



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 548 OF 2014

WITEROSE RADIO ALARMS (K) LTD.....PLAINTIFF

- VERSUS -

GUARDIAN BANK LIMITED.....DEFENDANT

RULING

1. *The plaintiff, Witerose Radio Alarms (K) Ltd*, filed its plaint on **26th November, 2014** and also simultaneously filed its **notice of motion** dated **18th November, 2014**. By that notice of motion, *the plaintiff* sought to injunct or restrain **Guardian Bank Ltd**, *the defendant*, from selling property **Kisumu/Koru/1493** which property is charged to *the defendant* as security for a loan facility of Excel Logisticis ltd, not a party in this case.
2. The application was heard interpartes and by this court's ruling of **28th February, 2017**, an injunction was granted pending hearing and determination of this suit.
3. The defendant has presented a **notice of motion** dated **11th April, 2018**, seeking an order for the discharge of the interlocutory injunction issued on **28th February, 2017**. The **notice of motion** is brought under Order 40 rule 6 of the Civil Procedure Rules (herein after referred to as the rules). That rule provides as follows:

“where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of 12 months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise”.

4. The defendant through its supporting affidavit, sworn by its legal officer, deponed that since obtaining the interlocutory injunction, the plaintiff had not fixed the matter for hearing, and was not interested in prosecuting the suit.
5. The plaintiff by its replying affidavit, sworn by its learned counsel, blamed the defendant's failure to file its defence as the cause of the suit not been fixed for hearing. The plaintiff stated in that affidavit, that it had complied with the filing of its documents and witness statement in readiness of obtaining a hearing date. Indeed the plaintiff requested the court to proceed and fix the case for hearing.
6. **F.Ochieng, J**, by his ruling of **28th February, 2017**, primarily granted an interlocutory injunction, in favour of *the plaintiff*, because on a prima facie basis the learned judge found that there was lack of land control board to the charge which *the defendant* was exercising its statutory power of sale. The learned judge in his said ruling in part stated:

“in the circumstances, I find that the plaintiff has demonstrated a prima facie case with probability of success. I so find because in the absence of a consent by the land control board, the charge instrument, which is the foundation upon which the bank would have derived its statutory power of sale would be a nullity.....in the final analysis, the court finds that the only ground upon which the plaintiff has demonstrated a prima facie case with a probability of success, are the absence of a consent from the land control board and inadequacy in the statutory notice.”

7. The learned Judge expressed himself in that ruling and stated that had he only found that the only failure on *the defendant's* part was inadequate statutory notice, he would have granted a conditional injunction, one that would allow *the defendant* to issue fresh statutory notices. It is clear therefore from that ruling that the learned judge formed the opinion that lack of land control board consent was a bar to exercise of statutory power of sale.
8. That in my view, is possibly the **'sufficient reasons'** envisaged under **order 40 rule 6** of the rules which would justify extension of

injunction beyond 12 months. The 12 months period for injunction issued in favour of *the plaintiff* expired on **27th February, 2018**.

9. Order 50 rule 6 of the rules empowers this court to enlarge time. That rule provides as follows:

“When a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

10. I am of the view that it is important for *the plaintiff's* suit to be heard on merit and to resolve the issue raised in the ruling of **28th February, 2017**.

11. Accordingly, I order as follows:

a. The defendant shall file and serve its defence witness statement and its documents within 30 days from today.

b. The injunction granted by this court on 28th February, 2017, is hereby extended for 12 months from today's date.

c. The cost of the notice of motion dated 11th April, 2018 shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of July 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant