



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 57 OF 2014

STEPHEN MBOGO KARIUKI.....PLAINTIFF

VERSUS

K-REP BANK LIMITED.....DEFENDANT

RULING

1. This Ruling relates to an Application by way of a Notice of Motion dated and filed on 6th June, 2014 in which K-Rep Bank Limited (the Bank) sought orders that:-
 - a. the application be certified urgent and be heard *ex parte* in the first instance;
 - b. the injunctive orders issued by this court on 15.05.2014 in favour of the Plaintiff/Respondent be set aside, discharged and/or varied;
 - c. the costs of the Motion be in the cause.
2. The application was supported by the Affidavit of one Harrison Mutie, the Applicant's Mombasa Branch Manager sworn on 6th June, 2014 and the grounds on the face of the application.
3. In a Replying Affidavit sworn on 25th June, 2014 and filed on 27th June, 2014, the Plaintiff/Respondent avers *inter alia*:
 - a. that he does not dispute the loan, (paragraph 6)
 - b. that the Defendant/Applicant is holding the Plaintiff's three titles which the Bank has refused to release to him for sale by private treaty, (paragraph 7, 8, 9 and 10)
 - c. that the arrears were occasioned by the decline of visitors in the hospitality and tourism industry, and despite requests the applicant declined to have the loan repayment rescheduled, but that given time he would have the loan and all accrued interest paid (paragraph 11, 12 and 13)
 - d. that the application is brought in bad faith to defeat the order of the court and to intimidate him.
4. On 18th March, 2015 the court granted counsel for the Plaintiff leave to file his written submissions and have them highlighted on 13th April, 2015 along with the submissions of the Applicant/Bank's counsel. To date counsel for the Plaintiff/Respondent has not filed his submissions. In a submission by Mr. Muthama, counsel for the Plaintiff informed him on 11th

May, 2015 that he would rely on the Plaintiff's Replying Affidavit.

5. I have accordingly considered the Applicant's submissions as well as the Plaintiff's Replying Affidavit. The application herein is premised upon the provisions of Order 40 rule (7) of the Civil Procedure Rules 2010 which says:-

“40. (1) – (6)

(7) Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

6. Rule 7 aforesaid does not indicate any grounds for setting aside, discharging and/or varying an injunctive order. We can only draw from principles laid down by Judges in precedents. For example in **Edward Karanja Ragui vs. Barclays Bank of Kenya (Nairobi Milimani Commercial Courts, HCCC No. 927 of 2002)** Ringera J. (as he then was) said:-

“In my opinion, as an order for injunction is an equitable remedy issued to prevent the ends of justice from being defeated, it may be discharged or set aside if it is shown to be unjust or inequitable to maintain it in force.”

7. In **LEAH NYAMBURA MBURU VS. BARCLAYS BANK OF KENYA LIMITED [2012] e KLR** the court said:-

“.....in my view an application under Order 40 rule 7 may be based on the events subsequent to the grant of the injunction such as the conduct of the Applicant which conduct make the sustenance of the injunctive orders unwarranted. This may occur where for example the Applicant's subsequent conduct is meant to frustrate the hearing and determination of the suit or where the Applicant goes to sleep after the grant of the said injunctive orders. The court does recognize that an injunction is an equitable remedy and the subsequent events may render the continued retention of injunction unreasonable or unjustifiable.”

8. In **PITHON WAWERU MAINA VS. THUKA MUGIRIA [1983] eKLR**, the court said *inter alia*:-

“Firstly, there are no limits or restrictions on the Judge's discretion except that if he does vary the Judgment he does so on such terms as may be just.....The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

9. It is rare that a Bank or lender would delay or in any way intend to abuse the process of the court. From the record the Bank/Applicant was not afforded an opportunity to be heard, and the orders were granted *ex parte*. A Bank or deposit-taking and lending institution, is both a bailee and trustee of public/private funds. It would be inequitable and a miscarriage of justice to compel them by order of injunction to keep experiencing loss occasioned by a Plaintiff borrower's default in repaying the loan.

10. An injunction may also be set aside, discharged or varied in circumstances where there was non-disclosure of material facts or deliberate misrepresentation of facts to the court. The authors of Halsbury's Laws of England 4th Edition Vol. 24, paragraph 111 support the proposition that –

“An injunction may be dissolved if it was granted on a suppression or misrepresentation of

material facts even if the injunction is about to expire.”

11. In **ANDREW OUKO VS. KENYA COMMERCIAL BANK & 3 OTHERS [2005] eKLT**, Azangalala J. (as he then was, now Judge of Appeal), cited with approval the holding of Viscount Reading C.J., Warrington and Scrutton L.J. where Scrutton L.J. said:-

“The court is supposed to know the law. But it knows nothing about facts and the applicant must state fully and fairly the facts and the penalty by which the court enforces that obligation in that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action it has taken on the faith of imperfect statements.”

“A plaintiff applying for ex-parte orders.....comes under a contract with the court. If he fails to do that, and the court finds, when the other party applies to dissolve the injunction that any material fact has been suppressed or not properly brought forward, the plaintiff is told that the court will not decide on the merits and that as he has broken faith with court the injunction must go.”

12. In this regard, the Plaintiff failed to disclose to the court relevant and material facts to the dispute between the Plaintiff's companies called **STEVECO CHEMICALS (E.A.) LIMITED** and **JEA-STEP CONTRACTORS COMPANY LIMITED** that the Applicant Bank had offered and the companies had accepted banking facilities by way of a loan of Kshs. 3 million, and Kshs. 6 million respectively (Kshs. 9 million in total) which sum was secured by way an Instrument of Charge dated 30th November, 2006, and the Further Charge dated 15th June, 2010, and to which facility he also gave a Personal Guarantee and Indemnity dated 15th June, 2010. The Plaintiff failed to disclose the existence of the charge in his application. The Guarantee by the Plaintiff was not merely as a Guarantee but also as a primary obligor and for which he had offered his property as security.

13. The Plaintiff/Respondent had been made aware, and was always aware of the default of the Borrower Companies of which he was director, and was equally aware of the Bank's decision to exercise its statutory power of sale over the charged property due to the default of the Borrower Companies. In addition the Bank had declined to restructure the facilities as the Plaintiff failed to meet the Bank's terms to pay at least Kshs. 1 million as a condition for restructuring.

14. The Plaintiff/Respondent had also failed to disclose to the court that the Bank had already served upon him, as the Chargor, the requisite statutory notices and any other necessary notices required by law and he had failed to redeem the charged property.

15. In the circumstances, non-disclosure of these material facts is valid ground for dissolving, vacating and/or discharging the injunction.

16. Finally, the Plaintiff has a ready remedy in damages, should he later establish that the suit property was sold without proper notices, fraud, gross undervaluation or other sufficient cause. The Applicant Bank is not known to be poorly managed or otherwise to lack the resources to compensate the Plaintiff. The claim that the charged property is a matrimonial home is merely a red herring. A matrimonial home or the family's jewels once charged or pawned become mere commodities for sale.

17. For those reasons, I allow the Applicant/Bank's Notice of Motion dated and filed on 6th June, 2014 in terms thereof.

18. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 15th day of May, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Miss Onyango for Applicant

N/A for Respondent/Plaintiff

Court Assistant Kaunda