



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 137 of 2010

A to Z TRANSPORTERS LIMITED ..... 1ST
PLAINTIFF

KEVAL R. PATEL ..... 2ND
PLAINTIFF

HASMUKHLALA VIRCHAND ..... 3RD
PLAINTIFF

SHITAL R. PATEL ..... 4TH
PLAINTIFF

ATUL C. V. SHAH ..... 5TH
PLAINTIFF

SUNIL C.V. SHAH ..... 6TH
PLAINTIFF

- VERSUS -

AFRICAN BANKING CORPORATION LTD. ....
DEFENDANT

RULING

1. Before court is a Chamber Summons application dated 10th March 2010. The application is bought pursuant to Section 3A of the Civil Procedure Act, Cap 21, Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules.

2. The application seeks as the main prayer an order that:-

a. That pending the hearing and determination of this suit, or until further orders of the court, this Honourable Court be pleased to issue an Order of temporary injunction restraining the Defendant either by itself, its servants and/or agents, employees, advocates or auctioneers or any of them or otherwise from doing the following acts or any of them, that is to say selling by public auction or private treaty, advertising for sale, disposing of or otherwise howsoever or completing any conveyance or transfer of any sale or otherwise howsoever interfering with the 1st Plaintiff's ownership of all the properties known

*as L.R. No Mombasa/Block XIV/328 and L.R. No. Mombasa/Block XIV/74 together with the shares and motor vehicles pledged as securities for the facilities advanced or other security or otherwise enforcing the personal guarantees executed by the 2<sup>nd</sup> to 6<sup>th</sup> Plaintiffs for the facility or acting in any detrimental way to the Plaintiffs.*

3. The application is supported by Affidavit of **KEVAL RAMESHBHAI PATEL** dated **10<sup>th</sup> March 2010** with annexures, and is premised on the grounds set out therein.

4. The application is opposed vide a Replying Affidavit by **GREGORY OMUSOLO** dated **6<sup>th</sup> April 2010** with annexures.

5. The brief history of the application is that the same was filed simultaneously with a Plaint on **10<sup>th</sup> March 2010**. The prayers sought in the Plaint are similar with those sought in the application except that there are additional prayers in the suit whose grant would finally determine the matter.

6. From the pleadings in the suit and from the affidavits and submissions of the parties, it is not in doubt that the Defendant offered various specified banking facilities to the 1<sup>st</sup> Plaintiff Company, and the 2<sup>nd</sup> to 6<sup>th</sup> Plaintiff provided guarantees for the same. It is also clear that soon, the relationship between the 1<sup>st</sup> Plaintiff and the Defendant deteriorated due to misunderstanding on, among other things, interests chargeable on the facilities and also on the terms of a restructuring of the facilities which was proposed and later abandoned.

7. The application was first heard under Certificate of Urgency on 10<sup>th</sup> March 2010, and an interim order of injunction was issued by the court. That order has since been extended to this day. What, however, is not clear to me is the urgency in the application. This is so because the suit property is not under any threat of sale, nor has the Defendant issued a Statutory Notice to exercise its rights to sell the suit property under the charges. However, the Applicant submits that the urgency is that they are ready to redeem the property but the 1<sup>st</sup> Defendant is not telling them the exact figure which is due. Because the facilities continue to accrue interests, therein then, as far as the Applicants are concerned, lies the urgency.

8. Mr. Odera Counsel for the Applicants submitted that in respect of the bank facilities the subject matter of this application, the Applicant admits owing the Plaintiff a sum of Kshs.36,000,000/= or thereabouts, while the Defendant insists that it is owed more than Kshs.53,000,000/= by the Plaintiff. In the cause of his submissions Mr. Odera stated that they are before the court pursuant to Section 72 (2) of the repealed Registered Land Act (R.L.A.) Cap 300. That Section empowers the chargor at any time if it wishes to redeem the suit property. However, in the Chamber Summons application before the court, the Counsel has not stated that they are in court pursuant to that Section. However, it is not necessary to state that the Applicant is in court pursuant to Section 72 (2) of the Registered Land Act. Any court should take judicial notice that a chargor can want to redeem his property of any time. However, the problem with Mr. Odera's submissions on this regard is that there is no supporting prayer in the Chamber Summons before the court. The application seeks a specific prayer of injunction. Of course the 4<sup>th</sup> prayer is an omnibus prayer seeking any other orders that the court may deem fit. That notwithstanding I will for the time being restrict myself to the main prayer, which, as I have already stated, seeks injunctive orders. In any application seeking an injunctive order the underlying presumption is always that the suit property is under some kind of immediate threat. In this case, the threat would be the possibility of the Plaintiff selling the suit properties. However, from the pleadings, and the affidavits of the parties, and from the submissions of parties it is clear that there is no immediate threat to the suit property. At paragraph 4 (b) of the Replying Affidavit of GREGORY OMUSOLO, the deponent states that the Respondent Bank has not sent a Statutory Notice under the Registered Land Act. The Applicant has not demonstrated that there is a threat to the suit property. If that is the case then filing this application under Certificate of Urgency was improper, and amounted to an abuse of the process of this court.

9. This then leads to me to issue raised by Mr. Odera, that is, that the Applicants wish to redeem the suit properties and all they need is to know from the Applicant the exact amount now due. In my view,

that is a legitimate quest. The chargor is at any time allowed to redeem the suit properties upon paying the advanced sums. The issue, then, is what is the amount now due? That is what is clearly disputed. The Applicants admits owing at least Kshs.36 million, while the Defendant demands more than Kshs.53 million. What then are we to do under the circumstances? The rational thing for a court of law to do in the circumstances is to allow the parties to prove their positions by way of oral evidence or by trial. Since a trial takes time the rational thing to do would be to issue an injunction and secure the suit properties pending the trial of the issues in dispute. This would be the position to be taken by this court if the suit properties were under any kind of threat.

10. The Applicant's desire to redeem the suit properties should not be fettered, but any such redemption must be based either on a sum agreed by the parties to be due to the Defendant, or based on a sum found by court after a legal process to be due to the Defendant. The court has no right to impose any figure or sum upon the litigants. That is an issue to be determined after the full hearing. Indeed prayer (1) of the Plaint fully envisages such a situation. It states:-

***“. . . the Plaintiffs jointly and severally pray against the Defendant for a declaration that the Plaintiffs total and final indebtedness to the Defendant to the Defendant is the sum of Kshs.42,892,171.06.”***

11. That declaration is not one of the prayers in the current application, and indeed cannot be made except after a full trial.

12. I have considered the entire application and I have found that none of the principles for the grant of injunction as specified under the Giella – Vs – Cassman Brown have been established by the Applicant. As for the purposes of granting the prayer for injunctions, this application is premature. As for the purposes of allowing the Plaintiffs to redeem the suit properties, a trial court must still establish the sum due as parties are not in agreement on the issue. In the case of LABELLE INTERNATIONAL LIMITED & ANOTHER – VS – FIDELITY COMMERCIAL BANK & ANOTHER, CIVIL CASE NO. 786 OF 2002, the Court re-stated the now long established legal rule that *“when part of amount claimed is admitted or proved to be due, a chargor cannot be restrained by an injunction.”*

13. For the foregoing reasons I dismiss the Chamber Summons application dated 10<sup>th</sup> March 2010.

14. In the alternative I allow the application as prayed on the condition that **Kshs.42,892,171.06** admitted by the Plaintiff in the Plaint as owing to the Defendant is paid to the Defendant within **30 (thirty) days** from the date of this Ruling, pending the determination in a full trial of the exact amount owing.

15. The cost of this application shall be for the Defendant/Respondent.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 30<sup>TH</sup> DAY OF MAY 2013**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Ithondeka for the Plaintiffs

No appearance for the Defendant

Teresia – Court Clerk