicant as one of the creditors and that it was owed Kshs.241,187,662.96/= by the 2nd Plaintiff.

48. In Paragraph 16 of the Judgment in **Re Kipsigis Stores Ltd (2018) eKLR (supra)**, Makau J held that:-

“The petitioner had demonstrated that statutory demand was issued for the purposes of section 384 of the Insolvency Act. The notice was not honoured provoking this petition. The debt has been admitted. There is no dispute over the indebtedness neither has the company challenged or contested the petition. The supporting creditors filed respective notices of intention to appear on the petition indicating that they are creditors in respect of respective sums as indicated in the notices. The company similarly did not bother to dispute or challenge the indebtedness to any of the supporting creditors. I therefore find the petitioner and the supporting creditors established that the company is unable to pay the debts. I further find and hold the petitioner has discharged the burden of proof as required by law.”

49. By an Order issued by Makau J on 19th September 2018, the 2nd Plaintiff was therefore liquidated under the provisions of the Insolvency Act and an Official Receiver was constituted as the liquidator of the company. This would ordinarily kick in the provisions of Section 432 (2) of the Insolvency Act which provide that:-

“When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.”

50. In the Complaint dated 26th July 2016, the Respondents herein (Alfred Kipkorir Mutai and Kipsigis Stores Limited) sought the following orders against the Applicant, Kenya Commercial Bank:-

a) A permanent injunction restraining the Defendant, its servants, employees and/or agents from selling, entering into, accessing, alienating, transferring, presenting a transfer, interfering with and/or in any manner whatsoever dealing with the 1st Plaintiff's properties known as **L.R No's Sotik Township/152, 153, 161, 197, 212, 249, 268, 421 and 496.**

b) A declaration that the Legal Charges over the suit properties are unlawful, null and void.

c) A declaration that the intended sale of the suit properties by the Defendant is illegal, wrongful and therefore null and void *abinitio*.

d) A declaration that the purported statutory notice dated 21st October 2015, the notification of sale dated 18th May 2016 and advertisement dated 18th July 2016 are illegal, wrongful, irregular, null and void *abinitio*.

e) An order for the immediate discharge of charge and release of all the title documents of the suit properties to the 1st Plaintiff.

f) Special damages.

g) General damages.

h) Costs of the suit.

i) Further and/or alternative relief as this court may deem fit to grant.

51. It is apparent to this court that the present suit contests *inter alia* the legality of the charges and extent of the indebtedness of the plaintiff to the defendant. It is not clear to this court however whether the indebtedness referred to by Makau J. at paragraph 4 of the judgment was in respect of the parties before this court. In any event the Office of the Official Receiver is now on record and is represented by an advocate. For the record, the official Receiver, though aware of the present application, made no submissions to assist the court. It will be upon the parties to demonstrate to the court the effect of Makau J.'s orders on the present suit.

52. I therefore find the prayer for dismissal of the suit premature.

53. In the final analysis, it is my finding that after getting the injunction on 30th May 2017, the Plaintiffs did not take any steps to set the suit down for hearing. They did not also seek an extension of the injunctive orders. It is my finding that there are no injunctive orders to vacate. The said Orders lapsed on 29th May 2018 by operation of the law and no attempt was made to have the court extend them.

54. Prayers 4 and 5 of the Application are premature and are therefore dismissed.

55. The costs of this Application are awarded to the Defendant/Applicant.

56. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 17TH DAY OF DECEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

Ruling delivered virtually to the parties as per their consent at the following email addresses:-

..... **& Co. Advocates for the Petitioner** –

..... **Advocate for the Respondent** –