



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 111 OF 2015

CASSIAN NGOTHO MWACHANYA PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

CREDIT REFERENCE BUREAU AFRICA LIMITED..... 2ND DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 14th June, 2016. It was brought under certificate of urgency and this court issued interim orders.

It sought the following prayers:-

(i) Spent;

(ii) That this Honourable Court be pleased to grant a temporary injunction restraining the 2nd respondent from releasing to any person/institution details that it may have in its possession concerning the applicant, details of which supplied by the 1st respondent concerning the credit facility extended to the applicant by the 1st respondent;

(iii) That this Honourable court be pleased to issue compelling orders, directing the 1st respondent to under oath provide a full statement of accounts to show exact indebtedness (sic) of the applicant and whether the repayment was by check off system; and

(iv) That costs of this application be in in the cause.

2. The application is based on grounds on the face of it and the supporting affidavit of Cassian Ngotho Mwachanya. The 1st defendant filed a replying affidavit on 27th June, 2016 and written submissions on 25th July, 2016 in response to the above application. The 2nd defendant filed a replying affidavit on 25th July, 2016.

APPLICANT'S SUBMISSIONS

3. Dr. Khaminwa, Learned Counsel for the applicant submitted that his prayer was for a temporary injunction pending the hearing of the main case. He sought for orders that the interim injunction continues in force until the case is heard and determined. It was his submission that there was a contract between the parties on a private matter whose details cannot be released to a third party who was not a party to the

contract as this would infringe on Article 31 of the Constitution of Kenya. He also relied on the depositions in the supporting affidavit and on the grounds on which the application is based. He further sought orders on prayer No. 3, for the 1st respondent, under oath, to provide a full statement of accounts to show the exact indebtedness of the applicant and whether repayment was by check off. He considered this a fair request.

1ST RESPONDENT'S SUBMISSIONS

4. Mr. Mwanyale held brief for Mr. Mwangi for the 1st respondent. He submitted that he was relying on the replying affidavit of the 1st respondent. He added that the statement of accounts for the applicant had been availed, thus prayer No. 3 had been satisfied. He did not highlight the 1st respondent's written submissions filed on 25th July, 2016.

ANALYSIS AND DETERMINATION

The issues for determination are:-

(i) If the applicant has made out a case for interim injunction pending the hearing of the case herein; and

(ii) If he is entitled to a full statement of accounts from the 1st respondent.

5. The applicant in his supporting affidavit sworn on 11th June, 2016 in paragraph 3 states that it was his understanding that since his loan was fully insured, the interest charges were to stop once he ceased being an employee of the Department of Defence (DoD) and to that effect, DoD was to take the responsibility to repay the loan from his retirement benefits.

6. In paragraph 7 thereof, he deposes that on 12th June, 2009, DoD cleared the outstanding loan balance of Kshs. 1,558,439.05 thus making the total amount remitted to the 1st respondent Kshs. 1,794,413.00 as per the copy of the bank statement marked CNM – 4.

7. A perusal of CNM-4 which is an extract of a bank statement is reflective of debits and credits made in respect of the applicant's loan account with the 1st respondent. Nowhere is it shown that an amount of Kshs. 1,558,439.05 was remitted by DoD to offset the loan.

8. In paragraph 9 of the affidavit, the applicant refers to a letter from the bank dated 24th February, 2010 in which the bank undertook to refund to him Kshs. 235,974.00 that had been recovered in excess of the required amount. This court notes that a copy of the said letter is not attached to the said affidavit. The payment mentioned as an overpayment remains unsubstantiated in the absence of documents to support the said averment.

9. The 1st respondent in an affidavit sworn by Tom Ogola, a Legal Manager with the 1st respondent, states that the applicant took two loan facilities, which he accepted through a letter of offer. The applicant however fell into arrears as deposed in paragraph 7 of the said affidavit whereby the bank made numerous communication to him. This necessitated the 1st respondent to forward the terms of default to the 2nd respondent. It was the 1st respondent's contention that the applicant owes it Kshs. 879,920.24 as per annexure TO5 which is a certified copy of the applicant's statement of accounts.

10. In paragraphs 10 and 13, the 1st respondent deposes that the forwarding of the applicant's name to the 2nd respondent was in accordance with section 31(5) of the Banking Act and that the applicant did not exhaust all the dispute resolution mechanisms before filing a case in court.

11. Although the 2nd respondent filed a replying affidavit on 25th July, 2016 sworn by Vivian Onyino, it was not represented in court at the hearing of the present application. I find paragraphs 6 and 7 of the

affidavit noteworthy in that the deponent reiterates the averment of the 1st respondent that there is a dispute mechanism available under the Banking Act and the Credit Reference Bureau regulations, 2013 which the applicant hereto failed to pursue.

12. The 1st respondent's counsel in his written submissions cited the decisions in **Hermannus Phillipus Steyn & 2 Others** [2012] eKLR, and **Suleiman vs Amboseli Resort Ltd.** [2004] eKLR 589 to show that in granting an interlocutory injunction, the court is not necessarily bound by the three principles set out in **Giella vs Cassman Brown** [1973] EA 358, but may also look at the circumstances of the case generally and the overriding objectives of the law.

The leading authority in grant of injunctions is undoubtedly **Giella vs Cassman Brown** (supra), the law is however dynamic and has evolved over the years to bring in other parameters that were not considered then.

13. Regulation 18 of the Credit Reference Bureau regulations, 2013 provides as follows:-

“1. Customer information which shall be exchanged pursuant to these Regulations is any customer information concerning a customer’s non-performing loan and any other negative information and may include details specified in sub-regulation (4)

2. An institution licensed under the banking Act shall in addition to exchanging the information required under sub-regulation (1), exchange positive information of their customers with Bureaus.

3. An institution other than banks may in addition to exchanging the information required under sub-regulation (1), exchange positive information with Bureaus with prior written consent of the customers concerned”.

Under sub-regulation (1) (2) and (3), the customer information to be shared includes:-

(a) The customers identity including -

(i) In case of a natural person his name, date of birth, national identity card number, personal identification number, passport number, driving licence number, past and current addresses and other contract details and related matters;

(ii);

(iii) The customer’s credit status including the nature of and amounts of loans or advances and other credit facilities granted, amounts outstanding thereof, Credit application and related matters;

(iv);

(v) Details of Credit facilities or default in payments by the customer, debt restructuring and actions taken by the institution to recover unpaid amounts including realization of securities, legal proceedings and related matters.”

14. Further, Regulation 26(1) provides that:-

“A Bureau shall protect the confidentiality of customer information received in terms these regulations and shall only report or release such customer information –

(a) To the customer concerned;

(b) To the Central Bank;

(c) To a requesting subscriber.

(d) To a third party as authorized by the customer concerned; or

(e) As required by law”.

15. I am persuaded by the decision in **Rupa Cotton Mills (EPZ) Ltd. & 2 Others vs Bank of Baroda (Kenya) Limited** [2012] eKLR where Justice Musinga (as he then was) held thus:-

“..... if a borrower has defaulted on a loan, it is mandatory that the bank shares this information with all other banks. The plaintiff’s assertion that they have been portrayed as bad, impecunious and doubtful debtors does not lie. The information that the defendant has provided falls within the ambit of the provisions of the banking Credit Reference Bureau regulations”

16. Dr. Khaminwa submitted that the applicants credit information should not be shared with a third party as it would infringe on his rights as enshrined in article 31 of the Constitution. The said provisions provide that :-

“Every person has the right to privacy, which includes the right not to have –

(a) Their person, home or property searched;

(b) Their possessions seized;

(c) Information relating to their family or private affairs unnecessarily required or revealed or;

(d) The privacy of their communication infringed.”

17. In the case of **Barbara Georgina Khaemba vs Cabinet Secretary, National Treasury & Another** [2016] eKLR, Judge Lenaola when faced with a petition akin to the present one had the following to say:

“Although the petitioner has alleged the threat of violation is obvious, I see no facts or even hypothesis to support such a contention. The regulations are reasonable, are applied to all loan applicants and are intended to create discipline among loanees. To expect that a serial defaulter should walk in and obtain a loan without due diligence of past repayment records is mischievous to say the least. That is the position the petitioner is propagating in the guise of a petition to allegedly enforce fundamental rights. With respect to her, this court cannot countenance such a situation”.

18. It is my finding that the right to privacy as enshrined under article 31 of the Constitution is not absolute as many factors can come into play that would require private information to be revealed as a matter of necessity. It would be a recipe for chaos if I was to hold that either positive or negative information of a credit facility advanced to a borrower by financial institutions cannot be shared with credit reference bureaux. This would lead to an economic crisis in the banking sector with borrowers hopping from one bank to the next to take out loans whose repayment they would fail to honour due lack of information sharing with Credit reference bureaux. This court cannot encourage unscrupulous borrowers to engage undeterred in such activities. Regulation 18 of the Credit Reference Bureau regulations is aimed to cure such mischief from being perpetrated.

19. A plain reading of regulation 26(1) of the said regulations shows that the sharing of credit information is limited to persons and institutions provided therein. It therefore follows that any unwarranted disclosure of such information to unauthorized persons is a matter that can be compensated by award of damages after due legal process.

20. On prayer No. 3 of the application, the 1st respondent in its replying affidavit has annexed a statement

of accounts for the loan facility advanced to the applicant by the 1st respondent. The said prayer is thus satisfied.

21. I hold that the applicant herein has failed to satisfy the tests laid out in **Giella vs Cassman Brown** for the issuance of an injunction. The application thus is dismissed with costs to the respondents.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 21st day of September, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Sidinyu holding brief for Mr. Kimani for 1st respondent/defendant

No appearance for 2nd respondent/defendant

No appearance for applicant

Ms. Rose Echor Court Assistant