



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO 451 OF 2013

GILGIL DISTRIBUTORS LIMITED1ST PLAINTIFF
VINCENT KARIUKI MBURU.....2ND PLAINTIFF
LEAH WANGUI MBURU.....3RD PLAINTIFF

VERSUS

KENYA BREWERIES LIMITED.....1ST DEFENDANT
UDV (KENYA) LIMITED.....2ND DEFENDANT
BARCLAYS BANK OF KENYA LIMITED.....3RD DEFENDANT

RULING

INTRODUCTION

1. Suit had initially been filed by Gilgil Distributors Limited, which was the only Plaintiff therein. It was for that reason that the Notice of Motion application dated 15th October 2013 and filed on 18th October 2013 was filed by the said company only.
2. Subsequently, suit was amended on 9th July 2014 when Vincent Kariuki Mburu and Leah Wangui Mburu were enjoined as 2nd and 3rd Plaintiffs respectively. The Notice of Motion application dated and filed on 14th July 2014 was thus filed by all the three (3) Plaintiffs as shown in the heading above.
3. The Plaintiffs did not amend the Notice of Motion dated 15th October 2013 and filed on 18th October 2013 to reflect all the three (3) Plaintiffs. To avoid confusion, the court deemed it fit to refer to the Company as the Plaintiff for the purposes of the said application of 15th October 2013.
4. As both applications had some connection to the Distributorship Agreement that had been entered into between the Plaintiff and the 1st and 2nd Defendants, the court deemed it prudent to deliver one (1) ruling in respect of the said applications. This is therefore a consolidated ruling in respect of the two (2) said applications which will, however, be dealt under separate heads.

I. NOTICE OF MOTION DATED 15TH OCTOBER 2013 AND FILED ON

5. The Plaintiff's Notice of Motion application dated 15th October 2013 and filed on 18th October 2013 was brought under the provisions of Order 40 Rules 1 and 2, Sections 3A and 63 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and all enabling provisions of the law. Prayer Nos (a), (b), (c) and (d) were spent. It sought the remaining following orders:-

(a) Spent.

(b) Spent.

(c) Spent.

(d) Spent.

(e) **An injunction be issued restraining the Defendants jointly and severally by themselves, agents, servants, employees or otherwise howsoever from recalling, liquidating, paying and/or utilizing the proceeds of the Bank Guarantee No 0770GGU12032001 issued to the 1st and 2nd Defendants by Barclays Bank of Kenya on behalf of the Plaintiff, pending the hearing and determination of this suit.**

(f) **A permanent injunction be issued restraining the 3rd Defendant from charging any interest on the Plaintiffs (sic) account in respect to the Bank Guarantee No 0770GGU12032001 and/or interfering in any way with the Plaintiff's properties issued to the 3rd Defendant as security for the Bank Guarantee No 0770GGU12032001, pending the hearing and determination of this suit.**

(g) **A permanent injunction be issued restraining the Defendants jointly and severally by themselves, agents, servants, employees or otherwise howsoever from refusing to supply the Plaintiff with sufficient and reasonable Brands/Stocks for Plaintiff operations and/or in any way terminating and/or breaching the distributorship agreement between them and the Plaintiff, pending the hearing and determination of this suit.**

(h) **The costs of this application be proved for.**

THE PLAINTIFFS' CASE

6. On 15th October 2013, Vincent Kariuki Mburu, a Director of the Plaintiff swore a Supporting Affidavit on behalf of the Plaintiff herein. The Plaintiff's written submissions were dated 18th March 2014 and filed on 19th March 2014 while its response to the Defendants' written submissions were dated 29th April 2014 and filed on 30th April 2014.
7. At all material times, the Plaintiff was engaged in the business of distributing various Brands of beverage alcohol products and non-alcoholic drinks for the 1st and 2nd Defendants, which business the Plaintiff Company had carried out since 1986. Under the said contract of distributorship, the 1st and 2nd Defendant allocated various territories to the respective distributors. The Plaintiff was allocated the areas of Gilgil, Molo and part of Nakuru town and the neighbouring environs.
8. It was always an express term of the distributorship contract that the Plaintiff would limit its business to the distribution of the 1st and 2nd Defendants brands only and comply with all the various stringent requirements formulated by the 1st and 2nd Defendants.
9. As it was required to do under Clause 4.1 of the Distribution Agreement, the Plaintiff obtained an acceptable Bank Guarantee No 0770GGU12032001 from the 3rd Defendant which was limited to

securing the payment to the 1st and 2nd Defendants of all amounts that would become due from the Plaintiff to the Defendants in respect of the Brands supplied on credit by the Defendants to the Plaintiff. The Plaintiff would make the full payments once the products were all distributed and sold.

10. On or around 2012, the 1st Defendant separately procured the Plaintiff's services to transport empty beer bottles from its Kisumu depot yard to its Nairobi depot. The transportation of the empty beer bottles was to be carried out on a need for services basis whereupon payment of the Hire Transport Order would be effected only upon the delivery of the empty bottles. There was no formal and/ or written contract in respect to this transportation arrangement. There was also no requirement for a bank guarantee.
11. In early January 2013, the 1st Defendant claimed that some hire transport order had not been fulfilled by the Plaintiff and that the subject empty beer bottles may have got lost on transit from the 1st Defendant's Kisumu yard to the Nairobi yard. This surprised the Plaintiff which averred that it had always delivered all the empty beer bottles from Kisumu to Nairobi.
12. It was the Plaintiff's contention that the Hire Transport Order pursuant to which the empty bottles were transported was clear that the transportation fees would only be paid upon satisfaction of the 1st Defendant that the bottles were delivered without any damages and/or loss and that the 1st Defendant had in fact made the payment for the subject transport services without any complaint and/or raising any concern.
13. Subsequently, the 1st and 2nd Defendants who are sister companies began to reduce their distributorship business with the Plaintiff and drastically reduced the amount of stocks and/or brands supplied to the Plaintiff under the guise that the Plaintiff should first sort out the issue of the lost empty bottles on transit if it wanted to continue with the distributorship business. The Plaintiff objected to this because the transportation of empty beer bottles from Kisumu to Nairobi was a separate and distinct engagement. It therefore urged the court to grant its application as prayed.

THE 1ST AND 2ND DEFENDANTS' CASE

14. In response to the said application, on 20th November 2013, the 1st and 2nd Defendants filed Grounds of Opposition of even date in which it was stipulated as follows:-
 - a. **The application was bad in law and did not lie.**
 - b. **The court had no jurisdiction to grant the injunctions sought in the motion and in the Plaint.**
 - c. **The Applicant had failed to comply with the orders made on 22nd October 2013.**

15. They also filed a Notice of Preliminary Objection dated and filed on 16th December 2013 indicating that the court lacked jurisdiction to grant the orders that had been sought in the application and Plaint. Their written submissions were dated 23rd April 2014 and filed on 24th April 2014.

THE 3RD DEFENDANT'S CASE

16. On 25th November 2013, Anne Mbatha, the 3rd Defendant's Corporate Recoveries Manager swore the Replying Affidavit on behalf of the 3rd Defendant herein. It was filed on even date. The 3rd Defendant's written submissions were dated and filed on 17th April 2014.

17. It said that it was aware of a business relationship existing between the Plaintiff and the East African Breweries Limited with regards to alcohol distribution but that it was not privy to the specific contract for transport crates or the Distribution Agreement at all.

18. Upon taking out of the Guarantee by the Plaintiff, it was required to pay the 1st and 2nd Defendants, upon their first written demand declaring the Plaintiff to have been in default of their payment, any sum or sums within limit of Kshs. 20,000,000/= as aforesaid without the 1st and 2nd Defendant needing to prove or show ground or reasons for the demand of the sum specified therein.

19. It received the 1st and 2nd Defendants' demand letter dated 9th October 2013 recalling and liquidating the Bank Guarantee No. 0770GGU120320001 and as it was not aware of any irregularity, unlawfulness and or lack of justification or reason affecting the claim for payment and it was bound under the Guarantee, it paid out the said Guarantee to the 1st and 2nd Defendants on 10th October 2013, a position it explained to the Plaintiff vide an email of 11th October 2013. It denied that its action was wrongful, illegal or in breach of contract and/or its fiduciary duty.

20. It pointed out that in March 2012, the 3rd Defendant had extended banking facilities in the form of Overdraft, loan and bank guarantee, to the Plaintiff to finance its working capital but that following the calling up of the Guarantee by the 1st & 2nd Defendants and payment thereon by the 3rd Defendants the debt was now in default and as at 15th October 2013 the Plaintiff owed the 3rd Defendant the sum of Kshs 56,967,883.60 plus interest which was accruing on the debt at the rate twenty four (24%) per annum.

21. The 3rd Defendant was categorical that the Plaintiff's application had been overtaken by events and urged the court to dismiss the same with costs.

LEGAL ANALYSIS

22. In its Notice of Preliminary Objection and Grounds of Opposition, the 1st and 2nd Defendants raised the issue of jurisdiction of the court. As this was a fundamental issue that went into the root of the ability and competence of the court to hear and determine this matter, the court found it necessary to address the said issue right at the outset. Instructively, the 3rd Defendant was not a party to the Distributorship Agreement as the same was between the Plaintiff and the 1st and 2nd Defendants.

23. Clause 9.13 of the Distributorship Agreement provided as follows:-

“Any dispute or difference arising between the parties hereto concerning this Agreement or the construction, meaning, operation or effect of all or any part thereof that cannot be settled amicably shall be referred to a single arbitrator to be agreed upon by the parties hereto, or failing such agreement the arbitrator shall be appointed by the Chairman for the time being of the Kenya Branch of the Chartered Institute of Arbitrators. The award or finding of any such arbitrator shall be final and binding on the parties hereto, and the hearing of the arbitration shall take place in Nairobi.”

24. The Plaintiff submitted that the 1st and 2nd Defendants' suggestion that Clause 9.13 of the Distribution Agreement ousted the jurisdiction of this Honourable court to hear and determine this matter lacked legal basis as the arbitration clause did not take away jurisdiction of this court to hear and determine the same.

25. It referred the court to Section 6 of the Arbitration Act which states that: -

a. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or

b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration...”

26. In view of the fact that there was a difference or dispute as to whether or not the 1st and 2nd Defendants had breached the terms of the contract when they recalled the Guarantee because of empty bottles that had got lost or whether it was because the Plaintiff was truly and justly indebted to the 1st and 2nd Defendants as had been contended by the Plaintiff and the 1st and 2nd Defendants respectively were indeed indicative of the fact that there was in fact a dispute to be referred to arbitration in view of the provisions of Clause 9.13 hereinabove.

27. Filing suit in a case where there was an arbitration clause would not have rendered the suit herein fatally defective for the reason that the Arbitration Act Cap 49 (Laws of Kenya) has a complete code on how to refer matters that have been filed in courts to arbitration.

28. Although the 1st and 2nd Defendants raised this issue of lack of jurisdiction by the court in their Notice of Preliminary Objection and Grounds of Opposition, they did not seem to have addressed the same in their submissions. The court did not therefore dwell on the same as they may have decided to abandon the said argument.

29. However, suffice it to state that the court was in agreement with the Plaintiff’s submissions that if the 1st and 2nd Defendants legitimately felt that this matter ought to have been referred to arbitration, they ought to have made the appropriate application as has been provided by Section 6 of the Arbitration Act.

30. This was a position that was fortified in the case of **Corporate Insurance Co Ltd vs Wachira[1995-1998]1 EA 20 (CAK)**, Gicheru, Kwach and Shah JJA (as they then were) held as follows;-

“...The arbitration Clause was in the nature of a Scott v Avery clause which provides that disputes shall be referred to arbitration and that the award of arbitration to be a condition precedent to the enforcement of any rights under the contract. A Scott v Avery clause can provide a defence to a claim but the party relying on it cannot circumvent the statutory requirement to apply for stay of proceedings. If the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading. By filing a defence, the appellant had lost its right to rely on the clause (Kenindia Assurance v Mutuli [1993] LLR 2833(CAK) applied.” (emphasis Plaintiff)

31. As matters stand now, this court has the jurisdiction to hear and determine the dispute herein. Indeed, it must be noted that the 3rd Defendant was not party to the Distributorship Agreement which had an arbitration clause. It cannot therefore be shut out from accessing the court as its right to do so has been enshrined in Article 50 of the Constitution of Kenya, 2010.

32. In any event, the jurisdiction of the court can never be ousted as intervention of the court in arbitral matters is well captured in Section 10 of the Arbitration Act. In the event, the 1st and 2nd Defendants were still keen to have the dispute between themselves and the Plaintiff and the 3rd Defendant referred to arbitration, then they ought to move the court appropriately under the correct provisions of the law.

33. Turning to the issue of the Guarantee, the court noted that Clause 4.1.1 of the Distributorship Agreement stated as follows: -

“Before the commencement date, and for as long as trading between the parties is on credit terms, the distributor shall arrange for a reputable bank approved by the company to provide to the company guarantees in acceptable form, content and amount to secure payment to the company of all amounts that may become due from the distributor to the company in respect of brands supplied on credit by the company to the distributor. The company shall have the right to require the amounts of such guarantees to be increased in any of the following circumstances...”

34. The Plaintiff was categorical that the line that provided that “**in respect of brands supplied on credit**” expressly limited the Bank Guarantee to act as security **solely for any goods supplied to the distributor on credit**. It was its contention that the foregoing set-up anticipated that all transactions between the parties herein would be on a pre-paid basis.

35. It denied that there was any credit arising from the distributorship business between the parties to warrant the 1st & 2nd Defendants presenting the Bank Guarantee to the 3rd Defendant and consequently presentation of the said Bank Guarantee could not arise.

36. The Plaintiff asserted that it was mandatory for the parties to reduce any credit facilities from the 1st and 2nd Defendant to the Plaintiff in writing. It referred the court to Clause 2.5 of the Distributorship Agreement in this regard in which it was stated as follows:-

“The company may agree to allow the distributor credit up to such limits and in accordance with such provisions as may be agreed in writing between the parties from time to time but such credit shall be unilaterally revoked by the company if, at any time, the distributor fails to comply with any of its obligations under this agreement...”

37. It was the Plaintiff’s further argument that the 1st and 2nd Defendants’ action to irregularly and unjustly liquidate the Bank Guarantee herein was designed to unlawfully and illegally deprive it of its legitimate business and that it was in the interests of justice that this court grants it the interim orders it had sought to protect its investments on the Distributorship Agreement. It said that the same were currently wasting by ordering that the 1st and 2nd Defendants not to utilise the proceeds of the said Bank Guarantee. It did not, however, provide any evidence to support this claim.

38. In this regard, the Plaintiff placed reliance on the case of **Dynamics Corp of America vs Citizens & Southern National Bank Civil Appeal No. 17197. 356 F.Supp. 991 (1973 (sic))**. The court was called upon to determine whether to issue a preliminary injunction in order to preserve a letter of credit pending the outcome of the main suit. In granting the preliminary injunction the court stated that: -

“The Deposit is currently in the hands of the Bank and is earning interest daily. It is a large sum of money and all sides attach a great deal of importance to their respective rights to it. An injunction against the Bank would merely require it to continue holding on to the Deposit. If plaintiff’s application were denied, the Deposit would be on its way to India, as would plaintiff’s remedy, and plaintiff, which has already filed a petition in bankruptcy, would be severely disadvantaged...It appears to the court that plaintiff has at least a decent chance of winning this suit, and there is as much public interest in discouraging fraud as in encouraging the use of letters of credit. Accordingly, the court concludes that a preliminary injunction is warranted.”

39. The 1st and 2nd Defendants did not file a Replying Affidavit in response to the Plaintiff’s Notice of Motion application dated 15th October 2013. Instead, relied on the Replying Affidavit of Anne Mbatha that was sworn on 25th November 2013. They maintained that the Plaintiff was at all material times aware that the 3rd Defendant had paid it the Guarantee and contended that the Plaintiff concealed this fact when it canvassed its application *ex-parte* on 22nd October 2013 which was 11 days after the 3rd Respondent had notified it of the payment of the said Guarantee as was evidenced in an email from them to the Plaintiff herein.

40. On its part, the 3rd Defendant pointed out that Paragraph 9 of its Replying Affidavit that was sworn by Anne Mbatha on 25th November 2013 as aforesaid clearly showed that it paid out the guarantee of Kshs 20,000,000/= to the 1st and 2nd Defendants on 11th October 2013 and that the Plaintiff was at all times aware that the said guarantee had been paid out. It was emphatic that it informed the Plaintiff vide an e-mail dated 11th October 2013 that instructions to pay the said guarantee had already been issued by the 1st and 2nd Defendant that it was and they were acting upon them. Similar to the 1st and 2nd Defendants, stated that the Plaintiff concealed this fact when it canvassed its application *exparte* on 22nd October 2013

as a result of which a mandatory injunction court not issue in favour of the Plaintiff.

41. The 3rd Defendant also referred the court to the case of **Gusii Mwalimu Investment Company and Others V Mwalimu Hotel Kisii Ltd Civil Appeal [1995-1998]2 EA 100**, where Tunoi, JA stated that a mandatory injunction could not issue restrain an event that has occurred, as equity would not grant an order in vain.

42. At the time the Plaintiff presented its Notice of Motion application dated 15th October 2013 to the court on 22nd October 2013, it seemed to suggest that the recalling of the Bank Guarantee was yet to be accomplished leading the court to maintain the *status quo* of the matter. These *status quo* orders have been extended severally in the course of hearing the application herein and were still in force by the time the court reserved its ruling herein. The Plaintiff was to inform the court of the status of the Guarantee when the application was fixed for *inter partes* but this has never done leading to the question as to what was the exact status of the said Bank Guarantee. Although the 1st and 2nd Defendants indicated in their Grounds of Opposition that the Plaintiff did not comply with the order of 22nd October 2013, it did not show the relevance of the same in relation to this case.

43. However, in Paragraph 9 of the 3rd Defendant's Replying Affidavit, Anne Mbatha stated as follows:-

a. **...The amount guaranteed of Kshs 20,000,000/= was paid to the 1st and 2nd Defendants on 11th October 2013 upon receipt of written demand dated 9th October 2013.**

b. **In making payment, the 3rd Defendant was bound by the terms under the Guarantee...**

44. The 3rd Defendant's payment of this amount appeared to have been in response to the 1st and 2nd Defendants' letter dated 9th October 2013 a copy which was annexed on pg 103 of the Plaintiff's application Exhibit marked "VKM-04" in which it was stated as follows:-

"RE: BANK GUARANTEE NO 0770GGU120320001 FOR KSHS 20,000,000.00 BY ORDER OF GILGIL DISTRIBUTORS LIMITED

We hereby lodge a claim against the above and original bank guarantee.

The customer, Gilgil distributors (sic) has defaulted in paying for good issued to him as per attached account statements with Kenya Breweries limited (sic) and UDV Kenya limited (sic); amounting to Kshs 20,286,612.00.

In line with your undertaking in the above bank guarantee we hereby call your bank to pay Kenya Breweries Ltd Kshs 20,000,000.00. The remaining balance of Kshs 286,612.00 is to be paid off by the customer himself...."

45. The 3rd Defendant's mandate to pay the said amount of Kshs 20,000,000/= was derived from Clause 4 of the Bank Guarantee contained on pg 99 of the Plaintiff's application in which it was stipulated as follows:-

"We undertake to pay to you, upon your first demand declaring the customer to be in default of their payment and without cavail or argument, any sum or sums within limit of KES 20,000,000.00 (Kenyan Twenty Million only) as aforesaid, without your needing to prove or show ground or reasons for your demand of the sum specified therein."

46. Whereas the Plaintiff contended that the Guarantee could only be recalled "**in respect of brands supplied on credit**" which expressly limited the Bank Guarantee to act as security **solely for any goods**

supplied to the distributor on credit, it was clear that the 3rd Defendant could pay the Guarantee for empties. In Clause 1 of the said Guarantee, it was provided as follows:-

“ We Barclays...undertake ...to pay you on demand for EMPTIES, LIQUID, SPIRITS & BEER supplied to you by the customer on credit as aforesaid but subject to the limit of our aggregate liability hereinafter prescribed...”

47. Notably, the agreement the Plaintiff purported to have been for transport of the empty bottles was not in writing. The 1st and 2nd Defendants did not also file any affidavit to give the court a clue of what really transpired. It did not also seem to address itself to the Plaintiff's assertions regarding the transport of the empty bottles. Its difficult for the court to make a conclusive finding on what the terms of the said agreement were.

48. However, bearing in mind the terms of the Guarantee, it was evident to the court that the 1st and 2nd Defendants could recall the Bank Guarantee where it was not paid for empties. The Plaintiff was unable to demonstrate any breach of the 3rd Defendant's fiduciary duty to it as it only did what it was obligated to do under the terms of the Guarantee.

49. The Plaintiff's contentions that interest would start to accrue if the Guarantee was paid were misplaced for the reason that it did appear to have been advanced overdraft facilities. The Plaintiff failed to demonstrate that it did not owe the 1st and 2nd Defendants any monies. Nothing would have been easier than for the Plaintiff to have tabled all its evidence before the court. Indeed, cogent evidence is required at the interlocutory stage as the court would be granting an interlocutory injunction without hearing the merits of a case hence the need to have a water tight case.

50. The fact that there had been a dispute between it and the 1st and 2nd Defendants since 2012 would not have been sufficient reason to have stopped the 3rd Defendant from carrying out its obligations under the Guarantee. In this regard, the court found itself in agreement with the holding in the case of **East African Foundry Works (K) Ltd vs Kenya Commercial Bank Ltd, EALR[2002] 2EA 371** that was relied upon by the 3rd Defendant that **“the court had acted in vain and quite irregularly (emphasis 3rd Defendant) in issuing an injunction to restrain the appointment of a receiver retrospectively, as it were, for the appointment had been made before the application was lodged and presented in Court.”**

51. As regards the Plaintiff's prayer to restrain the 1st and 2nd Defendants from refusing to supply it with Brands/ stocks or in any way terminating and/or breaching the Distributorship Agreement, the court found that that was outside the ambit of what a court could do.

52. The 1st and 2nd Defendants pointed out that the Plaintiff was requesting this court to direct the Defendants to perform a positive act, which was to supply it with stocks for distribution. It was its contention that granting a mandatory injunction would have the effect of supervising the performance of a contract, in particular to the Guarantee that was issued to the 1st and 2nd Defendants by the Plaintiff.

53. The court could not have agreed more with the submissions by the 1st and 2nd Defendants. While the Plaintiff did not say in very many words whether the contract had been terminated, the court noted that it could not interfere with termination of the Agreement as the same was clearly governed by Clause 5.1 of the Distributorship Agreement. The same provided as follows:-

“The Company shall have the right at any time(emphasis court) to terminate this Agreement forthwith on giving the Distributor Notice in writing”

54. Whereas it was not clear to the court if the 1st and 2nd Defendants issued the Plaintiff notice to terminate the Distributorship Agreement, the court noted that the issue was not one for determination by the court. The court was not persuaded that it could grant a mandatory injunction in favour of the Plaintiff

herein. Indeed, in the case of Esso Kenya Limited vs Okiya [1992] KLR 50 where the Court of Appeal held that the trial court had erred in granting a temporary injunction from terminating the operator's agreement as the agreement had already been terminated before the suit had been filed and that the remedy lay in compensation by way of damages.

55. The principles for granting a interim injunctions are now well settled. The court will only grant injunctions in clear cases and where there exists special circumstances. The Plaintiff argued that it had met the criteria which was set out in the case of Giella v. Cassman Brown & Co. Ltd [1973] E.A 360, where case it was held:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

56. However, having considered the pleadings, the affidavit evidence, the Notice of Preliminary Objection, Grounds of Opposition, written submissions and case law by the respective parties, the court found that the Plaintiff had not established a *prima facie* case with a probability of success. The prayer for permanent injunction had the potential of dispensing with the suit at an interlocutory stage and as was rightly argued by the 1st and 2nd Defendants, such an order could only be granted after a final hearing on the merits.

57. Indeed, as can be seen in the case of Locabail International Finance Limited v Agroexport and others [1986] 1 ALL ER, it was held that:-

“Moreover before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

58. As the Plaintiff was unable to establish a *prima facie* case with a probability of success, it could not be granted a mandatory injunction as there was no sufficient proof that if the court granted the said injunction, the outcome of the case would not be any different at the end of the trial of the case.

II. NOTICE OF MOTION DATED AND FILED 14TH JULY 2014

59. The Plaintiffs' Notice of Motion application dated and filed on 14th July 2014 was brought pursuant to the provisions of Order 40 Rules 1 and 2, (sic) of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A and 63 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and all enabling provisions of the law. Prayer Nos (a) and (b) were spent. It sought the following remaining prayers:-

a. Spent.

b. Spent.

c. **A temporary injunction be issued restraining the 3rd Defendant itself, agents, servants, employees or otherwise howsoever from advertising for sale, selling, alienating or in any other manner interfering with all the properties known as Tilte Nos Nyandarua/Gilgil West/394, 395 and 396, Nyahururu Municipality Blocks 6/344, 5/345 and 4/7 pending the hearing and determination of the suit.**

60. This was ideally a matter between the Plaintiffs and the 3rd Defendant. The 1st and 2nd Defendants merely associated themselves with the submissions of the 3rd Defendant.

THE PLAINTIFFS' CASE

61. The Plaintiffs' application was supported by the Affidavit of Vincent Kariuki Mburu that was sworn on 14th July 2014. The Plaintiffs' written submissions were dated 1st October 2014 and filed on 3rd October 2014.

62. The Plaintiffs pointed out that they had contested the unconventional and irregular manner in which the 3rd Defendant had paid out the aforementioned Guarantee to the 1st and 2nd Defendants. They contended that in an attempt to steal a match and while being aware of the aforementioned *status quo* order issued by the court on 22nd October 2013, the 3rd Defendant levied substantial interest, from eighteen (18%) per cent per annum to twenty four (24%) per cent per annum, on the Plaintiffs account and proceeded to issue statutory notices to dispose of the aforesaid properties that had been given as security.

63. They stated that the said amounts were unjustifiable and if the Plaintiffs were successful in obtaining a refund of the payment of the Kshs 20,000,000/=, it would be equitable that the 3rd Defendant be restrained from proceedings with the sale of the said subject properties. They were emphatic that they had rectified the default as was envisaged in Section 96 of the Land Act Cap 280 (Laws of Kenya) and that they were perfectly entitled to seek protection of this court under Section 103 of the Land Act.

64. They therefore argued that they had established a *prima facie* case with a probability of success and urged the court to grant injunctive orders as they had sought in their application that was dated and filed on 14th July 2014. They also placed reliance on the case of **Giella vs Casman Brown Co. Limited** (Supra) to buttress their arguments.

THE 3RD DEFENDANT'S CASE

65. Anne Mbatha also filed a Replying Affidavit in respect of the second application. It was sworn and filed on 5th August 2014. The 3rd Defendant's written submissions were dated 12th September 2014 and filed on 17th September 2014.

66. The 3rd Defendant was categorical that the aforementioned Guarantee was duly called up by the 1st and 2nd Defendants in clear and unequivocal language by letter dated 9th October 2013 and that it made payment thereon as it was obligated to do by the Guarantee and the Terms and Conditions in the Request for the Bank Guarantee dated and signed by the Plaintiffs on 30th January 2012. It issued Statutory Notices against the Plaintiffs for default of payment of the debt owed amounting to Kshs. 60,028,381.10 as at 23rd January 2014 and to which interest accrued and continued to accrue at the rate of twenty four (24%) per annum. Of the charged properties, Nakuru Municipality Block 4/7 was sold and the proceeds used to repay part of the Bank's debt. It said the amount due and owing it by the Plaintiffs, as at 16th July 2014, stood at Kshs 38,400,244.95 and the same continued to accrue interest at the rate of twenty four (24%) per annum.

LEGAL ANALYSIS

67. As could be seen hereinabove, the court found that the 3rd Defendant was justified in paying the aforementioned Bank Guarantee as it acted in accordance with the terms of the said Guarantee upon receipt of a clear and unequivocal demand from the 1st and 2nd Defendants. To that extent, the court had found that the 1st Plaintiff herein had been unable to establish a *prima facie* case with a probability of success and could not therefore qualify to be granted orders of injunction as the Plaintiffs had sought.

68. Once the 1st Plaintiff became indebted to the 3rd Defendant, the 3rd Defendant become entitled to recovering its monies through the charged securities. In this regard, the court was in agreement with the holding in the case of in the case of **Andrew M. Wanjohi vs Building Society & Another (2006) eKLR**

where it was held that:-

“By offering the suit property as security the charger was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with the interest thereon.”

69. When the subject properties were given as security, they became commodities and were subject to sale. Their value was ascertainable and any loss suffered by the Plaintiffs upon the sale of the same could be remedied by an award of damages. That notwithstanding, the law must be fully complied with before a chargee can exercise its statutory power of sale.

70. Section 90 of the Land Act provides as follows:-

- 1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.**
- 2. The notice required by subsection (1) shall adequately inform the recipient of the following matters—**
 - a. the nature and extent of the default by the chargor;**
 - b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;**

71. The court noted that the 3rd Defendant's three (3) months' Statutory Notices on pp 3-12 of the Plaintiffs' application showed that the 3rd Defendant had called for the entire sum that was outstanding. The contents that ran across all the Statutory Notices demand were as follows:-

“Our instructions are that Gilgil Distributors Limited as Borrower...is indebted to our client the Chargee in the sum of Kshs. 60,028,381.10...

...under the provisions of Section 90 (1), (2) (b) pf the Land Act...THAT after expiry of THREE (3) MONTHS from the date of service of this notice ...exercise its Statutory power of sale and sell the charged property namely....”

72. Reading the contents of the said Statutory Notices against the provisions of Section 90 of the Land Act, it was evident that the said notices did not indicate what the outstanding amount of arrears was but actually called for the whole outstanding sums. This rendered the said notices invalid, irregular and null and void *ab initio*.

73. Assuming the mandatory Statutory Notices were valid and lawful, and which this court found not to have been the case the Plaintiffs did not appear to have been given an opportunity to rectify the default before the 3rd Defendant purported to exercise its statutory power of sale, which right they were entitled to.

74. Turning to Section 96 of the Land Act, the same stipulates as follows:-

“1. Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under [section 90\(1\)](#), a chargee may exercise the power to sell the charged land.

2. Before exercising the power to sell the charged land, the chargee shall serve on the chargor a

notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell.”

75. Evidently, the 3rd Defendant did not issue the Plaintiff with a Notice under the provisions of Section 96 (2) of the Land Act. It cannot therefore proceed with the sale of the said subject properties unless the same has been done. A reading of Section 96 (1) of the Land Act shows that these forty (40) days would be in addition to the three(3) months’ notice under Section 90 of the Land Act. Notably, the Plaintiffs did not present any evidence to show that the 3rd Defendant had not complied with this aspect as well as the other provisions in the Land Act. The court will therefore not say more on this issue.

76. Notably, the Plaintiffs argued that the 3rd Defendant had increased the rate of interest contrary to the court orders. As was seen hereinabove, the 1st Plaintiff never informed the court what the status of the matter was and in any event, the orders were limited to establishing the status of the Bank guarantee. If this was the only ground under which the Plaintiffs would have been relying upon, it would have been difficult for them to get injunctive orders.

77. Indeed, in the case of **Civil Application No 108 of 2005 Francis J.K Ichatha v Housing Finance Company of Kenya Ltd**, the Court of Appeal had held that a dispute in computation of interest was a mathematical error that did not warrant restraining a chargee from exercising its statutory power of sale unless courts could show that such increase of the interest rates was unlawful and illegal. The Plaintiffs did not lead any evidence to proof their assertion of change of interest rates.

78. Notably, although the court should and ought not to re-write the contracts that have been entered into by parties, it must always have at the back of its mind that the sale of a person’s property is not a matter that should be taken casually because it deprives a party of right to own property, a right that is enshrined in Article 40 of the Constitution of Kenya, 2010. The importance of not depriving a person his or her property was an issue that was considered in the case of **Alice Awino Akello vs Trust Bank Limited LLR No 625 (CCK)**.

79. In this regard, the court associates itself with the holding in the case of **Kwanza Estates Limited vs Dubai Bank Kenya Limited (2013) eKLR** where it was held as follows:-

“I am satisfied that a party deprived of his property through an illegal process would suffer irreparable loss and or damage...”

80. The court was also in agreement with the holding in the case of **Joseph Siro Mosioma v Housing Finance Company of Kenya Ltd & 3 Others (2008) eKLR** where Warsame J had held that damages were not an automatic remedy when deciding whether or not to grant an injunction and that the same could not be a substitute for loss occasioned by a clear breach of the law. This was the same position that was taken in the case of **Sharok Kher Mohamed Ali v Southern Credit Banking Corporation Limited (2008) eKLR** which was cited, with approval, in **Kwanza Estates Ltd v Dubai Bank Kenya Ltd (Supra)**.

81. Similarly, in **Muiiri Coffee Estate Limited vs Kenya Commercial Bank [2009] eKLR**, Khaminwa J (as she then was) quoting from the decision of Ringera J (as he then was) in the case of **Lucy Njoki Waitthaka vs ICDC** observed as follows:-

“It is not an invariable rule that where damages may be an appropriate remedy an interlocutory injunction should never be granted. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. It would be unjust and be seen to be unjust.”

82. Having said so, the Plaintiffs did not persuade the court to find that the Statutory Notices that were issued by the 3rd Defendant herein had no legal basis. The Plaintiffs also appeared to have other

financial facilities with the 3rd Defendant which were quite distinct from the Bank Guarantee. This court would therefore be hesitant to restrain the 3rd Defendant from realising its securities as it was not clear at all if the subject properties were to secure the Bank Guarantee alone or they had secured other financial obligations. The court was unable to separate the two (2) issues due to the way the Plaintiffs had presented their case. That notwithstanding, this court was hesitant to restrain the 3rd Defendant from exercising its statutory power of sale as the court found the 3rd Defendant was entitled to exercise its mandate under the Bank Guarantee.

83. All things remaining constant, the court did not find anything that would have prevented the 3rd Defendant from realising its security. The 3rd Defendant, whether by itself or through its agents is therefore at liberty to re-issue the Statutory Notices that comply strictly with the provisions of the Land Act. This is because issuance of invalid notices would not in itself be a ground for a grant of injunctive orders as the omission can be rectified.

84. Accordingly, having considered the pleadings, the affidavit evidence and oral and written submissions and the case law in support of the parties' case, the court found that in respect of this second application, the Plaintiff had not made out a *prima facie* case with a probability of success in line with the threshold that was set out in the case of **Giella v Cassman Brown** (Supra). It was the view of the court that in the event the interlocutory injunction was not granted pending the hearing and determination of the suit herein, damages would be adequate compensation to the Plaintiffs. Consequently, the balance therefore tilted in favour of the 3rd Defendant.

DISPOSITION

85. For the foregoing reasons, the upshot of this court's ruling was that:-

a. The Plaintiff's Notice of Motion application dated 15th October 2013 and filed on 18th October 2013 was not merited and the same is hereby dismissed with costs to the 1st, 2nd and 3rd Defendants.

b. The Plaintiffs' Notice of Motion application dated and filed on 14th July 2014 was not merited and the same is also hereby dismissed with costs to the 1st, 2nd and 3rd Defendants.

c. The 3rd Defendant is at liberty to re-issue Statutory Notices that strictly comply with the provision of the law. The 3rd Defendant must bear in mind all the monies that have been paid by the Plaintiffs in furtherance of the Statutory Notices it issued and which the court found to have been invalid and irregular and null and void *ab initio*.

86. For the avoidance of doubt, the *status quo* issued herein is hereby discharged and/or vacated.

87. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of January 2015

J. KAMAU

JUDGE

