



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

CIVIL SUIT NO. 647 OF 2015

JARIBU CREDIT TRADERS LIMITED.....PLAINTIFF

VERSUS -

FIDELITY COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

1. The plaintiff has filed an application seeking interlocutory injunctive reliefs. It requests that the defendant be restrained from selling the suit property, **L.R. No. 209/7994/7**, whether by public auction or by private treaty.
2. The plaintiff also wishes to have the defendant restrained from appointing a Receiver over the plaintiff's assets, and also from referring the plaintiff to the Credit Reference Bureau.
3. Thirdly, the plaintiff seeks orders to compel the defendant to provide properly reconciled accounts. It was the plaintiff's case that the defendant would have to remove from the accounts, all amounts levied illegally. Those allegedly illegal levies were said to include compounded interests' penalties and collection fees.
4. When the defendant was served with the application, it filed a Notice of Preliminary Objection. the said objection raised the following points;

"1. THAT there is no jurisdiction to grant an injunction having regard to the cause of action sought by the plaintiff;

2. THAT the suit herein is statute barred by the provisions of S. 19 (1) of the Banking Act (Credit Reference Bureau Regulations, 2013) which provides:

"A suit, prosecution or other legal proceedings shall not lie against the Central Bank, Bureau, an institution or chairperson, director, member, auditor, advisor, officer or other employee or agent of such Bureau or institution or any other person authorized under these regulations to submit, receive, use or share credit information, for any loss or damage caused or is likely to be caused by anything done or intended to be done in good faith in pursuance of these Regulations or guidelines issued hereunder?"

3. THAT the Defendant's statutory power of sale has arisen and is being properly exercised;

4. THAT proper and valid statutory notices have been served prior to the exercise of statutory power of sale;

5. THAT the statutory power of sale is not being used oppressively or fraudulently;

6. ***THAT the plaintiff's guilty of material non-disclosure and suppression of material facts disentitling it from the grant of the equitable reliefs sought;***

7. ***THAT the plaintiff's allegations regarding fraud, deceit and misrepresentation are misplaced and misdirected;***

8. ***THAT the application is misconceived, bad in law and amounts to abuse of the court process***".

5. When canvassing the Preliminary Objection the defendant appeared to focus on only one limb of the application; the right and obligation of credit providers to provide information to the Credit Reference Bureau, concerning their customers who had defaulted on their obligations.

6. The respondent's position was that the regulations in force do not simply make it possible for credit providers to share information. The said regulations were also described as providing customers with the right to access the information which the Credit Reference Bureau holds about them.

7. Through that medium of communication and interaction with the **CRB**, the customer was given a forum at which he can challenge the content of the information, and also through which the customer can obtain a correction or a deletion of any information which was not factually accurate.

8. In the circumstances, I understand the defendant to be saying that the plaintiff should have utilized the avenues provided to address its concerns about such information as the plaintiff anticipated that the defendant would provide to the Credit Reference Bureau.

9. In **KENNEDY ODHIAMBO NYAGUDI Vs CENTRAL BANK OF KENYA & 3 OTHERS PETITION No. 209 of 2012**, Majanja J. held that the Banking (*Credit Reference Bureau Regulations*) 2008;

"provide for relief to any customer who is aggrieved by wrong and erroneous information. The petitioner's grievances fall within these provisions and he is entitled to invoke the statutory procedure provided".

10. The learned Judge went on to say that;

"Assuming that the respondents complied with the law, they cannot be held liable for any harm flowing from following a law that is claimed to be unconstitutional when in fact they did not participate in or actually promulgate the regulations?"

11. In the result, the court rejected the petition which had, inter alia, sought a declaration that the Banking (*Credit Reference Bureau Regulations*) 2008 were invalid and unconstitutional.

12. The petitioner had also asked the court to compel the Credit Reference Bureau to expunge his name and financial records from its data base.

13. By dismissing the petition in its entirety, the court must be deemed to have also rejected that relief. In effect, the Banking (*Credit Reference Bureau Regulations*) 2008 were valid, in law.

14. Therefore, if the plaintiff was only seeking orders to block the defendant from providing information to the Credit Reference Bureau, such a relief ought to have been sought in the manner provided for in the Banking (*Credit Reference Bureau Regulations*) 2008.

15. But the plaintiff is seeking much more than reliefs in respect to information which the defendant may be under a duty to provide to the Credit Reference Bureau. Such other reliefs

include the quest for interlocutory injunctions to restrain the defendant from realizing the security, and also to restrain the defendant from appointing a Receiver over the plaintiff's assets.

16. On a *prima facie* basis, I find that the plaintiff's claims include matters which went beyond the scope of the Banking (*Credit Reference Bureau Regulations*) 2008.

17. I find that the jurisdiction of the High Court has been properly invoked because the other reliefs sought by the plaintiff were incapable of being addressed through the Banking (*Credit Reference Bureau Regulations*) 2008.

18. In **AMY KAGENDO MATE Vs PRIME BANK LIMITED & ANOTHER, PETITION No. 17 of 2013**, one of the reliefs sought by the petitioner was a declaration that the petitioner had fully paid the outstanding loan, and that she should therefore be discharged from liability.

19. Hon. Mumbi Ngugi J. held as follows;

“In my view, whether the petitioner was indebted to the 1st respondent with regard to the loan she borrowed from it, was a matter that was, or ought to have been, the subject of litigation in the civil case before the Chief Magistrate’s Court?.

20. In similar vein, questions which the plaintiff herein has asked, concerning the alleged levying of illegal interest and penalties, are best handled by the High Court.

21. That implies that, contrary to the defendant's contention that the High Court lacks the requisite jurisdiction, it is the High Court which actually has jurisdiction.

22. The High Court will also be in a position to determine whether or not the defendant can be restrained from providing information to the Credit Reference Bureau. Such a determination is, however, not about the issue of the mandate or the jurisdiction of the court. My considered opinion is that that question is founded on the merits of the plaintiff's application.

23. The court would be determining whether or not, in the circumstances prevailing, the defendant was only performing its statutory duty when it provided information to the Credit Reference Bureau. If the answer to that question was in the affirmative, the court would determine whether or not it could or would restrain the defendant from meeting its statutory obligation.

24. It is conceivable that there might be information which the defendant may be obliged to provide to the Credit Reference Bureau. In this case, the plaintiff appears to suggest that there are certain kinds of information which banks or other credit providers should either not provide or which they may have a discretion about whether or not they should make available to the Credit Reference Bureau.

25. The plaintiff should be given the opportunity to present facts to the court, and to try and persuade the court about such possibilities. It is only after the court will have given a hearing to the parties that the court would be in a position to determine if the plaintiff's claim was well founded.

26. If we shut out the plaintiff at the outset, the court would never know if the plaintiff had a legitimate claim.

27. Reverting to the grounds raised in the Notice of the Preliminary Objection I now make the following findings:

1. The issuance of an interlocutory injunction is done by the court when the court is exercising its discretion based on both facts and law. Ordinarily, the High Court has jurisdiction to

determine whether or not to issue an injunction. Therefore, before hearing the parties, the court cannot determine the issue of jurisdiction.

2. The claims relating to the threatened realization of the security or the appointment of a Receiver have not been shown to be statute-barred.

Secondly, the Banking Act (Credit Reference Bureau Regulations) 2008 do not expressly oust the jurisdiction of the High Court.

3. Whether or not the defendant's statutory power of sale had arisen and was being exercised properly is a question of fact. It is not a basis for a preliminary objection.

4. The validity of the Statutory Notices which may have been served on the plaintiff is an issue of facts.

5. Whether or not the statutory power of sale was being exercised fraudulently or oppressively can only be determined after the court gives due consideration to the facts.

6. The court needs to give consideration to the question regarding the alleged material non-disclosure or the suppression of material facts. It is only if the court is persuaded that there was material non-disclosure or the suppression of material facts that the court would then decide if the plaintiff was, thereby, disentitled to the equitable reliefs sought.

7. Assertions of fraud, deceit or misrepresentations can only be determined through an analysis of evidence tendered by the parties. It is premature for the defendant to ask the court to find that those assertions were misplaced or misdirected, yet the court did not yet have the benefit of input from the parties.

8. The defendant has failed to demonstrate how the application was misconceived, bad in law or an abuse of the process of the court.

28. In the final analysis, there is no merit in the Preliminary Objection; accordingly, the said Preliminary Objection is hereby overruled.

29. The costs of the Preliminary Objection are awarded to the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of March 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Byaruhanga for the Plaintiff

Oyuke for the Defendant

Collins Odhiambo – Court clerk