



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HCCC NO. 580 OF 2015

**EMPRO ELECTRICAL & MECHANICAL
ENGINEERS LTD.....PLAINTIFF**

VERSUS

FIRST COMMUNITY BANK1ST DEFENDANT

P.M. GACHIE T/A REGENT AUCTIONEERS..... 2ND DEFENDANT

RULING

1. By an amended Notice of Motion dated 18.12.2015 the Plaintiff/Applicant seeks the following:

1. Spent

2. Spent

2(A). Spent

3. THAT an order of temporary injunction do issue restraining the 1st and 2nd defendant from proceeding on the basis of the void and defective notice dated the 29th day of September, 2015 from proceeding without service of the forty five (45) days notice form repossessing, from advertising, from selling by public auction or private treaty namely the motor vehicle registration NO.KBN 779Y pickup, KBL 026K and any other motor vehicle or assets attached or repossessed, form transferring the said assets to themselves or to any other third party person or parties or in any other manner from dealing with the Plaintiff’s assets pending the hearing and determination of this suit and /or until further orders of the Honorable court.

3A. THAT an order of temporary injunction do issue restraining the 1st and 2nd Defendant from proceedings on the basis of the void and defective notices above, from engaging in any recovery in violation of the Equity/Working Capital Financing Agreement (Investment Musharaka) from the 1st Defendant Bank to the Plaintiff signed by the parties herein dated the 23rd day of September, 2014 and 18th day of May, 201, from selling by public auction of private treaty, the plaintiff assets, motor vehicle Reg.No.KBN 776Y pickup and KBL 026K an any other motor vehicle or properties land reference Nos.209/9071/40 on IR 65316 Karen and L.R.No.209/20532 original No.209/20530/3 original No.209/20530/3, from transferring the said

assets to themselves or to any other third party or parties and/or in any other manner from dealing with the Plaintiff assets and any disrupted status quo restored to the position before the unlawful acts or to the position before the acts complained of above pending the hearing and determination of this suit and/or until further orders of the Honourable court.

4. An order for the mandatory interlocutory injunction issue in the unique and special circumstance of this case to the effect that the 1st and 2nd defendants do at this interlocutory stage reinstate and/or restore the plaintiff motor vehicle Reg. No.KBN 776 Y pickup and other assets and/or motor vehicle repossessed to the Plaintiff and the status quo restored before the unlawful acts above and/or before the acts of the 1st and 2nd defendant above.

5. That the time for compliance and/or for rectifying any default to redeem the motor vehicle registration numbers KBL 026K, KBG 115F, KBP 536L the properties L.R Number 209/9071/40, 14607 on IR 65316 Karen, L.R.No.209/20532 original No.209/20530/3 be extended for a period of 24 months or for such other period as the court may determine pursuant to powers conferred on the court under section 104(2) as read with section 90 of the Land Act, 2012.

6. Costs of the application be in the cause.

2. The amended Notice of Motion is supported by the grounds set out in the Amended notice of motion and the supporting affidavit of Jackson Andembesa filed on 21.12.2015.

3. The application is opposed via affidavit of George Obiko the Manager sworn on 2.12.2015. The undisputed facts are set out in said George Obiko's affidavit namely that; the Plaintiff/applicant was granted by the 1st Plaintiff credit facilities to finance its working capital requirements in the sum of Ksh.100 million on the terms set out in the letter of offer and acceptance dated 5.11.2014 and 18.5.2015. The credit facility was to be secured by;

- Charge over LR 209/9071/40 Nairobi Kshs.20 million
- Charge over LR NO.14607 Karen Kshs.50 million
- A legal charge over LR No.209/20532/South C
- All assets debenture of Kshs.150 million
- Joint registration of Motor vehicle KBP 536 L & KBN 776Y
- Assignment of payment from Kenya Pipeline Co Ltd (KPC)
- Joint and several guarantee duly executed by the Plaintiff's Directors.

4. It was a term of the agreement that, the loan advanced would be paid within 150 days together with profit realized and payable to the 1st Defendant. Further security to the loan was executed by Simon Muthomi M'tuamwari and Maingi Kinya Sheila for charges on LR No.207/20532 to secure borrowing made by Applicant to the extent of Ksh.50 million and as collateral to the debenture dated 25.9.2014 made by Plaintiff/applicant.

5. On 25.9.2014 the Plaintiff executed an all assets debenture in the sum of Kshs.150 million in favour of the 1st Defendant and further securing the borrowing made by the Plaintiff from the bank. On 15.10.2014, Naomi Jillo Waqo as a charger executed a charge in favour of the Plaintiffs Company for the property LR NO.45637 for Kshs.20 million and as collateral to the debenture dated 25.9.2014 made by the Plaintiff. Further the 1st Defendant procured joint registration of Motor vehicle KBP 536, KBN 776Y, KBL 02616 and KBG 115F to further secure the borrowing made.

6. The loan would be paid upon expiry of 150 days and profit agreed was Kshs.6, 575,342.50 and in default thereof the 1st Defendant would be at liberty to realize the securities offered and recover the debt amount.
7. The Applicant case is that the funds were to go to financing the Eldoret KPC Ltd Eld Ps 27 depot project which the Plaintiff was undertaking at the time and that there was to be assignment payments from KPC co ltd. The assignments were done but there were no funds because the Plaintiff and KPC Ltd were engaged in disputes and resultant litigation.
8. The 1st Defendant had already received Ksh.4 million and utilized it in account. The Plaintiff avers that there is no default because what the parties agreed has not occurred. In any event the Plaintiff and 1st Defendant agreement stipulated that in event of default, notice should issue requiring rectification of default no such notice has been issued.
9. Plaintiff avers that the Defendant No.1 and 2 are engaging in illegality and illegal recovery process. The Defendant no. 1 and 2 are depriving the Plaintiff right to redeem the charged properties in their act of unconscionable act of recovering aforesaid loan.
10. The 2nd Defendant auctioneer has failed to follow the law in undertaking the task as instructed by the 1st Defendant and thus issued notification of sale of charged properties and took away motor vehicle KBN 776 Y and no valuation has been done nor advertisement of the intended sale. There is a notification of sale of movable property dated 17.10.2015 by the 2nd Defendant.
11. The Provisions of S.90 Land Act 2012(L.A) are being violated. The notice of 29.9.2015 does not comply with the said provisions. Also Rule 15 of the auctioneers Rules is being violated; thus orders sought merited.
12. The Respondent No. 1 and 2 aver that there is default in loan payment of outstanding amount to the tune of Ksh. 106,575,342/50 as at 29.9.2015. Demand of outstanding debt was sent to the plaintiff in default of which, the 2nd Defendant was instructed to recover payment via repossession of the motor vehicles offered as securities and dispose same by sale in recovery of debt.
13. Motor vehicle KBN 776Y and KBP 536 K were repossessed and were advertised and sold via public auction. The Plaintiff is in default of payment as agreed and thus the 1st Defendant statutory power of sale has therefore crystallized and there is no basis to stop such process.
14. On submissions the Plaintiff submit that in terms of the definition of prima facie case in **MRAO VS. 1ST AMERICAN BANK (K) LTD**, it has established same via the materials placed before the court.
15. As regards the 2nd limb of grant of injunction under principles of **GIELLA VS. CASMAN BROWN** case, the Applicant has established irreparable loss and damage if charged properties are disposed via sale. It cites the case of **ROBINSON VS. PICKERING (1881) 16 Ch.D.660**. On damages, also cited are **OLYMPIC SPORTS CLUB HOUSE LTD VS. SCHOOL EQUIPMENT CENTRE LTD (2012)eKLR**.
16. Further the Plaintiff relies on the holding of **OUKO & ANOTHER VS. OTIENO CA.NAI. 3/1987** where court held that; *'the general principle is that where there are conflicts of facts, the trial court should maintain the status quo until the dispute has been decided'*.
17. The Applicant submit that it is seeking preservation of the status quo pending hearing and determination of the suit See also Republic Vs. National Environment Tribunal & another (2013)eKLR. On balance of convenience the Plaintiff relies on the case of **WAITHAKA VS. ICDC**. The Applicant thus prays for the orders sought.

18. The Respondent no.1 and 2 submit that the threshold of the grant of injunctions has not been met. There is no prima facie case established. The Plaintiff blames his default to a third party Kenya Pipeline Co. Ltd claiming the said KPC default in paying it (plaintiff) gave birth to the instant state of affairs of financial problem afflicting the Plaintiff.

19. The KPC refused to extend time for Plaintiff to complete Civil works under contract between the 2 which the loan from 1st defendant financed. There is no cause of action against the Defendant no.1 and 2. There is litigation ongoing between Plaintiff and Kenya Pipeline Company Ltd Nai.HCC 306/2015. In loan agreement herein, there was no condition to the effect that, it is payable upon performance of contract between Plaintiff and KPC neither was the payment herein subject to receipt of funds by Plaintiff from KPC.

20. Can the court thus stop recovery of the advanced amount to the Plaintiff? The court cannot stop the recovery of defaulted loan. The Respondent relies on **JUSTUS WAMBUA KAVYU VS. KCB (21012)eKRL**. The Contract of the Plaintiff and KPC and the litigation thereof in HCC 306/2005 cannot be applied to bar 1st Defendant from right to exercise its power of sale to realize the available securities under borrowing made by the Plaintiff.

21. The Plaintiff relies on the provisions of Land Act 2012 S.90 and 104 which deal with immovable properties secured by a legal charge. The 1st Defendant has not yet commenced any recovery process with regard thereto. The only securities realized by the 1st Defendant are the motor vehicle set out in the all assets Debenture which was executed by the Plaintiff and thus the provisions of Land Act 2012 are not applicable.

22. The process cannot thus be enjoined before it has even commenced. There is no demonstration of illegality in attachment and sale of the motor vehicle provided as securities for advanced amount.

23. The Defendants 1 & 2 submits that the Plaintiff seeks Equity with unclean hands. It has admitted default in payment of loan thus application ought to be dismissed. See **PATRICK WAWERU MWANGI & ANOTHER VS. HFCK (K) LTD (2013) e KLR**. Also see MRAO case Supra. The Defendants no.1 & 2 pray for dismissal of the application.

24. After going through the pleadings, affidavit and the parties submissions, the court finds the following issues emerge;

1. **Whether the Plaintiff has satisfied the conditions for granting interim injunctions.**
2. **What are the orders as to costs?**

25. The Applicant submits that on materials before court a prima facie case has been established to warrant grant of orders. However the loan which was to be paid at the expiry of 150 days remains unpaid to date more than a year ago.

26. The plaintiff blames the KPC for failure to extend time for performance of contract between it and the Plaintiff and thus failure to pay funds to finance the servicing of the loan. The Respondents no. 1 avers that in letters of offer and charge there was no conditions as to the KPC payment of Plaintiff to enable it pay the loan. The agreement was only payment as stipulated in letters of offer and the charge and in default the realization of the securities be activated. The Defendant no.1 has already repossessed and sold 2 vehicles.

27. The process of realization of securities in form of immovable properties has not commenced. In such state of affairs the court cannot stop the 1st Defendant from exercising the statutory powers of sale.

28. From the record before the court, the loan is not disputed and the default is not denied. The issues raised are problems of Plaintiff and KPC contract and payment thereof. In terms of case of KAVYU Supra, in such circumstances the exercise of the statutory power of sale cannot be stopped. In any event 2

of the motor vehicles were sold to a third party. The process of sale of the immovable properties is yet to commence via issuance of statutory notice of and sale thereafter.

29. The provisions cited S.90 and 104 of Lands Act 2012 have not been violated. They only apply to immovable properties and only movable properties have been sold. The court thus finds that there is no establishment of a prima facie case.

30. Having failed on the 1st limb on principles applicable in grant of interim injunctions,, the court need not go to the 2nd and third limbs of damages and balance of conveniences. The court thus makes the following orders;

1. The Notice of Motion dated and amended on 18.12.2015 is dismissed.

2. Costs to the Defendants no. 1 and 2/Respondents.

Dated, signed and delivered in court at Nairobi this 22nd day of April, 2016.

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C. KARIUKI

JUDGE