



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCCC NO.569 OF 2013

NAIROBI HOSPICE.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

DUBAI BANK KENYA LIMITED.....2ND DEFENDANT

JERRY HONEYWELL TRAVELS LIMITED.....3RD DEFENDANT

RULING

1. Dubai Bank Limited (in liquidation) (Dubai Bank) has set up a cross claim against the Kenya Commercial Bank (KCB Ltd) in which it seeks to enforce a Bank Guarantee dated 15th November 2013.

2. By an Application dated 9th March 2016, Dubai Bank prays for following Orders:-

1. THAT Judgment on admission be entered against the 1st Defendant to pay Kshs.7,500,000/= to the 2nd Defendant within 21 days of the order hereof.

2. THAT the 1st Defendant to pay the 2nd Defendant interest on Kshs.7,500,000/= at 16.99% pa. from 25th December, 2013 until payment in full within 21 days of the order hereof.

3. THAT the costs of the Cross-Claim and this Application be awarded to the 2nd Defendant.

3. The Court has considered the Application, Reply thereto and Submissions of Counsel.

4. Kenya Commercial Bank filed a Statement of Defence dated 5th August 2015 and stated as follows in paragraph 6,7 and 9 of thereof:-

6. Save to admit that the Plaintiff instructed the 1st Defendant to issue a bank guarantee in the maximum principal sum of Kshs. 7,500,00/=, the 1st Defendant denies the rest of the contents of paragraph 13 of the Plaintiff and puts the Plaintiff to strict proof thereof. In response thereto, the 1st Defendant avers that on 6th November 2013, the Plaintiff made a formal application requesting the 1st Defendant to issue a guarantee in its standard format in favour of the 2nd Defendant in terms of which:-

a) the 1st Defendant was to debit the sum of Kshs.7,500,000/= from the funds held under the Plaintiff's fixed deposit account number [...] and hold the same separately as cash collateral for the guarantee.

b) the sum of Kshs.7,500,000/= would be held in the 1st Defendant's name and be its sole property until cancellation of the guarantee or its discharge.

c) the 1st Defendant would pay any claim made against it under the guarantee subject to the maximum sum of kshs.7,500,000/= prior to the guarantee's expiry date of 26th December 2013.

d) the aforesaid payment would be made without any reference or further authority from the Plaintiff and without the requirement to enquire or confirm whether the same was due or whether any dispute exists as between the Plaintiff and the 2nd Defendant beneficiary; and

e) the Plaintiff's liability under the guarantee to be issued lapse on the expiry of the guarantee but would subsist up to and until discharged by the 1st Defendant.

7. In further response to paragraph 13 of the Plaintiff, the 1st Defendant avers that it issued to the 2nd Defendant a guarantee dated 15th November 2013 in the terms instructed. Further, on 27th November 2013, the 1st Defendant issued the said guarantee to the Plaintiff, on its express written instructions, in swift format on terms that the guaranteed sum was payable within a maximum of five (5) days upon the first demand being made by the 2nd Defendant by way of swift message to the 1st Defendant.

9. Save to admit that the 2nd Defendant made a demand upon the 1st Defendant on 23rd December 2013 under the aforesaid guarantee via swift message the 1st Defendant denies the rest of the contents of paragraphs 15-18 inclusive of the Plaintiff and puts the Plaintiff to strict proof thereof. In response thereto, the 1st Defendant avers that before it could act upon the aforesaid demand made by the 2nd Defendant, it was served with the court order of 27th December 2013 by the Plaintiff restraining it from compliance with the same.

5. In answer to the Application for Judgment on admission, the KCB had reiterated that it could not abide by the terms and conditions contained in the instrument of guarantee because it was duty bound to comply with the court order served upon it.

6. What is that court Order? Vide an application dated 24th December 2013, Nairobi Hospice (the Plaintiff herein) ,inter alia, sought some injunctive orders against Kenya Commercial Bank. On 27th December 2013, the court issued the following Orders:-

“COURT: Having read the application dated 24th December 2013 and the affidavit in support, I am satisfied that it is urgent and I so certify. I am also satisfied that it is in the interests of justice to grant restraining orders pending inter parties hearing of the application. I therefore grant orders in terms of Prayer 2 of the application dated 24.12.2013 for a period of 14 days. The application shall be served forthwith for interpartes hearing on 15.1.2014”.

7. On 15th January 2014 (which would be 14 days of 27th December 2013, given the manner of computing time under Order 50 Rule 4 of the Civil Procedure Rules) Gikonyo J. made the following Orders:-

“COURT: As parties are agreed on the matter being adjourned, I grant the adjournment to the defendants. The defendants have 21 days to file and serve replying affidavits. On being served, the

Plaintiff/applicant has 10 days to put in the reply, if they so wish. This matter shall be assigned a mention date by the Deputy Registrar to confirm compliance of the directors above, Meanwhile, Interim orders are extended”

8. It would seem that the matter was not mentioned before the Deputy Registrar as ordered by the Judge. And having carefully perused the file, the Court notes that the Application has never been argued nor have the Interim orders extended by Gikonyo J. on 15th January 2014 been set aside.

9. This Court would however be aware of the provisions of Order 40 Rule 4(2) of the Civil Procedure Rules on the period of ex parte orders of Injunction and Order 40 Rule 6 on the lifespan of Interim Orders of injunction. Order 40 Rule 4(2) reads:-

“(2) An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days”.

While Order 40 Rule 6 reads:-

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

10. The objects of Rules 4 and 6 of the Civil Procedure Rules are clear and laudable. They are intended to deal with the mischief where a party who has obtained a temporary injunction employs tactics to delay the disposal of the application for Injunction or the suit. The Rules are necessary safeguards against such machinations (see for example **Nguruman Limited Vs. San Bonde Nielsen & 2 others**[2014]).

11. And the Court of Appeal has had occasions to stress the clarity of Rule 6 of Order 40 in **Erick Kimingichi & Another vs. Equity Bank Ltd & Another** [2015] eKLR:-

“Rule 6 or Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months “unless”, as the Rule further provides, “*for any sufficient reason the court orders otherwise*”

12. While some Courts have taken the view that an Interlocutory Injunction lapses automatically on its first anniversary unless extended by an Order of Court, others hold that an aggrieved party ought to move a Court for a declaration of lapse. In this latter group would be the Decision in **Wilson Tanui Barno & 2 others Vs. Jennifer Kositany** [2015]eKLR in which Justice Munyao explained himself as follows:-

“I have my own problems with the practicality of Order 40 Rule 7, and I think it needs to be modified to take into account the reality that we have serious backlog of cases. It is not realistic, that all cases will be determined within one year of issuance of an injunction. In my view, where the court has issued an order of injunction pending hearing and determination of the suit, then that position should ensue, and if any party is aggrieved by the continued existence of the order of injunction, or wishes to have it set aside, whether on the basis of Order 40 Rule 6 or Rule 7, then such party is at liberty to apply to the court for the order of injunction to be set aside or to be varied. It is not proper for any party to take it upon himself that an order of injunction has lapsed pursuant to the provisions of Order 40 Rule 6 and proceed to disobey it. That can be recipe for anarchy. Litigation should not be seen or taken to be a game of cat and mouse, where one party lies in wait to pounce on the other, by some technicality of law. There needs to be decorum for at the end of the day, what is required of the court is to make a final determination of the rights of the parties in a matter.”

13. The relief of Temporary Injunction is given Statutory salutation in Section 63 of the Civil Procedure Act as a relief available to prevent the ends of Justice from being defeated. Section 63 provides:-

“In order to prevent the ends of justice from being defeated, the Court may, if it so prescribed-

a) issue a warrant to arrest the defendant and bring him before the Court to Show Cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;

b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;

c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;

d) appoint a receiver of any property and enforce the performance of this duties by attaching and selling his property;

e) make such other interlocutory orders as may appear to the court to be just and convenient”.

14. In interpreting Rules 4 and 6 of Order 40, one must not lose sight of the object of a temporary injunction as set out in the primary legislation which is to prevent the ends of justice from being defeated. And in recognition that an Order of Injunction can be unmerited, abused or oppressive, Rule 7 empowers a Court to discharge, vary or set aside an Order for injunction at the instance of a dissatisfied party. The Rule provides;

“Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order”.

15. Lord Denning in **Mcfoy Vs. United African Company Ltd(West Africa)** 3 ALL ER 1169 famously stated,

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.” (*my emphasis*)

The force of this statement is undoubted and is often acknowledged. The Good Judge himself cautioned that it may sometimes be convenient (and I would add appropriate) to have a void and null act so declared by Court. This would forfeit the view that even though a Temporary injunction lapses on its first anniversary by operation of law, there is need to seek a Court pronouncement that it has so lapsed.

16. This Court prefers to lean on the side of **Wilson Tanui Barno** (supra)and to hold that the lapse of an injunction contemplated under Order 40 Rule 6 should be so declared upon an application of a party. To leave it to self-help is a recipe for disorder, confusion and chaos. And given the univocal wording of Order40 Rule 6 there is no reason why a party aggrieved by a Temporary Injunction that has outlived it first anniversary should not move Court even by way of an informal application for the appropriate Declaration.

17. Being of this view, I would have to find that the order of Gikonyo J. made on 15th January 2015 not having been declared lapsed still subsists.

18. The conclusion that must necessarily follow is that the said Order still bars the enforcement of the Guarantee. This court agrees with the Lawyers for the Plaintiff and Kenya Commercial Bank that the orders sought in the Motion of 9th March 2016 cannot be granted in the face of that express order.

19. This Court need not consider the matter any further and hereby dismisses the Notice of Motion dated 9th March 2016 with costs.

Dated, Signed and Delivered in Court at Nairobi this 13th day of April, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Attonga for 1st Defendant

Omwenge h/b for Ojiambo for Plaintiff

Gitoro for 2nd Defendant/Applicant

Alex - Court Clerk