



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 1361 of 1999

AFRICAN AIRLINES INTERNATIONAL LIMITED.....PLAINTIFF

VERSUS

**SOUTHERN AFRICAN TRADE & DEVELOPMENT
BANK (THE P.T.A BANK).....DEFENDANT**

R U L I N G

1. By a Notice of Motion dated 27th July, 2012 brought under the provisions of Order 40 Rules 2 & 4 Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, the Plaintiff has sought for orders to restrain the Defendant from recalling, taking possession, selling or in any way dealing with the property known as LR No.9042/583 Nairobi and for maintaining the *status quo* pending the hearing and determination of the suit. The application is premised on the grounds that the Defendant appointed a Receiver Manager without the Plaintiff Directors' knowledge, that the Defendant does not have sufficient cause to warrant the valuation of the suit premises, that there are pertinent issues in the main suit to be determined and that the suit would be rendered nugatory if the orders sought were not allowed. The application was supported by the affidavit of Captain Musa Hassan Bulhan sworn on 27th July, 2012.

2. The Plaintiff contended that the Defendant through the receiver had sought to value the suit property with a view to sell the same, that the Plaintiff was not the mortgagor as had been properly found by Hon. Njagi J in his ruling of 21st June, 2004 which had not been appealed against, that there are other persons in the premises who have been in possession as such for over 12 years now and their rights will be affected if the status quo was not maintained.

3. The Defendant opposed the application through Grounds of Opposition dated 30th July, 2012 and a Replying Affidavit by Bernard Rop sworn on 1st August, 2012. The Defendant contended that the application was an abuse of the court process, that the matters that form the basis of the matter had been adjudicated upon and determined by the court and that no new claim had arisen nor the Plaintiff amended for the court to once again consider an application for injunction. It was contended that the Plaintiff had previously filed applications that had been dismissed by the court and that the application was therefore an abuse of the court process.

4. I have carefully considered the Application, the Supporting Affidavit, the Grounds of Opposition and the Replying Affidavit. I have also considered the ruling of the court in **Nairobi Civil Appeal No. 80 of 2003** and the oral submissions by counsel for the litigants. In considering an application for an injunction, the principles are well set out in the case of **Giella v Cassman Brown (1973) EA 358**. To the effect that

an applicant must show a prima facie case with a probability of success, that an injunction will not normally be granted unless the applicant might otherwise suffer irreversible damage; and that when the court is in doubt, it will decide the application on the balance of convenience.

5. In the oral submission made by learned counsel, Mrs. Mwenesi for the Plaintiff submitted that the *status quo* ought to be maintained in order for the matter to be referred to arbitration as the Court of Appeal had found. Mr. Chacha for the Defendant referred the court to page 12 of the ruling of the Court of Appeal in C.A No. 80 of 2003 to which the court recognized that there was an application made in October, 2010 to refer the matter to arbitration which had however, not been followed up. He further submitted that reference to arbitration can only be made if the circumstances permitted and that in any event, the Plaintiff never intended to pursue arbitration as it would have already done so.

6. I have considered the Affidavits on record and submissions of counsel. I have seen paragraph 3(a) to (c) of the Replying Affidavit. Therein the Defendant has contended that on 24th September, 1999, 17th July, 2000 and 23rd January, 2001 the Plaintiff had made similar applications for injunctions which were all dismissed. This was recognized in the judgment of Njagi, J in **High Court Civil Case Nairobi Civil Case No. 544 of 2002 (O.S)**. wherein at pages 7– 8 of that judgment he stated of this suit:-

“Thereafter African airlines failed to repay the amount secured in the charge and debenture and the bank exercised its rights under the debenture and appointed receivers on 29th July, 1999. Thereafter African Airlines filed HCCC No.1361 of 1999 seeking to lift the receivership and also tried to stop the bank from exercising its right of sale of the suit premises.

Several applications were filed in that suit. The first one was filed on 24th September, 1999 seeking an injunction to restrain the bank from selling the property. It was dismissed by the court on 20th April, 2000. A second application of a similar nature was filed on 17th July, 2000. It was similarly dismissed on 23rd January, 2001. A third one was filed on 23rd January, 2001 seeking an injunction to restrain the bank from disposing of or otherwise dealing with the suit property. It was dismissed on 17th January, 2002. As of now, there is no order barring the bank from exercising its power of sale. The necessary statutory notices have been issued, but the Respondent is residing on the property and has refused to vacate.”

The upshot of that judgment, the referred to rulings and the Court of Appeal Judgment above mentioned is that as regards applications for injunction, the matter has been conclusively determined by courts of competent jurisdiction and that the matter was now settled between the parties. I believe I can safely conclude that the issue of interlocutory injunction in this matter may res-judicata as between these parties unless there is new material to warrant any such an application. I see no new material before me to warrant yet another injunction application.

7. As regards maintaining the status quo pending arbitration, the Court of Appeal in **Civil Appeal No. 80 of 2008** (supra) observes at page 14 :-

“...a court is not precluded from hearing an injunction application in a matter subject to arbitration. An injunction is merely intended to preserve the subject matter of a dispute pending determination of that dispute and does not, in our view prejudice any party’s right in the subject matter being only preservatory in nature. The dispute is still pending and the parties are not precluded from referring the dispute to arbitration if the circumstances of the case so permit.”

The parties are at liberty to make a reference to arbitration should the circumstances permit. In this instance, the parties decided to proceed to and have the matter determined in a court of law. The Court of Appeal was alive to this fact when it stated at page 12 of its judgment thus:-

“...the parties had chosen a forum before which this dispute would be resolved. The loan facility agreement had an arbitration clause providing for any of the disputes between the parties relating to the loan facility to be referred to arbitration. The Respondent was not opposed to a reference and as

stated earlier, in its grounds of opposition it wanted the superior court to hear the injunction application but refer the suit to arbitration pursuant to the provisions of Section 6 of the Arbitration Act 1995.”

8. The issue of arbitration has been alive since 2010. The Court of Appeal did allude to it in its aforesaid judgment. The Plaintiff did not take any steps to pursue that angle until now. I think it is too late. It took a loan which it has failed to repay. It filed a suit and has for a very long time not taken effective steps to have it determined and is only woken up by the Defendant's efforts to recover its outlay. I think in the circumstances of this case, it will not be in the interests of justice to grant any of the orders sought. However, I note that the Defendant is not averse to the granting of the injunction on terms. The Defendant has asked for a deposit of US\$800,000 which Mrs. Mwenesi thought to be onerous. The amount claimed is in excess of US\$ 1 million. In the circumstances, I grant an injunction in terms of Prayer 4 of the Notice of Motion dated 27th July, 2012 on condition that the Plaintiff pays to the Defendant US\$800,000 within 7 days in default of which the orders shall stand discharged without the necessity of any other order to that effect. However, in the circumstances of this case, I will award the costs of the application to the Defendant.

DATED and delivered at Nairobi this 28th day of September, 2012.

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A. MABEYA
JUDGE