



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 188 OF 2014

ARGOS FURNISHERS LIMITED PLAINTIFF

VERSUS

ECOBANK KENYA LIMITED 1ST DEFENDANT

VALLEY AUCTIONEERS2ND DEFENDANT

RULING

Lis pendens and injunction

[1] I have been called upon to determine the application dated 6th May 2014. The application is seeking for an injunction to restrain the Defendants whether by themselves, their servants, agents, employees, assigns, personal representatives and or anyone claiming through or under them from advertising for sale, wasting, alienating, selling or disposing of or otherwise interfering with land known as L.R. NO 1432/529-HOMABAY and L.R. 533/86/11-MOLO (hereafter the suit properties) pending determination of this suit. The application is supported by two affidavits of SHUSHEEL SHAH and other grounds the Applicant adduced during the hearing of the application.

[2] The Applicant does not deny it is indebted to the 1st Defendant. Even its re-calculations through a report dated 25th July, 2011 by Interest Rate Advisory Centre (IRAC) shows that the Applicant owes the 1st Defendant a sum of Kshs. 44,761,219.61. According to the report, there is a difference of Kshs. 6,118,565.02 between the figure they think is the lawfully owing debt and the one claimed by the 1st Defendant of Kshs. 51,124,237.71. The difference is attributed to what the Applicant calls ***...levying interest upon interest, penalties and other levies on the Plaintiff's accounts which levies are unlawful, usury and un-contractual.*** On 25th June, 2014, Mr. Mutubwa made submission on behalf of the plaintiff. He submitted that the 1st defendant was in breach of the lending agreement between the parties herein when it charged the un-contractual, illegal and oppressive interest. The loan that was obtained was for Kshs. 170,000,000/= but the Applicant has paid over the sum borrowed after selling off several of its properties. According to the Applicant the contention is on the interest charged. He relied on the report by Interest Advisory Centre which he referred to as expert evidence to demonstrate the interest charged was illegal and un-contractual. He averred these were triable issues.

[3] Mr. Mutubwa continued. There has been a material departure from the lending contract through negotiations which culminated into an assignment of a debt owed to the Applicant by a 3rd party (the County Government of Mombasa) to the 1st defendant. The assignment of the debt was intended to discharge the plaintiff from the debt. Those negotiations did not collapse and the deed of assignment is still under negotiations. During the negotiations, there were representations that the deed of assignment shall be concluded thus discharging the plaintiff from the debt, the basis of this suit. The plaintiff acted on the representations by the 1st defendant and passed all the decrees in the Mombasa case to the advocate who was appointed to follow through the deed of assignment. On that basis, the Plaintiff submitted, the 1st defendant is estopped from denying the same or selling the suit property.

[4] Mr. Mutubwa also submitted at length on the principle of *lis pendens* and cited the case of **SILOCK V KASHIM SHARRIF MOHAMED [2013] eKLR** by Angote J who cancelled a transfer of property done during the pendency of a case. Counsel was of the view that any sale of a property which is subject of a case must be sanctioned by the court. He also relied on the case of **ANNE NJERI MWANGI V CO-OPERATIVE BANK [2013] eKLR** – on *lis pendens* principle. Even where the justice to Bank has not been issued, the parties are bound.

[5] The above and the overriding objective, according to counsel for the Applicant, should entitle the plaintiff its day in court. The Applicant has established prima facie-prima facie case is not one which will succeed but one which is arguable. He stressed that the plaintiff has paid the principal sum and had made a deed of assignment.

Mr. Luseno argued the case for the Defendants

[6] He started by an explication of the principle of *lis pendens*. He referred the Court to the statutory notice at page 154 and 155 of application and submitted that the notices were issued before the suit was filed. Therefore, at the time of the issuance of the Notice, there was not pending suit. The principle does not, therefore, apply. He went on to state that the principle of *lis pendens* was reserved under ITPA not the Land Act. The Land Act does not recognize the doctrine. Also, the principle of *lis pendens* has not been pleaded but was raised from the bar by counsel.

[7] Mr. Luseno attacked the Deed of Assignment at page 158 of the Application. He submitted that the Deed is not executed. If anything, the Deed represents only an intention to enter into, which cannot create contractual relationship. If the Plaintiff wanted it to be binding on the parties, it ought to have executed and returned it to the bank. The letters by the Applicant appearing at page 171 – 172 are dated 10th and 20th April, 2012 and since that time up to now, the Applicant has never executed the Deed of Assignment, which is an indication that their conduct is wanting. They have not even explained why they have not executed the said Deed of Assignment. Mr. Luseno then quipped: Why should we postpone an accrued right in favour of unexecuted document? He gave his answer; that would be unfair to the 1st Defendant. He made further submissions on the Deed of Assignment; that in the recitals at page 159 at Clause 2(b) the Applicant admitted the debt as at 31st of May, 2012 to be Kshs. 178.80 on Current Account and Kshs. 51,125,738.53 on Loan Contract. He insisted that Recitals in unexecuted agreement bind parties and are useful. For all purposes, Mr. Luseno submitted that Clause 2 and 3 of the Deed of Assignment at page 161 clearly provided that the assignment was an additional security to and not a substitute for the previous securities held by the bank. The assignment could not have even been a substitute of the securities held by the bank because the Preliminary Decree at page 106 of the Replying Affidavit was for Kshs. 20,720,923.84.

[8] He pressed on, that illegality is being touted by the Applicant yet no particulars were pleaded or provided. He termed it to be a mere smoke screen. He also stated that a party cannot infer breach of contract. It must prove the breach. No witness statement by an expert which has been filed. No affidavit or report by an expert witness which has been filed. They only wrote a letter

dated 25/7/2011 complaining of illegal interest. But they again ironically went ahead in 2012 to acknowledge the debt and assign a debt owed to them by Mombasa Municipal Council. At pages 116 – 135 of the Replying affidavit contains admission by the plaintiff through their directors and lawyers. The Applicant has sold several properties by private treaty and paid some of the proceeds of sale towards the loan. But, it has defaulted severally and up to now is still in default. Only two properties are now remaining as security. They also want to sell these two properties on their terms. This is a borrower who is holding the bank at ransom. See page 119 and 122 he advised the properties himself. He was given 2 years to sell the properties and pay off the loan but in vain. In all, the Applicant as a borrower does not satisfy Cassman Brown case. What damage will he suffer if sale is by auction? It has no prima facie case. The property has been valued and the valuations show the property is much less than the debt. Convenience does not tilt in favour of continuing this state of affairs. The debt is becoming bigger and will hugely outstrip the value of the properties. The Applicant owes the 1st Defendant and cannot seek help of equity through an injunction. They have sought permanent injunction in the application which is not substantive order in the plaint. The Defendants relied on the case of **ABDULKADIR SHARRIF ABDIRAHIM v ECOBANK KENYA LIMITED & ANOTHER NBI HCCC NO 115 OF 2012, MRAO LIMITED v FIRST AMERICAN BANK OF KENYA LIMITED [2003] KLR 125** and **NBI HCCC NO 92 OF 2007 MECHANICAL ENGINEERING PLANT LIMITED & OTHERS v STD BANK** to demonstrate that Equity cannot stop sale by secured creditor and a chargor cannot be restrained. The auction herein was postponed by consent as a gesture of good faith on the part of the Defendant.

MR. Mutubwa in reply:-

[9] He made pointed reply. An injunction is a substantive prayer and has been sought for in the plaint. Although ITPA was repealed, it applies to suit property as charges were registered vide that law. He relied on the SILOCK CASE (Supra) and ANN NJERI MWANNGI CASE (Supra). In the latter case, Havelock J explained the effect of repeal of laws. The amount due is disputed and so case by Musinga J does not apply. No letter admits Kshs. 51,000,000 debt. The Motion raises *lis pendens* as one of the grounds. The principle relates to interlocutory applications where a suit is pending. Counsel seeks to rely on recitals whereas he has objected to the deed of assignment. But nonetheless, they seek to rely on the same document. The Applicant has come with clean hands; acknowledged having borrowed and also defined the amount owing. It has disclosed all material facts in the case.

COURT'S DETERMINATION

[10] The application I am faced with is one of an interlocutory injunction pending hearing of the suit. The relief is an equitable one and is granted only when the legal threshold set out in the case of **GIELLA v CASMAN BROWN** are met. These dimensions like all law have evolved and in later decisions consideration is given to instances where there have been violations of law by the Applicant or public interest is involved. And of course, good faith on the part of the Applicant is paramount in such equitable reliefs. The basic test is that:

- i. ***The applicant must show a prima facie case with a probability of success.***
- ii. ***An 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; and***
- iii. ***When the court is in doubt, it will decide the application on the balance of convenience.***

[11] I will apply these dimensions in determining this case. It is worth of note that the application before me is seeking to restrain a Chargee from exercising its statutory power of sale of the charged property under a debenture and charge instruments. Therefore, the law on mortgage becomes important on this matter. The Applicant has advanced three arguments which it believes entitles it to an injunction. First, it has argued that the doctrine of *lis pendens* applies in this case, for, there is a pending suit on the mortgaged property and, therefore, any sale of the mortgaged property should be with the permission of the Court. Second, it is contended by the Applicant that

the sum purportedly owing includes illegal and un-contractual interest. Third, the Plaintiff had concluded a Deed of Assignment assigning a debt it is owed by the Municipal Council of Mombasa to the 1st Defendant. I will deal with the arguments on *lis pendens* first.

Principle of *lis pendens*

[12] *Lis pendens* is a common law principle but was codified as a statutory provision in section 52 Indian Transfer of Property Act (ITPA)-now repealed. I wish to state that, a repealed law continues to apply to transactions which were carried under the repealed law. The basis of that approach is the too familiar constitutional philosophy that there should be no wrong suffered without a remedy. The aim of the law here is; to preserve a right which had accrued; and enforce obligation or liability which had attached. There are ample decisions on this subject but see section 23(3) of the Interpretation and General Provisions Act which provides:

(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

Therefore, ITPA would still apply on all mortgages done under it. Be that as it may, *lis pendens* relates to acts which are done during the pendency of a suit. Pendency of a suit commences from the time the plaint or the pleading commencing proceedings is presented and filed in court. See **Mulla on Transfer of Property Act, 1182** Ninth edition, Lexis Nexus: Butter-worth. Invariably, even under ITPA, *lis pendens* will not affect any process in the exercise of the chargee's power of sale which commenced before the suit was filed. That distinction is important because a contrary view will amount to an automatic stay of the exercise of the chargee's power of sale which began before the suit; practice that will in turn render the need to apply for an injunction unnecessary. Where the exercise of the chargee's power of sale preceded the suit, as is the case here, and is the subject of the proceeding can only be stopped by the order of the Court. I wish to resist the notion of inverting that position of the law to be that in such case as this, the chargee's statutory power of sale can only be exercised with the permission of the Court. I, disagree with Mr. Luseno if in his submissions he meant that the Respondent is before this Court to get permission to exercise its statutory power of sale. On the contrary, it is the Applicant who is before the Court seeking to stop the chargee from exercising its statutory power of sale. And if the Applicant is not successful in the quest for an injunction, does not mean the Court has given the Respondent permission to exercise the statutory power of sale of charged property. It simply means the Applicant failed to get an injunction and in the absence of any other restriction the chargee is at liberty to exercise its power of sale as long as he complies with the law. Those are not semantics; they are matters of real practical significance especially in the face of Mr. Mutubwa's arguments on *lis pendens*. In

the premises, I dismiss the argument of *lis pendens* in so far as they are presented in this case as a basis for requesting for an injunction. Perhaps the other arguments are more plausible and I will consider them as below.

Disputes on the sum owing and interest charged

[13] I wish to begin by stating that, the Applicant is not disputing the Debenture herein which is the company's security for a monetary loan advanced. It is also not denying the charges which then were created on the company's assets or suit property. Further observation; it does not deny it owes a debt to the 1st Defendant. The only quarrel they have is that the debt of Kshs. 51,124,237.71 being demanded by the 1st Defendant is inflated with illegal and un-contractual amount of interest. In its own recalculations contained in a report dated 25th July, 2011 by Interest Rate Advisory Centre (IRAC), the Applicant admits it owes the 1st Defendant a sum of Kshs. 44,761,219.61. According to the report, their only quarrel is a sum of Kshs. 6,118,565.02 which the Applicant claimed was as a result of the 1st Defendant...***levying interest upon interest, penalties and other levies on the Plaintiff's accounts which levies are unlawful, usury and un-contractual.*** The point of contention is therefore the interest charged. What does the law say about disputes on the sum owing and interest charged on mortgage as a basis for granting an injunction?

[14] The subject on whether disputes on the sum owing and interest charged on a mortgage sum could be a basis for the issuance of an injunction is replete with ample judicial precedents as well as respected literary works. I am content to adopt a work of Rudd, J in **BHARMAL KANJI SHAH AND ANOTHER v SHAH DEPAR DEVJI** (*supra*) that:

...the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage...

[15] To that, I add the decision of the Court of Appeal in the case of **FINA BANK LTD. v RONAK LTD**, [2001] 1 EA 54 that dispute on accounts is not a basis for grant of an injunction, and more specifically on interest, I cite the following passage at page 68 of the said decisions, that:-

"...As the charge documents which were in evidence before the High Court expressly reserved, in favour of the Appellant, the right to charge interest at variable rates its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly the Respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis."

[16] Again, I find the following passage in Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725 to be quite useful, that:

"725 When mortgagee may be restrained from exercising power of sale

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive".

[17] Therefore, as a general rule, disputes on the amounts owing or interest charged *per se* will not be the sole basis of granting an injunction against a mortgagee who is exercising the statutory power of sale of the mortgaged property. The re-calculation of interest by Interest Rates Advisory

Centre only becomes necessary in an application for injunction, if, from the face of such recalculation and the terms of the mortgage, the Court is able to easily discern that the interest charged is plainly illegal or manifestly and unjustifiably excessive. The Respondent must provide sufficient evidence which will prima facie show the amount claimed is excessive. And where illegality has been claimed by the Respondent, it must be in the plain eye-sight of the Court and totally irreconcilable with the terms of the mortgage. This is to avoid a situation where Respondents will use re-calculation of interest by IRAC or other professionals to re-writing the contract of the parties and obtain an injunction of that basis alone. What evidence has the Applicant provided to show the interest charged is illegal or un-contractual?

[18] The Applicant has alleged illegal interest was charged and heaved on the sum owing. It did not, however, provide the particulars of the illegality, which makes it impossible for the Court to find any apparent illegality on the face of the documents presented. What the Applicant has provided is the re-calculation of interest by IRAC which does not plainly establish illegal interest. It only alludes to non-contractual fee of Kshs. 543,183 which **was a charge of 3% of the amounts in excess of approved overdraft limit of Kshs. 50 million**. IRAC also talked of a fee of Kshs. 1,00,000 which was debited into the account on 27th August, 2008 as **“2% comm on O/D 50M from 2008”** which it omitted in its calculations pending justification by the bank on the basis of its application. IRAC again did a recalculation of the loan and made findings such as: 1)... **although the Bank charged various commissions and appraisal fee, the facility limits were not advanced; and 2)...though an additional arrears rate of 5% was provided for in the offer letter, the bank did not apply this. When applied, IRAC’S recalculation is a debit of Kshs. 52,614,870.76 which is Kshs. 1,436,615.98 higher than the bank’s balance**. All these issues are not obvious and do not lend themselves as readily showing illegality. More trouble is found in the fact that these issues raised by IRAC have not been pleaded anywhere in the plaint or statement filed. On the other hand, penalty interest of 5% was agreed upon by the parties on any excess facility. The Debenture also provided for charging of commissions, costs, interest on costs, and fee at 5% over the base rate. See Clause 2 and 11 of the Debenture. Given these facts, and despite the recalculation by IRAC, there is nothing which prima facie makes the amount claimed excessive. But before I close on this point, I need to decide whether the other argument by the Applicant on the un-executed Deed of Assignment is feasible?

Deed of Assignment

[19] Doubtless, the Applicant admits in the Deed of Assignment that it owed a sum of Kshs. 51,125,738.53 in the recitals at page 159, i.e. at Clause 2(b). The Applicant has laid a huge reliance on the said Deed of Assignment and confirmed it is willing to be bound by its contents to the Court-that was supposed to be a sufficient demonstration of the bona fides of the Applicant in dealing with this debt and applying for relief. The seeker of equitable relief such as an injunction must show utmost good faith in his application. And a bona fide groom who is seeking the hand of equity on the promise of unexecuted Deed of Assignment in which it has admitted a debt, will not, in the same breath seek to deny the debt on illegality or excessiveness in an application founded on the same Deed. Such would be a dramatic irony! The conduct by the Applicant may not therefore excite kind attention from a court of equity. I am tempted to say something about the advertisements which the Applicant placed in the newspapers in an attempt to sell the suit property. The Debenture in Clause 6 prohibited any sale or attempt to sell the suit property without prior written consent of the 1st Defendant. The Applicant has not placed before the Court any evidence to show the advertisements for sale of the suit property was done with the written consent of the 1st Defendant.

[20] Another important issue; the Deed of Assignment herein is not executed by any of the parties including the Applicant. Considerable time has passed since 2012 when the negotiation seems to have been concluded but the Applicant; despite repeated assurances it is committed to assigning the debt in partial satisfaction of the debt herein has not executed the Deed. What is surprising is that the Applicant wrote a letter dated 25/7/2011 complaining of illegal interest. But ironically went ahead in 2012 to acknowledge the debt and assign a debt owed to them by Mombasa

Municipal Council to the 1st Defendant. In law, the said Deed of Assignment has not created a binding contract between the parties. I agree with Mr. Luseno also that the Deed of Assignment, even if it is enforceable was in addition to and not a substitute of the other securities held by the Bank on the loan herein. Clauses 2 and 3 of the said Deed are clear on that. Equally, the assignment is less than the debt claimed by the 1st Defendant. Even the Applicant who is insisting that the Deed is binding is just using the Deed to persuade the Court to issue estoppel and an injunction yet it is not serious on the assignment. In all fairness, the conduct of the Applicant in the entire process of the purported assignment and the facts of this case is not bona fide. For those reasons, the Deed falls short of becoming a basis for me to issue an injunction. See the case of **MUGAMBI v HFCK LTD (2006) eKLR**.

[21] Going back to the law, a mortgagee would only, in the circumstances of this case, ***be restrained, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him.*** The Applicant has not paid in court the amount claimed or even proposed to pay the sum it admits is due as a sign of good faith. Considering the entire above, the Applicant has not established any prima facie case with a possibility of success. See the case of **GIRO COMMERCIAL BANK LIMITED v MUTESI CA NO 342 OF 2000 (Unreported)**.

Balance of convenience

[22] If I utilize the second test, any land given as security becomes a commodity for sale and its sale is compensable by damages. And I do not find anything which shows the Respondent has violated the law in the exercise of the chargee's power of sale as to impel the Court to issue an injunction despite damages being appropriate remedy. The suit property, even if I go by the advertisements placed by the Applicant are worth Kshs. 17 million (HOMABAY) and 7 million (MOLO). That confirms the submission by Mr. Luseno that the suit property is worth far less than the debt and the more the debt swells due to interest, the more it outstrips the value of the security. In those circumstances, the balance of convenience will tilt toward refusing the relief sought. The upshot is that the application dated 6th May, 2014 is dismissed with costs to the Respondents.

Dated, signed and delivered in open court at Nairobi this 29th day of September, 2014

F. GIKONYO

JUDGE