



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 349 OF 2018

MARGARITTA VILLAS LIMITED.....PLAINTIFF

-VERSUS-

MWANANCHI CREDIT LIMITED.....1ST DEFENDANT

EXCELLENCE & INTERGRITY AUCTIONEERS..2ND DEFENDANT

RULING

1. The Plaintiff Margaritta Villas Limited is the owner of apartment No. 702 on L.R No. 1/780. By its Notice of Motion application, dated 20th August 2018, it seeks interlocutory injunction to restrain Mwananchi Credit Limited, the 1st Defendant from selling that apartment in exercise of its Statutory Power of Sale.
2. The Plaintiff obtained *ex parte* temporary injunction on 28th August 2018. In granting the *ex parte* injunction the court stated that the allegations of the Plaintiff, that the 1st Defendant had not disbursed the loan to it, was serious.
3. The affidavit in support of the Notice of Motion application, sworn by Catherine Njoki Kimani, the Director of the Plaintiff in part stated:
 - a) *That, the Plaintiff Company is the registered owner of Apartment No.702 on L.R. No 1/780.*
 - b) *That, the Plaintiff Company requested for a loan of kshs.4,000,000 (Kenya Shillings Four Million) from the 1st Defendant and executed the relevant charge documents but the 1st Defendant failed to disburse. Annexed and marked CNK2 are copies of charge documents.*
 - c) *That, the Plaintiff severally demanded that the 1st Defendant release the lease documents free of any encumbrances in its favour but the 1st Defendant failed to heed.*
 - d) *That, the 1st Defendant purported to have disbursed the said loan through 3rd parties and fraudulently, recklessly and illegally decided to charge the Plaintiff interest thereof now amounting to Kshs.11,348,871(Kenya Shillings Eleven Million Three Hundred and Forty Eight Thousand Eight Hundred and Seventy one) which amount is unconscionable and illegal.*
4. The Plaintiff's allegations in that affidavit are indeed serious.
5. The 1st Defendant opposed the application through the replying affidavit of Dennis Mwangeka Mombo, the 1st Defendant's Director. He deponed that the 1st Defendant is a non-deposit taking institution and accordingly the loans issued by it are governed by the loan agreements it has with the loanee, and are not governed by the Banking Act.
6. The 1st Defendant, through its Director further deponed that the Plaintiff was being untruthful in alleging that the 1st Defendant did not disburse the loan. The 1st Defendant referred to the Plaintiff's letter dated 22nd September 2016 by which the Plaintiff advised the 1st Defendant to remit Kshs.2 million of its loan to Daniel Orege & Company Advocates and Kshs. 2 million into the Plaintiffs bank account. That the amount was remitted, by the 1st Defendant, as requested.
7. The above depositions by the 1st Defendant, were not controverted by the Plaintiff. It also needs to be stated that I have seen the Plaintiff's letter dated 22nd September 2016, where the Plaintiff instructed 1st Defendant to remit its loan to the two accounts, as stated before. It

follows, from above, that the Plaintiff in obtaining *ex parte* injunction obtained it by suppressing information of those instructions it gave to the 1st Defendant. The Plaintiff in obtaining that injunction was less than truthful. It lacked utmost good faith. The court of appeal discussed the need to provide relevant information at *ex parte* stage in the case: **UHURU HIGHWAY DEVELOPMENT LIMITED – VS- CENTRAL BANK OF KENYA & OTHERS CIVIL APPLICATION NO. 140 OF 1995**, where the justices had this to say:

“Order 39 Rule 3 (1) of the Civil Procedure (revised) Rules (now Order 40 of the Civil Procedure Rules, 2010) permits the granting of ex parte injunctions but it must clearly be understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the relevant material, including even material which is against his interest. The basis for this requirement is obvious. It is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. Ex parte orders, whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and compelling reason for it.

.... I would add my voice to that of my Learned brothers that there cannot be any legal authority for obtaining an ex parte injunction on one basis, and when it comes to the inter partes hearing of the application, a totally different or even a more detailed basis is advanced to support the ex parte order. A party who has obtained an ex parte order must be able to support that order, at the inter partes hearing, on the very same grounds upon which he was able to obtain it in the first place. I would also agree that the granting of ex parte injunctions should be the exception rather than that rule. Ole Keiwua, J. found as a fact that the applicant obtained the ex parte order of injunction by concealing from Githinji J. relevant material which it could have been in a position to disclose to the later learned Judge.”

8. The requirement for a party to have utmost good faith was also discussed in the case: **THE KING –VS- GENERAL COMMISSIONERS FOR THE PURPOSE OF THE INCOME TAX ACTS FOR THE DISTRICT OF KENSINGTON KBD (1971)** where the Court stated:

“That the rule of the court requiring uberrima fides on the part of application for an ex parte injunction applied equally to the case of an applicant for a rule nisi for a writ of prohibition.... That, there having been a suppression of material facts by the applicant in her affidavit, the Court would refuse a writ of prohibition without going into the merits of the case.”

9. The Plaintiff, in view of the fact it failed to show utmost good faith, at *ex parte* stage, and because there is no truthfulness in its contention, that its loan was disbursed to third party without its knowledge, the Notice of Motion is without merit and is dismissed with costs to the 1st Defendant.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE 1ST DEFENDANT

.....FOR THE 2ND DEFENDANT