



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 47 OF 2019

ASSOCIATED ELECTRICAL AND HARDWARE SUPPLIES LIMITED.....1ST PLAINTIFF

JARIBUNI QUARRY LIMITED.....2ND PLAINTIFF

VERSUS

BANK OF BARODA KENYA LIMITED.....1ST DEFENDANT

PETER N. GICHUKI T/A SPOTLIGHT INTERCEPTS.....2ND DEFENDANT

RULING

1. Before me is a **Notice of Motion** application dated **28th July, 2020** and filed on even date by the Plaintiffs/Applicants. The same is brought pursuant to **Order 42 Rule 6** of the **Civil Procedure Rules, 2010**. The Applicants are mainly seeking the following orders:-

a) Spent.

b) There be and is hereby issued an order of injunction to restrain the Defendants either by themselves, officers, agents, employees, assigns or any person acting for them from selling and disposing of any and all the properties known as Land Reference Nos.709/Section III/Mainland North, Kilifi/ Mwapula/Magogoni/404, Kilifi/Mwapula/Magogoni/706, Kilifi/Mwapula/Magogoni/707, Kilifi/Mwapula/Magogoni/ 1044, Mombasa Block XVIII/256, Mombasa/Block XIX/221 and Mombasa/Block XIX/222, pending hearing and determination of the Intended Appeal.

c) Costs of this application be provided for.

2. The **Notice of Motion** application is premised upon on **grounds (1) – (7)** on the face of the application and is further supported by **Supporting Affidavit** of **Shailesh Hira**, the Plaintiffs' Director, sworn on **28th July, 2020**. He deponed that this court vide a Ruling delivered on **30th October, 2019** dismissed the Plaintiffs' earlier application seeking injunctive orders in terms sought in the instant application. That the 1st Plaintiff/Applicant made efforts by disposing its assets and settled its liabilities by clearing the **loan balance of Kshs.145,819,676/=**. He further deponed that the 2nd Plaintiff/Applicant also intends to dispose of its assets to repay the loan which has fallen due on its part but the efforts have been thwarted by challenges related to Covid -19. As such, the deponent avers that there is a real danger that the Defendants are likely to advertise and sell the suit properties which may render the intended Appeal, although arguable nugatory.

3. The Defendants opposed the application and in doing so the Defendants rely on a **Replying Affidavit** sworn by the 1st Defendant's Manager; **Mukesh Kumar** dated **11th August, 2020** and filed on **12th August, 2020**.

4. The Defendants' case is that the 1st Defendant advanced a loan to the Plaintiffs and they have failed to repay the loan in the terms contained in the **Letters of Offer**. That as at **4th June, 2019**, the 1st Plaintiff was indebted to the Defendant in the sum of **Kshs.147,534,739.83** while the 2nd Defendant is indebted in the sum of **Kshs.136,553,696.50**, which amounts are accruing interests to date. It is averred that the Defendant has not issued new Notices for a new sale and as such no prejudice has been shown by the Applicants.

5. According to the Defendants, the **Notice** of the **Intended Appeal** was filed **nine (9) months ago** and to date the Plaintiffs have not been swift in filing the Appeal. Consequently, the 1st Defendant views the instant application as a further delay tactic which the court should avoid.

6. On the merits of the application, the 1st Defendant argued that the Plaintiffs have not demonstrated that they will suffer irreparable injury which would not be compensated by an award of damages nor have they offered any security. That being the case, the 1st Defendant pleads with the court to find that the Plaintiffs have not established sufficient cause for grant of the orders of Stay of Execution.

7. The Application was disposed by way of written submissions. Both parties complied in filing their submissions and I will briefly outline their respective submissions as below.

Plaintiff's Submissions

8. The Plaintiffs in their submissions invited the court to consider the case of **Bilha Mideva Buluku...Vs...Everlyne Kanyere [2016]eKLR**, where the court set out the guiding principles in determining an application for injunction pending Appeal. It is argued that this court should consider the instant application and grant the prayer sought for purposes of preserving the *status quo* so that the Appeal is not rendered nugatory.

9. It is also submitted that the Plaintiffs have made an effort of paying **Kshs.145,819,676.00** to the 1st Defendant thereby settling all the 1st Plaintiff's liabilities and if the Defendants are not restrained from selling the suit properties, then the Plaintiffs risk losing the suit properties after paying a substantial amount of the loan.

10. On whether security should be offered, the Plaintiffs submit that the 1st Defendant is already holding security in terms of Charges registered against the suit properties hence no further security is required.

11. Lastly, the Plaintiffs submit that the award of damages will not be sufficient recompense since the properties are of high value. Reliance was placed in the case of **Robert Mugo wa Karanja..Vs...Ecobank (Kenya) Limited & Another [2019]eKLR**.

1st Defendant's Submissions

12. The 1st Defendant submitted that the Plaintiffs have not met the principles for interlocutory injunctions as set out in the celebrated case of **Giella..Vs...Cassman Brown & Co. Ltd [1973]EA 358**. To wit, it is submitted that the Plaintiffs have not established a *prima facie* case, demonstrated irreparable injury if an injunction is not granted and lastly that the balance of convenience is in favour of the Defendants.

13. As for whether the *status quo* should be maintained, it is submitted that owing to the **Ruling** delivered by this court on **30th October, 2019**, the *status quo* is that the 1st Respondent should not sell the charged properties without first issuing an **Auctioneer Notice** that is compliant with the auctioneers rules. In any event the 1st Defendant submitted that the 1st Plaintiff has never made any loan repayment since this was filed and there is a risk of the debt outstripping the value of the security.

Analysis and Determination

14. I have carefully considered the **Notice of Motion** application herein, the **Affidavit** in support as well as the **Replying affidavit**. I have also considered the written submissions made by both parties in support of their opposing positions. The issue arising thereto for consideration is as follows:-

a) Whether on the evidence and material placed before court, the Plaintiff has satisfied the conditions upon which a temporary injunction can be granted;

b) Whether this court can issue the orders sought in the application in circumstances of the present case;

c) Who should bear the costs?

15. Those principles settling the law have remained that, a Plaintiff seeking to get and be granted a temporary injunction must establish a *prima facie* case with probabilities of success, must establish that he/she stands to suffer a loss irreparable by an award of damages if the injunction be refused and where the court is in doubt, it balances the convenience between the parties. In a later decision by the Court of Appeal in the case of **Nguruman Limited...Vs...Jan Bonde Nielsen & 2 Others [2019] eKLR**, the law was laid that the three prerequisites must be proved in a sequential manner underscoring the fact that the foundation of grant of temporary injunction is a *prima facie* case with probabilities of success.

16. However, it is important to note that the issue as to whether the Applicants have met the threshold for grant of temporary injunction was considered by this court in its **Ruling** delivered on **30th October, 2019**. The court considered whether both the Plaintiffs/Applicants had established the three prerequisite principles to warrant the issuance of temporary injunctive orders. After considering the arguments presented by the parties, the court granted a conditional temporary injunction restraining the Respondents from selling the suit properties unless they (the Respondents) complied with **Rule 15(b)** of the **Auctioneers Rules** and further re-issue the **Sale Notices**.

17. What the deponent who is a Director of both the Plaintiffs/Applicants is now alleging is that the 1st Applicant has made efforts in repaying all the debt which is due by disposing some of its properties. He adds that the 1st Applicant has repaid the debt to a tune of **Kshs.145,819,676/=** as a mark of willingness to pay the outstanding debt.

18. The gist of that background is that the 2nd Applicant similarly intends to pay off its debt but its efforts to dispose of its property were thwarted by challenges associated by **Covid-19** pandemic. As such, the Applicants aver that there is danger of the Respondents disposing off

the suit properties and if the orders for temporary injunctions are not granted, the Applicants will suffer an irreparable loss.

19. It is incumbent upon the Applicants to convince the court that there had been change of circumstances from the time when the court delivered its **Ruling on 30th October 2019**. Some of the grounds that constitute changed circumstances would include whether the Applicants have repaid a substantial amount of the debt owing to the 1st Respondent. The list is not exhaustive but each case is to be considered on its merit.

20. Considering the circumstances of this case, the Applicants have established that they have re-paid a sum of **Kshs.145,819,676/=** in observance of the **Ruling** delivered on **30th October, 2019** and in a bid of clearing of its debt owing to the 1st Respondent. In interpretation of this court, payment of sum a substantial portion of the debt owing to 1st Respondent is a show of good faith in a bid to settle the debt. This court considered the case of **Keshvaji Jethabhai & Bros Ltd...Vs...Saleh Abdulla [1959]EA 260**, which laid down some guiding principles that should guide exercise of discretion in a mater like the instant one. It thus stated:-

a) Whilst creditors' rights must be considered each case must

be considered on its own merits and discretion exercised accordingly.

b) The mere inability of a debtor to pay in full at once is not a sufficient reason for exercise of the discretion.

c) The debtor should be required to show his bona fides by arranging prompt payment of a fair proportion.

d) Hardship of the debtor might be a factor, but it is a question in each case whether some indulgence can fairly be given to the debtor without prejudicing the creditor.

21. The Court is of the view that the Plaintiffs have shown bonafides in paying the sum of **Kshs.145,819,676/=** which the Respondents do not dispute having received. The court is also alive to the hard times brought about by the **Covid-19** pandemic and is inclined to granting the Applicants a chance to redeem the suit properties. On the same note, this being a court of justice it is minded that justice be done to all and not to only one of the parties.

22. In the premises therefore, this court holds that the Applicants have established bona-fides to warrant this court exercise its discretion in granting temporary injunction in the favour of the Applicants and proceeds to make the following orders:-

a) That a temporary injunction be and is hereby issued restraining the Respondents and/or their agents from selling and disposing of any and all the properties described under paragraph 1 of this Ruling pending the hearing of the Intended Appeal.

b) The Plaintiffs/Applicants are directed to file the Appeal and the Record of Appeal within 90 days from the date hereof.

c) For purpose of expeditious disposal of the Intended Appeal, this Court notes that timelines are of key importance. I therefore direct that failure to abide with Order (b) above, the injunctive orders under Order (a) will stand vacated.

d) In circumstances of this case the costs of the applications are awarded to 1st Respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 28th day of October, 2020.

D. O. CHEPKWONY

JUDGE

28/10/2020

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE

28/10/2020