



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Suit 398 of 2011

THOMAS NYAKAMBA OKONG'O.....PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA LTDDEFENDANT

RULING

Before the Court is an application dated 14th September, 2011 brought by way of Notice of Motion seeking in the main an order that this Honourable court be pleased to issue a permanent order to restrain the Respondent, its servants, agents, and or representatives from selling or transferring or interfering with the plaintiff's residential property known as Njoro/Ngata Block 1/2074 in the name of Thomas Nyakamba Okong'o until this suit is heard and determined.

The motion is supported by an affidavit sworn by **Thomas Nyakamba Okong'o**, the plaintiff herein on 14th September, 2011. According to the deponent, he was employed by the defendant in 1994 as Acting Chief Manager Personnel and Manpower Development for the Managing Director. In July 2005 he applied for a house loan of Kshs. 1,600,000.00 which application was approved and the repayment rate was Kshs. 5,840.00 per month with interest rate of 4% per annum. As security for the said loan he charged his property known as Title No. Njoro/Ngata Block 1/2074 in favour of the defendant and a legal charge was registered against the title on 26th August 2005. The legal fee for the said charge was indicated by the defendant's legal office and company secretary's department to be Kshs. 38,900.00. On 14th September 2005 the defendant's Chief Manager Human Resources Development instructed the Manager Mumias Branch to issue a Banker's cheque of Kshs. 1,600,000.00 for the house loan and vide a letter dated 6th October 2005 the defendant's legal officer confirmed that the advocate's fee note was being attended to. However, on 17th January 2007, the plaintiff was informed of the defendant's Board's decision to retrench him from employment with effect from 26th January 2007 and on 22nd August 2008 he was issued with a certificate of service. Then on 28th August 2009, the Defendant demanded from the plaintiff the outstanding liabilities of Kshs. 1,518,286.50 arising from the said charge. On 9th August 2009, the defendant's instructed valuers valued the charged property in the sum of Kshs. 5,000,000.00. On 18th July 2011 the defendant through Kolato Agencies served the plaintiff with a 45 days redemption notice in respect of the charged property. This was followed on 8th July 2011 by a notification of sale of the said property. The same day the defendant demanded from the plaintiff a sum of Kshs. 1,730,336.05. He had in meantime on 22nd June 2011 requested the defendant to allow him repay the outstanding loan

at the rate of Kshs. 10,000.00 per month. He had on 10th June 2011 received a letter from an advocate representing all the retired staff indicating that his retirement benefit was Kshs. 12,620,212.00. On 5th September 2011, the said property which is the plaintiff's residential property was advertised for sale. According him such action would subject him and his family to mental torture since they reside in the said premises and hence suffer irreparable and substantial loss if the orders sought herein are declined. He therefore seeks from the court the injunctive orders sought as well as an order allowing him to repay the loan by monthly instalment of Kshs. 10,000.00.

The application was opposed by an affidavit sworn by **Samuel M. Kibugi**, a legal officer of the defendant, on 6th December 2011. According to the deponent paragraphs 2 to 16 and 18 of the supporting affidavit are true. However, the contents of paragraph 17 alleging the plaintiff's entitlement to Kshs. 12,620,212.00 as retirement benefits are untrue, baseless, untenable and without any merits whatsoever as the said sum is not only speculative, but merely based on an alleged advocate's opinion. According to the deponent, the plaintiff was duly paid his terminal benefits and there are no dues owing from the defendant to the plaintiff. The allegation by the plaintiff that he stands to suffer irreparable and substantial loss is dismissed by the deponent who deposes that it is in fact the defendant who stands to suffer great loss and damage since the loan facility which is not being serviced, will continue to accrue and accumulate interest and thereby diminish the value of the security held by the defendant. It is further deposed that if the plaintiff succeeds in his suit, a monetary decree would be an adequate remedy since the defendant, being a bank is capable of meeting such an award. Since the plaintiff has defaulted, it is contended that the defendant's statutory power of sale has crystallised and the proposal to settle the outstanding amount by way of monthly instalment of Kshs. 10,000.00 which the defendant rejected is unacceptable to the defendant as it would take 14 years, according to the deponent, to liquidate the debt which stood at Kshs. 1,730,336.05 as at 7th July 2011. According to the deponent the plaintiff's application does not meet the principles set out in **Giella vs. Cassman Brown Ltd [1973] EA 358** to warrant an injunctive order.

On 22nd November 2011 the Court directed the parties to file skeleton submissions. On 31st January 2012 when this matter came up for mention, the plaintiff's advocate informed the court that they could not file their submissions as the file was misplaced, Accordingly the matter was stood over to 12th March 2012. On the said day the plaintiff had not filed his submissions but the matter was adjourned on the ground that the court was engaged in other matters. Come 29th March 2012, the only submissions on record were those filed by the defendant on 21st March 2012. **Mr. Oira**, learned Counsel for the plaintiff who appeared after the matter had earlier orders made informed the court that he was relying the documents on record after which the matter was reserved for ruling.

According to the defendant, through his submissions by **Mr. Kimondo**, its learned counsel, the applicant has not established a prima facie case since neither the indebtedness nor the service of statutory notice is disputed. Reliance is placed on **Giella vs. Cassman Brown (supra)** and **Aikman vs. Muchoki [1984] KLR 353**. It is further admitted that the refusal by the defendant to allow the plaintiff settle the outstanding amount by instalment cannot be a ground for an injunction since the plaintiff is bound by the terms of the charge and it is not the business of the court to re-write a contract between the parties as parties are bound by the terms of their contract in the absence of coercion, fraud or undue influence which are not alleged in this case. On this proposition reliance is placed on **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another Civil Appeal No. 95 of 1999** and **Caesar Njagi Kunguru vs. Kenya Commercial Bank Ltd HCCC No. 1543 of 2000**.

The plaintiff's claim that he is entitled to Kshs. 12,620,213.00, it is submitted, is not only denied by the defendant but is a mere claim which has not been adjudicated by the court until which time it remains a mere allegation. The defendant gathers support for this submission from **Elijah Kipngeno Arap Bii vs. Kenya Commercial Bank Limited HCCC No. 324 of 2000**. The defendant therefore submit that the plaintiff has not made out a prima facie case.

With respect to irreparable loss it is submitted that the value of the charged property is given as Kshs. 5,000,000.00 and it is not contended that the suit premises is of unique nature and that the applicant cannot acquire a similar property if he is paid damages. The mere fact that he alleges that his family

resides therein, it is submitted, is of no legal consequence since on the same being charged it immediately became a commercial commodity in the event of any default on his part. The defendant relies on **Middle East Bank Kenya Ltd vs. Milligan Properties Ltd Civil Appeal No. 251 of 1998**. It is further submitted based on the same authority that the defendant should not be stopped from exercising its statutory power of sale in view of the fact that the loan facility will continue to accrue and accumulate interest and thereby diminish the value of the security held by the Defendant thereby occasioning the Defendant great loss and damage. Accordingly, it is submitted that an award of damages would be an adequate remedy and the defendant, which is a bank, would be able to meet such an award.

With respect to the last consideration of the balance of convenience, it is submitted that since the debt is not being serviced, the security held will be diluted owing to further accrual of interest thereby diminishing the security further to the detriment of the defendant. The plaintiff will likewise be disadvantaged by ending up paying more than the sum presently due. Consequently, it is submitted that the balance of convenience tilts in favour of the defendant hence the need to decline the prayer sought.

I have considered the application, the affidavits both in support of and in opposition to the application and the submissions on record. Having done that, I form the following view of the matter.

The conditions necessary for the grant of interlocutory injunction in this country is generally accepted to be the ones laid down in **Giella Vs. Cassman Brown & Co. Ltd. [1973] EA 358** in which Spry, VP who delivered the leading judgement of the Court stated as follows:

“The granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially...The conditions for grant of an interlocutory injunction are now 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”.

The foregoing conditions are, however, not exhaustive. At an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties. The remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Injunction being an equitable remedy, the court is enjoined to look at the conduct of the supplicant for the injunctive orders, the surrounding circumstances whether the orders sought are likely to affect the interests of non-parties to the suit, the issue whether an undertaking as to damages has been given as well as the conduct of the Respondent whether or not he has acted with impunity. The Court is also, by virtue of section 1A(2) of the Civil Procedure Act, enjoined to give effect to the overriding objective as provided under section 1A(1) of the said Act in exercising the powers conferred upon it under the Civil Procedure Act or in the interpretation of any of its provisions. One of the aims of the said objective as interpreted by the Court of Appeal is the need to ensure equality of arms, the principle of proportionality and the need to treat all the parties coming to court on equal footing.

In determining this application, I am well aware that at this stage the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a prima facie view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.

Therefore, the first issue for consideration by the Court is whether a prima facie case has been made out. It was held by the Court of Appeal in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** that:

“A 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...The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show 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...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case 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 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 but 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”.

In this case the indebtedness is not disputed and neither is the service of statutory notice. The 1st issue raised by the plaintiff is that it intends to pay the outstanding amount by way of monthly instalment of Kshs. 10,000.00/. It has not contended whether there was a provision in the contract between the parties allowing the plaintiff to renegotiate the terms thereof in case of difficulties occasioned by such events as retrenchment or the fact that the plaintiff’s economic fortunes have taken a nosedive. In **Caesar Njagi Kunguru vs. Kenya Commercial Bank Limited NBI HCCC No. 1543 of 2000** Ringera, J (as he then was) held that it is not the function of the courts to modify a party’s contractual obligations by ordering repayment of the loan in a manner different from the one covenanted in the charge until his business improves. Courts, the learned judge opined, exist to interpret and give effect to the contracts which litigants have freely entered into but it is not part of the court’s mandate to re-write or otherwise modify those contracts for the reason of changed economic or other circumstances. In **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd** (supra) the Court of Appeal stated that a court of law cannot rewrite a contract between the parties as the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. The Court cited **Fina Bank Limited vs. Spares & Industries Limited Civil Appeal No. 51 of 2000** where it was held that it is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain. The Court’s role in contractual matters is now well settled. It is not the business of the court to read extraneous issues into a contract entered into with sound legal mind. The general law is that as regards contracts between persons not under a disability, or at arms length, the courts of law should maintain the performance of contracts according to the intention of the parties and should not override any clearly expressed intention on the basis that the judges know the business of the parties better than the parties themselves. Indeed in construing a contractual document, the grammatical and ordinary sense of the words is to be adhered to, unless such construction would lead to absurdity, or some repugnance or inconsistency with the rest of the documents, in which case the grammatical or ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency but no further. See **John Njoroge Michuki vs. Kenya Shell Limited Civil Appeal No. 227 of 1999; Walls vs. Smith [1882] 21 Ch.D 243 at 266; D N Njogu & Company Advocates vs. National Bank of Kenya Limited Nairobi (Milimani)**

HCMCC No. 730 of 2006 [2007] 1 EA 296.

It follows therefore that the issue of the plaintiff's intention to settle the outstanding admitted sum by way of terms other than the contractual ones does not establish a prima facie case.

The other issue raised is the plaintiff's entitlement to Kshs. 12,620,213.00 as advised by his advocate. As was rightly stated in **Elijah Kipngeno Arap Bii vs. Kenya Commercial Bank Limited** (supra), a legal claim, until and unless admitted or proved is no more than a hope for money. It is a contingent asset or, in the language of the learned, a chose in action which cannot be offset against an existing liability. The borrower cannot be heard to say, he does not owe the lender money because there is a chance that a Court of Law may at some unknown time in the future adjudge the lender to be indebted to him in a sum equal to or exceeding his present liability.

I therefore find that the plaintiff's alleged entitlements aforesaid does not establish a prima facie case for purposes of restraining a chargee from exercising its statutory power of sale which has admittedly accrued.

The failure to establish a prima facie case accordingly means that there is no need to consider the other two conditions under the **Giella vs. Cassman Brown** principle since the said conditions are sequential.

However, I will all the same consider the same for completeness of the record. The value of the charged property is placed at Kshs. 5,000,000.00. No allegation is made that the defendant is incapable of making good that loss were the plaintiff to succeed in his suit. However, the plaintiff contends that the charged property is the family's residential property. Whereas in appropriate cases, the fact that the property being is sold is a residential or family property may be considered in deciding whether or not to grant an injunction that consideration must be weighed against the fact that once a property is given as security, it becomes a commodity for sale and there is no commodity for sale to which a value cannot be attached. Otherwise financial institutions would be reluctant to extend financial accommodation to genuine borrowers whose only security is their place of abode. In other words, the fact that the property is a residential home as well is just one of the many factors that the court takes into account. In **John Nduati Kariuki T/A Johester Merchants vs. National Bank of Kenya Ltd Civil Application No. Nai. 306 of 2005 [2006] 1 EA 96** the Court of Appeal held as follows:

“A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant having obtained a large amount of those funds and had full benefit of it and having offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents, cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capacity has not been challenged”.

Accordingly, I am unable to agree with the plaintiff that in the circumstances of this case he stands to suffer irreparable loss.

With respect to the issue of the balance of convenience, the defendant's contention that the loan is not being serviced has not been controverted. I therefore agree with the decision in **Middle East Bank Kenya Ltd vs. Milligan Properties Ltd** (supra) that if the realisation of security was kept in abeyance there is a likelihood of the security being diluted and the value of the suit property could depreciate even further. I also agree with the submissions made on behalf of the defendant that since there is no indication that the plaintiff's financial position is likely to improve in the near future, it is in the interest of the plaintiff that the property be realised at this stage to avoid further escalation in interest.

In conclusion I wish to draw litigants' attention to Pall, J's decision (as he then was) in the case **Muhani & Another vs. National Bank Of Kenya Ltd [1990] KLR 73** in which the learned judge stated as follows:

“The mortgagor who has given an express power of sale cannot by starting a suit perhaps a

perfectly hopeless suit derogate from that which it has in express terms conferred upon the mortgagee by the instrument namely a statutory power of sale and to hold otherwise would be simply to tear up the instrument which contains the contract agreed upon by the parties...The very object of the legislation granting a chargee a statutory power of sale would be negated if the courts interfere with his statutory or contractual powers unless, of course there is an allegation of fraud or improper exercise of the power of sale”.

It follows that the Notice of Motion dated 14th September 2011 lacks merit and it is dismissed in its entirety with costs to the defendant.

Ruling read, signed and delivered in Court this 9th day of May 2012.

G.V. ODUNGA
JUDGE

In the presence of:

Ms. Kamende for Mr. Ratemo for Plaintiff.

No appearance for Defendant.