



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 394 OF 2016

ASSOCIATED CONSTRUCTION COMPANY

(K) LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

SPIRE BANK LIMITED (formerly EQUATORIAL COMMERCIAL

BANK LTD).....DEFENDANT/RESPONDENT

RULING

[1] The Plaintiff/Applicant filed the Notice of Motion dated 3 October 2016 pursuant to Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 40 Rule 1 of the Civil Procedure Rules, 2010 for the following orders:

[a] spent

[b] That pending the hearing and determination of this application, there be interim injunction restraining the Defendant and the Interested Party whether by themselves, their officers, servants and/or employees from proclaiming, attaching or in any other way interfering with the Plaintiff/Applicant's property;

[c] That pending the hearing and determination of this suit, there be temporary injunction restraining the Defendant and the Interested Party whether by themselves, their officers, servants and/or employees from displaying misleading information and/or notice on the Plaintiff/Applicant's assets.

[d] That the Court be pleased to order that the Defendant/Respondent do supply the Plaintiff/Applicant with a Statement of Account on the financial facilities/the loan granted to the Plaintiff/Applicant from the time when the Fixed Asset Debenture was registered.

[e] That costs of the application be provided for.

[2] In support of the application, the Plaintiff/Applicant relied on the affidavit sworn by Nanak Singh Bansal annexed thereto, in which it was contended that on the instructions of the Defendant/Respondent, the Interested Party issued a Proclamation Notice dated 26 September 2016, thereby giving 7 days' notice

of their intention to attach and sell the Plaintiff's movable assets on account of a debt it owes to the Defendant. It is the Plaintiff's contention that no warrants of attachment were issued and therefore the Proclamation and intended attachment is invalid and unlawful. It was further averred that the Proclamation and intended attachment is wrongful, unjustifiable and oppressive for the reason that the Defendant failed to issue a notice to the Plaintiff informing it of the nature and extent of the default and the amount that must be paid to rectify the alleged default.

[3] It was further deponed by the Plaintiff that the Defendant's move towards attachment and sale of its assets will make it impossible for it to continue with the ongoing construction works and thereby frustrating its entire business operations. In an attempt to explain its apparent inability to pay the debt owing to the Defendant, the Plaintiff averred that it has current receivables of **Kshs. 2,200,000,000** from the current contracts and claims, with **Kshs. 367,000,000** from invoiced bills, **Kshs. 597,000,000** from work in progress and **Kshs. 1,300,000,000** in claims and arbitration; and that delay in payment had been occasioned by failure of the Government through the Kenya National Highways Authority, Kenya Rural Roads Authority, the Ministry of Housing and Urban Development and the County Government of Narok to make payments to the under the various contracts.

[4] The Plaintiff also averred that it had paid over **Kshs. 200,000,000** to the Defendant in the last two years alone; and that it had tendered a proposal on how it intended to settle the sum of **Kshs. 192,919,720.59** that is outstanding. The Plaintiff therefore posited that if the orders sought are granted the it will be able to accomplish the outstanding works and therefore be in a position to pay off the loan; whereas if the intended attachment and sale proceeds, it will be subjected to irreparable loss and damage. The Plaintiff thus urged the Court to find that it is in the interests of justice to grant the orders sought and to allow the application dated **3 October 2016** and grant orders as prayed therein.

[5] The application was opposed by the Defendant on the grounds that it does not disclose any sufficient grounds upon which the orders sought may be granted, and that it has not been brought in good faith. It was further contended that no security for costs had been offered. These grounds are set out in the Grounds of Opposition filed herein on **5 October 2016**, and were amplified in the Replying Affidavit sworn by **Mercy Mwobobia** on even date. The Defendant urged the Court to note that the amount owed to the Defendant is not in dispute, and that the repayment is long overdue. It is for this reason that the Defendant posited that the application has not been brought in good faith as no concrete proposals were put forward for repayment. The Defendant therefore urged for the dismissal of the application with costs.

[6] The Court has carefully considered the application, the grounds upon which it is predicated, the reply thereto by the Defendant as well as the oral submissions made on **5 October 2016** by Learned Counsel. **Order 40 Rule 1 of the Civil Procedure Rules** under which the instant application has been brought provides that:

"Where in any suit it is proved by affidavit or otherwise--

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

[7] As was stated in the case of **Giella Vs Cassman Brown**, all the applicant herein needs to show are:

[a] That it has a prima facie case with a probability of success.

[b] That it stands to suffer irreparable injury which would not adequately be compensated by an award of damages unless a temporary injunction is granted in the interim.

[c] That the balance of convenience is in its favour.

[8] The Plaintiff has sued the Defendant and the Interested Party on account of a Proclamation dated **26 September 2016**, issued by the Interested Party on the instructions of the Defendant for recovery of a debt owed by the Plaintiff. That Proclamation is attached to the Supporting Affidavit as **Annexure NSB 2**. It reflects the amount due to be **Kshs. 192,919,720.59**. The suit simply seeks a Permanent Injunction to restrain the Defendants from proclaiming, attaching, repossessing or in any other way interfering with the Plaintiff's property. The question that arises is whether the Plaintiff has demonstrated that it has a prima facie case with a probability of success.

[9] In **Mrao Limited Vs First American Bank Of Kenya Limited & 2 Others [2003] eKLR** the Court had this to say with regard to what amounts to a prima facie case;

“...in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

[10] At paragraph 4 of the Plaintiff, it was expressly admitted by the Plaintiff that it took out a facility from the Defendant in the sum of **Kshs. 50,000,000**, which was secured through a Debenture. It is not in dispute that the Plaintiff has not fully repaid the loan. In the Supporting Affidavit, it was deposed that the Plaintiff had tendered a proposal on how it intends to settle the sum of **Kshs. 192,919,720.59**; and that the Plaintiff's directors have, subject to the granting of the application, re-organized their finances and they will restructure the repayments of all their debts and interest. As rightly pointed out by the Defendant, the Plaintiff has exhibited various documents to show that it is owed substantial sums of money for finalized and/or ongoing contracts, but failed to give a concrete proposal as to how it intends to pay the debt that is the subject of this suit. This, is a demonstration of lack of good faith, a point made by **Bosire, JA** (as he then was) in **the Mrao Case**(supra) thus:

"...The appellant conceded it had obtained money from the first respondent, it had given its property as security, it had not repaid the money, and that with or without a demand it was required to repay the whole debt by 31st May 2000, which it admitted it had not done. The applicant had come to a court of equity but having failed to show utmost good faith, I cannot but hold that it was not entitled to the injunction it prayed for in its application..."

I would similarly come to the same conclusion.

[11] I do note that in its Notice of Motion, the Plaintiff asked for an order that the Defendant do supply it with a Statement of Account on the financial facilities/loans granted it from time to time on the basis of the Debenture aforementioned, thereby suggesting that there could be a dispute over accounts. It is now trite that disputes over accounts are no basis for granting an injunction. (see **Fina Bank vs Ronak Ltd [2001] 1 EA 64**)

[12] As it was the Plaintiff's contention that the assets that have been proclaimed are the subject of a fixed Debenture, and that the right course of action would have been for the Defendant to appoint a Receiver, it was pertinent for the Plaintiff to exhibit a copy of that Debenture. As it is, there is no prima facie evidence of the Debenture.

[13] In the result, it is my finding that, overall, the Plaintiff has failed to demonstrate a prima facie case with a probability of success. I would therefore dismiss the application dated **3 October 2016** with costs.

It is so ordered.

SIGNED, DATED and DELIVERED at NAIROBI this 28TH DAY OF OCTOBER, 2016

OLGA SEWE

JUDGE