



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.365 OF 2018

WILSON NGIGI WAITHAKA.....1ST PLAINTIFF

PRODRIVE KENYA LIMITED.....2ND PLAINTIFF

ALLIANCE TECHNOLOGIES SOLUTIONS LIMITED.....3RD PLAINTIFF

VERSUS

AFRICAN BANKING CORPORATION LIMITED.....1ST DEFENDANT

KENYA MEDICAL SUPPLIES AGENCY.....2ND DEFENDANT

KENYA REVENUE AUTHORITY.....3RD DEFENDANT

RULING

1. Before me are two applications set down for hearing together. The first application is by the 1st and 3rd plaintiffs/Applicants and is dated 12th September 2018. The second application is by 2nd defendant and is dated 9th October 2018 and filed on 9th October 2018.

2. The 1st and 3rd Plaintiffs/Applicants through an application dated 12th September 2018 brought pursuant to section 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Order 40 Rule 1,2,4, 10 and 51 Rule 1 of the Civil Procedure Rules prays for the following orders:-

a) THAT this Application be certified urgent and heard ex-parte in the first instance.

b) THAT pending *inter-partes* hearing and determination of this Application, this Honourable Court be pleased to grant a temporary order of injunction restraining the 1st Defendants jointly and severally whether by themselves, their employees, servants and/or agents from further advertising, trespassing selling by public auction or otherwise, leasing, alienating, disposing off, transferring to a 3rd party, evicting, dealing and or interfering in any manner with the Plaintiff's quiet, peaceful enjoyment, possession of a property known as **Title No. Loc. 3/Gituru/329**.

c) THAT this Application be heard inter-partes as a matter of urgency on such date and at such time as this Honourable Court may direct.

d) THAT pending hearing and determination of this suit, this Honourable Court be pleased to grant a temporary order of injunction restraining the 1st Defendants jointly and severally whether by themselves, their employees, servants and/or agents from further advertising, trespassing, selling by public auction or otherwise, leasing, alienating, disposing off, transferring to a 3rd party, evicting and or interfering in any manner with the Plaintiff's quiet, peaceful enjoyment, possession a property known as **Title No.Loc.3/Gituru/329**.

e) THAT costs of this Application and the suit be borne by the Defendants.

3. The application is premised on grounds nos (i) – (xiv) on the face of the application. It is further supported by affidavit of Wilson Ngigi Waithaka sworn on 12th September 2018 and annexure (**MNW-1 – MWM-5**). The application is further supported by a further affidavit of Ngigi Waithaka sworn on 19th October 2018 and annexure (**MNW-6**).

4. The application is opposed. The 1st Respondent relies on the 1st Respondent's Replying affidavit by Evalyn Gachoki sworn on 22nd October 2018 and annexures **EG-1 – EG-11**. It is further opposed by the 2nd Respondent through a Replying affidavit by Fredrick Wanyonyi sworn on 9th October 2018 and the 3rd Respondent's Replying affidavit by Levi Mukhweso and annexures (**LM-1 – LM-7**).

5. The 2nd Defendant/Applicant through an application dated 9th October 2018 brought pursuant to section 1A, 1B, 3A of the Civil Procedure Act, Order 2 rule 15(1) (b) (d), order 4 Rule (2) (4) and (6) of Civil Procedure Rules 2010 prays for the following orders:-

a) **THAT** the Plaintiff be struck out for being fatally defective and/or in the alternative;

b) **THAT** the suit against the 2nd Defendant be struck out for being both frivolous and vexatious and an abuse of the process of court.

c) **THAT** costs of this application be borne by the Plaintiffs.

6. The application is based on grounds nos. (a) – (f) on the face of the application and supporting affidavit of Fredrick Wanyonyi sworn on 9th October 2018 and filed on even date.

7. The same is opposed and the plaintiff relies on further affidavit of Ngigi Waithaka sworn on 19th October 2018 and filed on the even date in opposing 2nd defendant's application.

8. The parties in the two applications opted to file written submissions in support of their rival positions. The Plaintiffs/Applicants' submissions were filed on 13th December 2018; the 1st Defendant/Respondent's submissions were filed on 16th January 2019; the 2nd Respondent/Applicant's submissions on 16th January 2019 and those of the 3rd Defendant/Respondent on 28th December 2018. The advocates opted not to highlight on the same.

9. I have considered the two applications, affidavit in support and in opposition as well as counsel rival submissions and I am of the view that the issues arising thereto for consideration can be summed up as follows:-

a) **Whether the Applicants' application has met the threshold for granting orders of injunction?**

b) **Whether the plaintiffs suit is fatally defective and whether the suit against the 2nd defendant should be struck out for being both frivolous and vexatious and an abuse of the process of court?**

1) **NOTICE OF MOTION DATED 12TH SEPTEMBER 2018 BY THE PLAINTIFFS**

A) Whether the Applicants' application has met the threshold for granting orders of injunction?

10. The Applicants are seeking an order of injunction to issue pending the hearing and determination of the suit restraining the defendants jointly and severally whether by themselves, their employees, servants and/or agents from further advertising, trespassing, selling by public auction or otherwise, leasing, alienating, disposing off, transferring to a 3rd party, evicting and interfering in any manner with the plaintiff's quiet, peaceful enjoyment, possession of a property known as **Title No. Loc 3/Gituru/329**.

11. It is now settled that for an injunction to be granted the Applicant has to satisfy that it has a prima facie case with probability of success; that damages is not adequate compensation and lastly that the balance of convenience tilts in its favour. I shall therefore proceed to consider whether the Applicants application meets the threshold for granting orders of injunction. The thresholds are well set out in the case of **Giella vs Cassman Brown & Co. (1973) E.A. 358**.

12. I now proceed to examine whether the plaintiff have established a prima facie case with probability of success.

13. What is prima facie case? In **Mrao Ltd vs First American Bank of Kenya Ltd & 3 Others, Nairobi CA No.39 of 2002 [2003] eKLR**, a prima facie case was defined as:

"....a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter....."

14. The applicants have averred that they have demonstrated that the 1st plaintiff is the registered proprietor of House No.4 at City Park Nairobi, on a property known as **Title No. Loc 3/Gituru/329**. That the 1st defendant extended an invoice discounting loan and overdraft facility of a maximum of Kshs.20, 000,000/-and Kshs.3, 000,000 respectively secured by irrevocable letters of undertaking by 2nd and 3rd defendants to directly pay the 1st defendant all amount due and payable to 3rd plaintiff from the 2nd and 3rd defendants (see letters dated 26th September 2011 and 3rd November 2011 by the 3rd and 2nd defendants respectively to the 1st defendant (**MNW-1 and 2**). That the Applicant offered his suit property by a charge and further charge dated 22nd February 2012 and 9th July 2013 to the 1st defendant to secure any further invoice discounting and overdraft loan facility to the 3rd plaintiff above the limit secured by above stated letters of undertaking, with the charge having a maximum amount of Kshs.30,000,000/-.

15. The Applicants contend that by invoices exhibited as **MNW-4** in the applicants supportive affidavit; the 3rd plaintiff invoiced the 2nd

and 3rd defendants for total sum of Kshs.27, 511,594/70 consequently settling the debt under IDF and overdraft facility.

16. The 2nd defendant do not support the Applicants application and urges there is similar matter pending being Hccc No. 87 of 2013. The Respondent on its part urges the Applicants enjoy several facility from the 1st Respondent. It is further urged that the applicants secured an injunction order without disclosing relevant material facts, that they had been extensively accommodated by the Bank through restructuring of the loans to all of them to make payment and settled the outstanding amount. That the outstanding monies in respect of facilities stands at Kshs.60,600,314/-38 as at 1st October 2018 (see annexure **(EG-11)**). That the Bank issued statutory notice to the chargor on 18th January 2018. That the Bank issued 50 days' notice of sale dated 17th May 2018. The Bank avers that it never did any wrong doing as regards the process followed in the realization of the affected security. The 3rd defendants do support the Applicant's application and in its submission is of the view that the Applicants application is misconceived.

17. I have nevertheless considered the Bank's submissions and I am satisfied that the bank has demonstrated that the Applicant was advanced with a Bank facility and overdraft, which the Applicants admit. That according to the Respondent the Applicant defaulted in payment and the bank followed all laid down procedures to recover the money with no avail. The Applicants have attempted to conceal the indebtedness urging the 2nd and 3rd defendants settled the debt but the 2nd and 3rd defendants in their submissions do not support the Applicants submissions. The 2nd defendant in its submissions urged the Applicant suit is proper for striking out. The 3rd defendant describes the application as sham. I find the Applicants have failed to demonstrate they have fully paid the loan.

18. The Applicants however urge the statutory notices issued claimed different amounts as per being EG-10, 12, 13 and 14 and auctioneers notification of sale exhibit **(MWM-5)** claiming Kshs. 48,023,970/26; Kshs.49, 345,312/45; Kshs.521, 503,791/62 and Kshs.56, 926,257/37. That though there is no dispute of statutory notices having been issued there is no justifiable explanation that has been offered for variance in the amount in the statutory notices. **Section 90 (1) of the Land Act** provides:-

"(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."

19. In **Koileken Ole Kipolonka vs Mellech Engineering & Construction Ltd & 2 Others (2015) eKLR**, the Court found merit in the instant argument that notices which gave different amounts merit the Applicant an injunction as the same are in breach of section 90 of the Land Act.

20. **Section 97(2) of the Land Act** provides:-

"(2) A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer."

In this suit I have found any not find no evidence of a Valuation Report as none has been attached to the Replying affidavit nor is there evidence in the manner in which the forced value alleged in auctioneer notification of sale of 8,625,000 was arrived at. I find in the interest of protecting a right of the debtor a valuation Report is necessary and in absence of the same the credit or should ensure one is carried out and served upon the debtor before auction takes place. In absence of valuation report injunction should be issued to give the credit or time to avail the same upon the debtor. In the view of the above I am satisfied the plaintiffs have demonstrated that they have a *prima facie* case with probability of success.

21. On the issue of irreparable loss and balance of convenience; it is Respondent's submission that the plaintiff will not suffer any loss incapable of compensation by an award of damages and for such, injunction order should not issue. It is Applicants contention that once a *prima facie* is established injunction ought to be granted; urging that the properties in the nature of lands are not common and once property is disposed the same cannot be compensated by damages as the same land cannot be recovered. The court is aware that there is no commodity for sale which cannot be adequately compensated in damages. The applicants claim they are not indebted to the Respondent who claims otherwise; this fact cannot be determined at the interest interlocutory as the court has first hear the matter and determine it after full trial. It is the Applicants contention that the chargee is acting unlawfully and claiming non-existent and illegal debt. In the case of **Alice Awino Okello vs Trust Bank Ltd & Another LLR No. 625 (CCK)** supports the fact that where there is doubt of validity of statutory notices an injunction should issue.

22. On balance of convenience it is Applicants contention that the money claimed was not secured by charge and it is urged there is document examiner's report that the letter of offer, guarantee and charge produced by the 1st defendant in support of its claim are forged, obtained by fraud and is not executed by the plaintiffs. That the debt was indeed settled by the principal debtor. That though the 2nd and 3rd defendants denies the role alleged by the plaintiffs, the serious allegations raised thereto touching on the issue of illegalities and the doubt caused on validity of the statutory notices and the sum secured by the charge; I find that due to such doubts the injunction ought to be granted. The balance of convenience tilts in favour of the Applicants. I find that injunction sought in view of the above to be granted.

2) NOTICE OF MOTION DAETD 9TH OCTOBER 2018

23. The 2nd defendant through a Notice of Motion dated 9th October 2018 brought pursuant to section 1A, 1B and 3A of Civil Procedure Act, order 2 rule 15(1) (b) (d) order 4 Rule 1 (2) (4) and (6) of Civil Procedure Rules 2010 seeks the following orders:-

1) **THAT** the Plaintiff be struck out for being fatally defective and/or in the alternative;

2) **THAT** the suit against the 2nd Defendant be struck out for being both frivolous and vexatious and an abuse of the process of

court.

3) **THAT** costs of this application be borne by the Plaintiffs.

24. The same is premised on the grounds on the face of the application being inter-alia: - that the verifying affidavit dated 12th September 2018 is defective; that there is no compliance with order 4 rule 1(1) (f) and/or legal notice 36 of 2000; that there no compliance with order 4 rule 4 which is practiced in mandatory terms and lastly there is no cause of action against the 2nd defendant disclosed in the suit. The application is supported by the affidavit of Fredrick Wanyonyi sworn on 9th October 2018 and annexures thereto. The 3rd Respondent filed a Replying affidavit dated 26th October 2018 in support of the 2nd Respondent's application. The Applicant in opposition of the application relies on affidavit of Ngigi Waithaka sworn on 19th October 2018.

25. Both counsel rely on their respective submissions.

26. In determining the 2nd Defendant's application the court has to go back to the pleadings and examine the same. I have perused the verifying affidavit dated 12th September 2018 by one Andrew Kamau Ngigi which under paragraph 2 he states:-

"That I am conversant with the facts in this suit and swear this affidavit in verification of the correctness of the averments contained in the plaint filed herewith."

I find no error of the said verifying affidavit.

27. The verifying affidavit is sworn by a Director of the 2nd and 3rd plaintiffs, who is also the 1st plaintiff in this suit, and who has stated he is duly authorized by the plaintiffs. There is no requirement under order 4 Rule 1(4) of Civil Procedure Rules that a resolution under seal be filed together with the suit indicating authorization to swear the affidavit. Order 4 Rule 1(4) of Civil Procedure Rules provides:-

"(4) Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."

I therefore find no basis on grounds nos. (a) (b) and (c) on the face of the application.

28. On whether there is cause of action against the 2nd defendant. Paragraph 5 – 10; 14 – 18, 20, 23, 32, 35 and prayers nos. (b) (c) of the plaint lays the basis of the plaintiff's claim against the 2nd defendant. That if the case is struck out on the grounds as raised it would in my view be determining a matter before court not on merit but purely on procedural technicalities. Article 159 (2) (d) prohibits such an action.

29. Under **order 4 (1) (1) (f) of Civil Procedure Rules**, it is provided:-

"(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint."

30. Under paragraph 35 of the plaint dated 12th September 2018, the plaintiff avers that there is other pending suit and there have be no previous proceedings before any court between the plaintiff and the defendants over the same subject matter. Save for Hccc No.87/2013. The plaintiffs claim is on the basis of letters dated 3/11/2011 and 26/9/2011 by the 2nd and 3rd defendants respectively to the 1st defendant issued for the benefit and favour of the 3rd plaintiff. The plaintiffs aver the letters of inventory by 2nd and 3rd defendants were accepted by the 1st defendant leading to the advance of **IDF** and overdraft facility. It is the plaintiffs contention the said letters of undertaking constitute a promise to pay under section 3(1) of the Law of Contract Act. In view of the pleadings I am satisfied that, the plaint raises triable issues which cannot be wished away. The issues raised cannot be determined summarily through an application but through full hearing. I find that there is a cause of action disclosed against the 2nd defendant in the present suit.

31. The upshot is that I proceed to make the following orders:-

1) Application dated 12th September 2018 succeeds and I will make the following orders:-

a) Pending hearing and determination of this suit temporary order of injunction be and is HEREBY issued restraining the 1st Defendant jointly and severally whether by themselves, their employees, servants and/or agents from further advertising, trespassing, selling by public auction or otherwise, leasing, alienating, disposing off, transferring to a 3rd party, evicting and or interfering in any manner with the Plaintiff's quiet, peaceful enjoyment, possession of a property known as Title No.Loc.3/Gituru/329.

b) Costs to the Applicants/Plaintiffs.

2) Application dated 9th October 2018 is dismissed with costs.

Dated, signed and delivered at Nairobi this 21st day of February, 2019.

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J .A. MAKAU

JUDGE