



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMERCIAL & TAX DIVISION

HCCA 20 OF 2018

(CMCC NO 7937 OF 2014)

JOSEPH MWAURA NJOROGE.....PLAINTIFF

VERSUS

EQUITY BANK (K) LTD.....DEFENDANT

RULING

The Applicant filed Memorandum of Appeal on 25th July 2018 against the Ruling delivered on 18th July 2018 by Hon. E.K.Usui SPM in **CMCC 7937 OF 2014** on grounds that the Trial Court failed to consider circumstances of the case in the Ruling. The Trial Court is alleged to have disregarded that the Plaintiff has been able and continues to pay debt owing at the statutory interest rate.

The Applicant also filed Notice of Motion Application under **HCCA 342 of 2018** which was consolidated to this matter and transferred from Civil Division of the High Court to Commercial Division of the High Court. On 9th August 2018 Hon Justice Makau granted interim /temporary injunction pending hearing and determination of the appeal.

The Applicant sought an injunction pending appeal under **Order 42 Rule 6CPR 2010** to restrain the Respondent agents and/or servants from attaching and selling the Appellant's **LR Ngong/Ngong 50210** and motor vehicle **KCH 676B**.

The Appellant/Applicant took loan facilities and charged properties; the 1st charge of 16th August 2013 and the 2nd charge of 24th April 2016 and had restructuring session with Respondent Bank on 28th April 2019.

The Appellant/Applicant's contention is that after statutory review of interest rates from 24% to 14 % the Respondent continued to wrongfully charge 24% instead of 14% as settled on after the review meeting.

The Appellant/Applicant filed **CMCC 7937 of 2017** and sought restraining orders to restrain the Respondent from attachment and sale of the charged suit properties and the Trial Court dismissed the application with costs. It is the said Ruling that is the subject of appeal.

The Respondent filed Replying Affidavit on 11th September 2018 and opposed the application on grounds that the Appellant obtained loan facilities as follows;

- a) On 16th August 2013 the Appellant obtained a loan facility of Ksh 4,200,000/=
- b) On 25th April 2016, the Appellant executed further charge securing Ksh 3,600,000/-
- c) The loan accumulated to Ksh 7,800,000/-
- d) The Appellant filled a business loan application dated 22nd March 2017 and requested another loan facility to be utilized by the Borrower for loan restructure.

The Respondent annexed all duly executed charges securing the loan facilities obtained by the Appellant, the bank statement, demand letter of 28th September 2017 for payment of Ksh 8,257.390/- and the statutory notice under **Section 90 of Land Act** for arrears of Ksh 539,668.20/-. The letter dated 28th April 2017 constituted new offer and acceptance; the Appellant was to pay KSh 127,501 monthly instalments for 109 months. The Appellant defaulted on repayments. The Respondent contended that since the Appellant sought an equitable

remedy of an injunction, then he ought to come to equity with clean hands by showing that he serviced loan facilities.

DETERMINATION

1. At the outset this Court shall commit on the pertinent issue of the missing Court file and/or Ruling.

On 19th February 2019, this Court granted parties leave to obtain file and serve the impugned Ruling that is the subject of the appeal and status quo was maintained until 2nd May 2019. At the same time parties were to exchange and file written submissions to canvass the appeal.

On 19th September 2019, the Appellant's Counsel informed the Court that despite various spirited attempts by the Counsel to obtain the said Ruling subject of the appeal, the efforts were fruitless. The Applicant's Advocate's Affidavit filed on 18th September 2019 deponed on the efforts to obtain the Ruling and the Trial Court file that went missing. In fact, even after seeking assistance of the Chief Magistrate Nairobi Law Courts, the Court file and/or Ruling could not be availed.

The Appellant's advocate annexed letters marked **RMM2** dated;

- a) 25th February 2019
- b) 30th April 2019
- c) 6th May 2019
- d) 28th May 2019
- e) 6th June 2019
- f) 3rd July 2019
- g) 30th July 2019
- h) 5th August 2019
- i) 28th August 2019

written to the Trial Court, Registry and Chief Magistrate Nairobi Law Courts but the response was not forthcoming neither has/did the court file and/or Ruling was availed.

This Court on 16th October 2019 sought to have the original Court file CMCC 7937 of 2017 retrieved through Deputy Registrar Commercial Division. An Appellate court cannot legally hear and determine an appeal in the absence of the Ruling, Judgment, decree or order being challenged so as to confirm the grounds raised against the said Ruling *vis a vis* the evidence and reasoning in the Ruling. Therefore, this Court's hands are bound; the Appeal cannot be heard and determined on its merits.

2. The issue for determination is whether the Court may grant injunction pending appeal against the Respondent from attachment and sale of charged properties.

With regard to the instant application for injunction pending appeal, **Order 42 Rule 6 (6) CPR 2010** provides;

“(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

In the celebrated case of *Giella –vs- Cassman Brown and Co. Ltd [1973] [EA 358]* the court set out the principles for Interlocutory Injunctions; these principles are:-

- i) The plaintiff must establish that he has a prima facie case with high chances of success;***
- ii) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;***
- iii) If the court is in doubt, it will decide on a balance of convenience.***

In the case of *Mrao Limited –vs- First American Bank of Kenya Limited [2003] KLR 125*, the court stated as follows;

“A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement

of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

The Appellant does not contest the fact that he approached the Respondent bank and obtained loan facilities subject to charged properties. He does not challenge the execution and registration of charge documents. What he contends as demonstrated by the letter dated 25th May 2017 written by his advocate on record to Head of Legal Services Head Office Equity Bank, is the issue of accrued interest. The pertinent parts of the letter read as follows;

"Our client who is also your longstanding customer, borrowed a sum of Ksh 7,842,000/- in May 2016 on the strength of existing security being Land Parcel Ngong/Ngong/50210. At the time the repayment rate was Ksh 171,000/- p.a. for a period of 10 years. Upon insistence by our client following revision of applicable interest rate by Government of Kenya, you eventually agreed to adjust the interest rate to 14% p.a. translating to a monthly repayment instalment of Ksh 127,000/- p.a.. This was acknowledged in your letter dated 28th April 2017 [annexed to Respondent's Replying Affidavit]

The Applicant has established a *prima facie* case as the above letter depicts alleged infringement of a right that ought to be heard and determined by the Trial Court and it is assumed it did and culminated to the Ruling of the Court. It is now the subject of appeal. If the dispute of interest calculation is not resolved as per the Respondent's own agreement to adjust as alluded to in the above letter, there is likelihood of irreparable damage that maybe occasioned by resultant attachment and sale of charged properties where the amount due and owing in light of agreement to adjust interest by Respondent is not determined.

Whereas this Court agrees that the Respondent is entitled to exercise its right to statutory power of sale in 'normal' circumstances where a party has defaulted in servicing the loan facilities contrary to the contract(s), in this case, the party's right to appeal is vitiated by loss of the Trial Court's record. The Appellant is entitled to pursue an appeal as the Respondent is entitled to realize its securities. These are competing interests to safeguard each party's rights.

Every person is legally entitled to pursue an appeal under the statutory requirements. The appellant's right of appeal is curtailed from 25th July 2018 when the memorandum of appeal was filed to date. We do not know what the process of the appeal would be and therefore, not granting an injunction pending appeal at this rate to preserve the Appellant's right of appeal would amount to granting execution without resolution of the dispute which seems to relate only to interest chargeable but would automatically affect the payment of the principal sum in determining the outstanding amount.

DISPOSITION

The Court in consideration of all pleadings and submissions tilts towards granting the application filed on 26th July 2018 for injunction pending appeal with costs, but on the following conditions;

- 1. The appellant shall continue to repay the monthly instalments and arrears**
- 2. The Appellant and Respondent and/or their advocates or representatives and/or accountants shall reconcile the loan accounts and repayments made and due and owing Integrating Clause 4 of the letter of offer of 28th April 2017. Clause 4 alludes to Interest & Fees. The effective Interest rate is thus 14% per annum from the date of the letter to date.**
- 3. The reconciled accounts report shall be filed in Court through DR Commercial Division jointly or separately within 60 days from delivery of Ruling.**
- 4. The DR Commercial Division to pursue and/or facilitate the retrieval of the Court File and/or Ruling/Decree/Order(s) of CMCC 7937 FROM CM Nairobi Law Courts within 60 days.**
- 5. Any execution or precipitate action is withheld during this period of ongoing Corona Virus pandemic Lockdown until the Government announces resumption of normalcy.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH APRIL 2020.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

RICHARD M. MUTISO ADVOCATE FOR APPELLANT/APPLICANT

MUCHEMI 7 COMPANY ADVOCATES FOR RESPONDENT