



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYAHURURU
CIVIL APPEAL NO.22 OF 2019

(Appeal Originating from Nyahururu CM's Court ELC.CM.142 of 2017by: Hon. O. Momanyi S.R.M.)

JOHN KINGORI KIONI.....APPELLANT/APPLICANT

VERSUS

SIDIAN BANK.....1STRESPONDENT

ANTIQUA AUCTION AGENCIES.....2ND RESPONDENT

R U L I N G

Before me is the applicant dated 15/4/2019. The applicant John Kingori seeks the following orders:

1.spent;
2.spent;
3. That pending the hearing and determination of this appeal or further orders of the court, a temporary injunction be issued restraining the respondents, their agents, servants, employees, or any other persons acting through or under them from seeking and/or dealing in any manner whatsoever with L.R.Nyandarua/OlJOROROK Salient/6756 and motor lorry Reg. No. KBU 308X and for release of motor lorry Reg. No. KBU 308X and the goods worth Kshs.4,500,000/= that were on board the vehicle at the time of attachment.
4. He also asks for costs of this application.

The application is supported by the grounds in the body of the application and the applicant's affidavit sworn on 15/4/2019.

The applicant was advanced a loan of Kshs.6.4 million by the 1st respondent, Sidian Bank, for the purchase of a lorry as per letter of offer J.G.K.(1)(a). He started to repay the monthly installments of Kshs.182,262/= till the loan was restructured to Kshs.139,228/=. By then he had paid a total of kshs.6.5 million; that although the interest rate is capped, the respondent continued to calculate interest at a higher rate and the 1st respondent claimed a further Kshs.8,042,761/= on the loan as at 22/11/2017; that the said interest is over and above 100% of the loan advanced to the appellant and hence illegal; that based on the alleged balance, the 1st respondent instructed the 2nd respondent, Antiqua Auction Agencies to attach the subject motor vehicle and also sell L.R.Nyandarua/OlJOROROK Salient/6756 which the applicant had pledged as security; that at the time of attachment, the vehicle had on board a customer's goods worth Kshs.4,500,000/=. He exhibited a delivery note (S.K.K.3); that due to the attachment, he was forced to buy other goods to deliver to the customer as per delivery note J.J.K.4. The applicant further deposed that at the time, the land was pledged as security, it was valued at Kshs.4,783,333/= in 2013 yet in 2017, the 1st respondent wants it to be sold at Kshs.3,300,000/= and a forced valued of Kshs.2,500,000/=: that in February, 2013, motor vehicle KBU 308X was valued at 7.6 million and that its current value is Kshs.5,500,000/= (J.K.K.6); that if the 1st respondent goes ahead with the sale of the two properties, it will amount to unjust enrichment and that is why he filed ELC.CM.142/2017 and being aggrieved by the court's Judgment he has filed this appeal.

Geoffrey Kiragu Muriithi, the Branch Manager of Sidian Bank Ltd Nyahururu put in a replying affidavit dated 11/7/2019 which is to the effect that indeed the applicant was advanced an asset finance loan of Kshs.6.4 million to enable him buy a lorry as per letter of offer dated 12/3/2013 (J.K.K.1). He denied the allegation made by the applicant that the 1st respondent used a doctored letter of offer in the lower court; that later, the applicant applied for an overdraft facility of Kshs.500,000/=: working capital as per letter of offer dated 3/6/2014 (G.K.M.7) and both loans were secured by the motor vehicle KBU 308X and land title Nyandarua/OlJOROROK Salient/6756. A legal charge and a mortgage were registered in respect of the vehicle and land; that the applicant defaulted in repayment of the loan and a restructuring was done by letter of offer of 28/9/2015 and he was to pay monthly installments of Kshs.139,256/=. However, the applicant again defaulted as a

result of which the 1st respondent commenced the process of realizing its securities by issuing the necessary notices, that is, statutory notices, redemption notice and notification of sale (G.K.M.K.10, 14 & 15); that before the restructuring, the applicant had only paid Kshs.4,105,628/= on the asset finance loan but nothing on the overdraft; that the applicant then paid Kshs.1,469,000/= on the restructured loan bringing the total paid to Kshs.5,574,630/= and that no illegal interest was charged. It was denied that there were any goods on the vehicle at the time of attachment and the owner of the goods has not brought any claim; that the subject properties were valued before issuance of notice (G.K.M.12 a & b). Meanwhile, the loan has continued to accrue interest and the application therefore lacks any merit.

Appellants Submissions:

Mr. Nderitu, counsel for the applicant filed written submissions on 29/7/2019 which he highlighted.

Mr. Nderitu submitted that if the two properties, that is, motor vehicle and land are sold before the appeal is heard, then the substratum of the appeal will be lost; that there are issues that need to be determined including the fact that the letter of offer was doctored by the 1st respondent to reflect figures that were not shown to the applicant; that so far, the applicant has paid the principal sum of Kshs.6.4million and it is unlawful for the 1st respondent to demand 100% over and above the principal sum; that the contention that there were goods on the attached vehicle has not been controverted by the 2nd respondent.

As regards the valuation reports, counsel submitted that the discrepancy in the two valuation reports is so wide that it raises triable issues that can only be resolved at a full hearing; that the 1st respondent has not obtained the best value for the suit land and vehicle and that the applicant's allegations on the valuation reports are not controverted. He relied on the case of *Mrao Ltd v First American Bank Kenya Ltd and 2 others [2003] KLR 125* where the court considered what a prima facie case in civil entails and that the applicant has established a prima facie case.

On the question of the applicant suffering irreparable loss which cannot be compensated by way of damages, counsel relied on the case of *Nguruman Ltd v Jan Bonde Nielson C.A.77/2012* where the court held that the applicant needs to establish that he may suffer irreparable injury which cannot be adequately compensated by damages in absence of an injunction.

On the balance of convenience, counsel submitted that it tilts in the applicant's favour as he has demonstrated that he will suffer injury.

Respondent's submissions:

Mr. Njogu, counsel for the 1st respondent submitted that there is no dispute that the applicant was advanced a loan of Kshs.6.4 million and a further overdraft of Kshs.500,000/=; that he was supposed to pay both principal and interest and there is no dispute that there was default in repayment; that the appeal is based on an allegation that the respondent doctored the letter of offer marked as J.K.K.1B but there is no such annexure save the letter of offer for annexure J.K.K.1 dated 12/3/2013 and hence the allegation is unfounded.

The second ground of appeal is that illegal and unlawful interest has been imposed, despite the law of capping of interest; counsel submitted that the law on capping of interest was introduced by Section 33B(1)a & b of the Banking Amendment Act No.25 of 2017 came into effect on 11/9/2016 after the contract between the applicant and 1st respondent had been entered into and hence does not apply to the said contract. For that proposition, counsel relied on the decision in *Air Travel & Related Studies Ltd v Equity Bank (2017) eKLR* where J. Okongo held that the law on capping of interest does not have retrospective application. On the grant of an order of injunction pending appeal, counsel submitted that the grant of order of injunction is discretionary and the same cannot be granted where the appeal is frivolous and hence one has to establish an arguable case. Counsel relied on the decisions in:

1. *Giella v Cassman Brown*
2. *Naresh Darbar v Thara orchards Ltd [2008] eKLR (NRB CA.519/2008);*
3. *Anglican Church of Kenya St. Peters Church Gatunduini v Secretary, Murang'a County Government & Another [2015] eKLR.*

As regards the allegation that there was cargo on the attached motor vehicle, Mr. Njogu submitted that it is an afterthought as it had not been pleaded in the plaint nor was it mentioned in the application in the lower court; that in any event, if there was indeed cargo, it can be claimed in the lower court as the case is still pending. As to whether the applicant will suffer irreparable loss if the sale proceeds, counsel submitted that the applicant can be compensated for the land and vehicle in monetary terms. He urged the court to dismiss the application.

I have duly considered the application, the affidavits, and submissions of both counsel. The first issue for consideration are whether a temporary injunction can issue against the respondents to restrain them from selling the applicant's land LR.Nyandarua/Ol Jororok Salient/6756 and motor Lorry Reg.No.KBU 308X and the goods on board the said lorry. The other issue is whether a mandatory injunction can issue against the respondents ordering them to release goods attached with the vehicle.

I have considered whether the applicant has satisfied the conditions precedent to grant of an interlocutory injunction pending appeal. In the decision of *Naresh Darbar (Supra)* Justice Okwengu when considering such application, relied on the decisions of J. Visram in *HCCA.492/2004 Patricia Njeri & 2 others v National Museum of Kenya* where the Judge said as follows:

“In the Venture Capital case: the Court of Appeal said that an order of injunction pending appeal is a discretionary matter. The discretion must, however, be ‘exercised judiciously and not in a whimsical or arbitrary fashion.’ This discretion is guided by certain principles some of which are as follows:

- a. The discretion will be exercised against an appellant whose appeal is frivolous (see *Madhupaper International Ltd v Kerr [1985]*

KLR 840 (cited in Venture Capital). The application must state that a reasonable argument can be put forward in support of his appeal (JK Industries v KCB 1982 – 88) KLR 1088 (also cited in Venture Capital);

b. The discretion should be refused where it would inflict greater hardship than it would avoid (See Madhupaper);

c. The applicant must show that to refuse the application would render his appeal nugatory (See Butt v Rent Restriction Tribunal [1982] KLR 417 (cited in Venture Capital);

d. The court should be guided by the principles in Giella v Cassman Brown & Co. Ltd [1973] EA 358 as set out in the case of Shitukha Mwamode & 9 others [1986] KLR – 445 (also cited in Venture Capital).”

The principles that were set out in Giella v Cassman Brown & Co. Ltd (Supra) are well known; that an applicant for a temporary injunction must show that he has a prima facie case with a probability of success, in this case, whether the applicant has an arguable appeal; that such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury or harm which cannot be adequately compensated by an award of damages and if there is a doubt to the foregoing, the application will be determined on a balance of convenience.

Whether the applicant has a prima facie case or arguable appeal:

It is not in dispute that the applicant was advanced a loan facility of Kshs.6.4 million on 12/3/2013 and a further overdraft of Kshs.500,000/= on 3/6/2014 and the security for the said loans are the land parcel 6756 and the Motor Vehicle KBU 308X. It is also not in dispute that the applicant defaulted in repayment of the loan, which he admits in the plaint filed in the trial court.

The applicant’s complaint is that the sums claimed are overstated; that the 1st respondent has been charging illegal interest based on a fake (doctored) loan agreement. I must point out at this stage that though the applicant claimed that there was a doctored letter of offer marked JKKI.1(b), which was used to claim the outstanding loan, the same was not annexed to his paragraph 2 of his supporting affidavit. The only annexure is annexure JKKI’1’ which is the letter of offer from the respondent. Therefore, there is no evidence that there exists a doctored letter of offer.

According to the applicant, by the time the loan was restructured on 28/9/2015, he had paid a total of 6.5 million and therefore the 1st respondent’s claim of Kshs.8.042,761/= as at 22/11/2017 was illegal as it was above 100% of the sum advanced. The total sum of the loan advanced is 6.9 million. According to the 1st respondent, the interest chargeable on the Kshs.6.4 million was at a rate of 23.5% per annum payable in 60 monthly installments of Kshs.192,262/= and hence the total amount payable was Kshs.10,935,736/=; that having defaulted, the applicant requested for a restructuring, for a total sum of Kshs.6,005,952/= payable by installments of Kshs.139,256/= for 96 consecutive months but he only paid one installment and defaulted again. The respondent contends that the applicant has so far paid only Kshs.5,574,630.17. The onus therefore lies on the applicant to demonstrate that the sum claimed by the 1st respondent is erroneous because of illegal and unlawful interest.

The applicant contends that interest charged by the respondent contravenes the Banking (Amendment) Act, 2016. The said Act came into effect on 14/9/2016 whereas the loan facilities had been given in 2013 and 2015 as per the letters of offer dated 12/3/2013 and 28/9/2015. The charge on the suit property and Chattels transfer are dated 19/4/2013 and 11/6/2013. The charge was registered on 19/4/2013 while the Chattels mortgage was registered on 26/6/2013. It is obvious that these instruments were registered way before the Banking Amendment Act, 2016 came into force. The question is whether the Act applies retrospectively.

In The Air Travel & Related Studies Ltd (Supra), J. Okongo considered the said provision and cited the case of Municipality of Mombasa v Nyali Ltd [1963] EA 371 where Newbold J.A. said:

“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights, it will not be construed to have retrospective operation unless a clear intention to that effect is manifested. Whereas if it affects procedure only, prima facie it operates retrospectively unless a clear intention to that effect is manifested.

Whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary.”

In The Air Travel case, the court came to the conclusion that the Banking Amendment Act is not a procedural legislation but one that affects substantive rights of the lenders and borrowers; if it was the intention of parliament that the Act apply retrospectively, it would have stated so expressly in the Act, and hence the Act did not have a retrospective effect. I totally agree with the above view and therefore the applicant is bound by the terms of the contract entered into between the applicant and the 1st respondent on the interest payable. If the court were to find otherwise, it would be rewriting the contract for the parties which is not this court’s work. As held in National Bank of Kenya Ltd v Pipeplastic Samkolit & another [2001] KLR 112, a court of law cannot rewrite a contract between the parties and parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. In this case, the applicant cannot run away from the terms of contract.

Generally where there is a default in loan repayment, a dispute over the amount payable is not a ground for restraining a chargee from exercising his statutory power of sale. This was stated in the case of Priscillah Krobought Grant v Kenya Commercial Finance Co. Ltd. & 20 others NRB.CA.227/95 where the court said:

“Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee

from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & another v Shah Depar Devji [1965] E.A.91, 32 Halsbury's Laws of England (4th Edition) paragraph 725 and Uhuru Highways Development Ltd. v Central Bank Kenya and 2 others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J.A.”

See also Waudi vs National Bank of Kenya [2002] 2 KLR 254 at page 259 (line 1 – 12).

After considering all the above facts and decisions, I come to the conclusion that the applicant has not demonstrated that he has an arguable appeal.

Whether the applicant will suffer irreparable loss:

In Nguruman Ltd (Supra), the court considered what irreparable loss entails, when it said:

“.....an applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately compensated or remedied by damages in the absence of an injunction. This is the threshold required and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot ‘adequately’ be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation of whatever amount will never be adequate remedy.”

The applicant contends that the price at which the respondent intends to sell the property is too low, that is Kshs.3,300,000/= and Kshs.2,500,000/= forced value and the lorry at Kshs.4,000,000/= market value and Kshs.2,800,000/= forced value (GKM 12 a & b); that if the sale proceeds, he will suffer irreparable harm.

So far, the sale has not taken place but even if it had, undervaluation of property has never been a ground to invalidate a sale. In the case of John Keriga Githae v KCB Ltd & 2 others HCC.34/2013 (NKU) J. Emukule adopted the decision in Downhill Ltd v Herith Ali El Busaidy (2000) eKLR where the court held:

“If as the borrower contends, the property had been said at an undervalue, that was a proper ground for recovering damages from the Bank. It is no ground for stopping the sale or transfer to the applicant. We note that the borrower instituted these proceedings after his equity of redemption had been extinguished. He could have paid the amount demanded even after the sale to the applicant but before he was registered as proprietor.”

In Tiwi Buffalo Safaris Ltd [2015] eKLR, the court was of the same view as above. If the property is undervalued, the chargor can sue for damages. That is the position in law.

In the case of Andrew Mwaniki Wanjohi v Equity Building Society Ltd & 2 others 203/2005, the court said:

“...by offering the suit property as security, the chargor was equating it to a commodity which the chargee may dispose of so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss would be calculable on the basis of the real market value of the said property.”

In Isaac O. Litali v Ambrose Lusumbai & Beatrice Subali & AFC J. Ringera as he then was stated as follows:-

“However, since the plaintiff has in his pleadings and affidavit made a mountain out of the fact that he has developed the land in question to a home and its sale would, therefore, occasion pain and loss which cannot adequately be compensated in damages, I think it would be fair to express a view on the matter. I am of the opinion that once land has been given as a security for a loan, it becomes a commodity for sale by that very fact and any romanticism over it is unhelpful. I say so for nothing is more clear in a contract of charge than that default in payment of the debt will result in the sale of the security. In that respect, land is no different from a chattel such as a motor vehicle or any other form of security. And needless to state, there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages.”

The answer to the appellant's complaint lies in the above cited case which represents the position that once one offers land as security for a loan, the land becomes a commodity which can be sold. The applicant will not suffer irreparable loss because the damage's are quantifiable.

Balance of convenience:

In my view, the balance of convenience tilts in favour of the 1st respondent who advanced two loans to the applicant which the applicant failed to repay within the stipulated time and interest continues to accrue. If left unpaid the applicant may never be able to repay. The applicant has therefore failed to satisfy the court that he is entitled to the equitable remedy of temporary injunction.

The applicant also seeks a mandatory injunction for release of the motor vehicle and goods on the said vehicle.

I wish to agree with the 1st respondent's submission that so far, there is no evidence to confirm the existence of any goods on the vehicle. The alleged owner of the goods has not sworn any affidavit to confirm ownership and one wonders why the said owner of the goods has never

moved the court claiming illegal attachment. Interestingly, the applicant never sought release of the alleged goods when he moved the lower court. No claim for the said goods has been made in the trial court.

Whether a mandatory injunction can issue:

Generally, a mandatory injunction will be issued in very rare cases. An order of mandatory injunction is sought at paragraph 3 of the Notice of Motion. The same is not sought in the plaint. Generally, an order of mandatory injunction will not be granted unless the applicant demonstrates that there exist special circumstances. This was the subject of discussion in James Wahome Ndegwa & others v Kenya Urban Roads Authority ELC 7/2018 in which the court cited Locabail International Finance Ltd v Agro Export & Another [1986] ARL ER 901. The court stated:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction.”

The applicant has not demonstrated that the attachment of the lorry was illegal and unlawful and that the attached lorry had goods thereon. As earlier noted, there is no proof of existence of the said goods. A mandatory injunction can only issue in the clearest of cases which this one is not.

In the end, I come to the conclusion that the applicant has not met the threshold for grant of a temporary injunction to restrain the 1st and 2nd respondents from selling the attached land and motor vehicle nor has he demonstrated that clear and special circumstances exist for grant of a mandatory injunction. The application is declined and dismissed with costs to the 1st respondent.

Dated, Signed and Delivered at Nyahururu this 28th day of May, 2020.

.....

R.V.P Wendoh

JUDGE

PRESENT:

Mr. Nderitu for applicant

Mr. Njogu for 1st respondent

Eric – court assistant