



REPUBLIC OF KENYA

High Court at Meru

Civil Suit 122 of 2012

MERU MWALIMU CO OPERATIVE

SAVINGS AND CREDIT SOCIETY LTD.....PLAINTIFF/APPLICANT

VERSUS

THE CO OPERATIVE BANK OF KENYA LTD.....DEFENDANT/RESPONDENT

RULING

The plaintiff filed a notice of Motion dated 20th June 2012 under certificate of urgency brought under order 51 Rules 1 and 3, Order 40 rule 2, 3, 3 1 and 4 of Civil Procedure rules and section 1A, 1B, 3A and 63(e), of Civil Procedure Act seeking to be granted injunction orders restraining the defendant its agents, servants and /or receiving or recovering from the plaintiff's account an amount of loan interest in excess of the rate of 10.5% chargeable on reducing balance as per the loan agreement made between the parties on 26th February 2011 pending the hearing and determination of the suit. That on 21st June,2012 court certified plaintiff's application urgent and granted orders sought under interim terms pending interpartes hearing.

The defendant immediately thereafter filed a Notice of Motion under certificate of urgency dated 3rd July 2012, brought under Order 40 Rule 7, Order 51 Rule 1,3 and 15 of Civil Procedure Rules and Section 1A, 1B,3,3A, and 63(e) of Civil Procedure Act seeking *inter alia* an order to stay the interim injunction orders granted by court on 21st June 2012 solely on the ground that the plaintiff obtained the orders by suppression, misrepresentation and/ or non-disclosure of material facts to the honourable court. The defendant's application was filed on 4th July 2012 exactly a day before the date set down for hearing of the plaintiff's application for orders of injunction which had been set earlier on for interpartes hearing.

The basis of the defendant's allegation that the orders were obtained by suppression, misrepresentation and/or non-disclosure of material facts is because the defendant contend that the plaintiff in obtaining the exparte orders deliberately and conveniently failed to disclose to the court the existence of a loan agreement dated 26th February 2011.

On the other hand the plaintiff denies having ever concealed any material facts from the court and contends that he had placed all material facts and documents before the court necessary for the court to make a just decision and that the documents included the letter of offer dated and signed on 26th February 2011 between the defendant and the plaintiff, which letter forms the contract as it carries the negotiated and agreed terms and conditions of contract subject matter of the suit herein. The plaintiff further avers that the loan agreement alluded to above by the defendant has never been in its possession and that the same is solely kept by the defendant and as such there was no way that it could have produced the

same. The defendant in turn alleges that the loan agreement dated 26th February 2011 supersedes that letter of offer dated 25th February 2011 and that the same was merely executory.

The gist of these two documents is as follows: The plaintiff claims to have entered into a written loan agreement on or about 26th February 2011 where the defendant agreed to advance to the plaintiff a loan or financial facilities in the sum of Kshs. 420,000,000/- payable in 72 consecutive monthly installment of Kshs. 5,833,334/= at an interest rate of 10.5% calculated and charged monthly on a reducing balance basis. The said loan was disbursed to the plaintiff's account on or about 28th February 2011 and the plaintiff commenced repayments of the loan as per terms of the said loan agreement.

The plaintiff avers in total breach of the loan agreement, the defendant without any justifiable cause arbitrary increased rates from the expressly agreed rate of 10.5% per annum to 20.5% from around month of November 2011. The defendant on the other hand states that it was an express term of the loan agreement dated 26th February 2011, that the defendant reserves the right to change the interest on the basis on which the interest is calculated without reference or notice to the plaintiff.

The defendant further avers that between the loan agreement dated 26th February 2011 and the subsequent letter of offer dated 25th February 2011, the letter of offer was an precursory contract that was superseded upon execution of the loan agreement dated 26th February 2011, and that accordingly the loan agreement is the governing contract between the plaintiff and the defendant. The plaintiff on the other hand contends that the letter of offer is the superior contract document between the parties and that the terms and conditions in the letter supersede any other provisions contained in the general loan agreement.

Condition two of the loan agreement under a sub-heading titled "**general conditions**" provides as follows:-

"The borrower shall pay interest on loan amount outstanding at the rates herein specified or at such other rates as the lender may in its sole direction decide and shall pay such interest in arrears (as well after or before any demand or judgment)

Paragraph 2 of the letter of offer provides as follows:-

"It is hereby agreed by and between Meru Mwalimu Sacco Society Limited (the borrower) and Cooperative bank of Kenya (the bank) that in the event of any inconsistency between the terms and conditions of this letter and the Banks general terms and conditions the terms and conditions of this letter shall apply".

This court has heard oral submissions made by Mr. Nyaga learned advocate for the plaintiff and Mr. Sichangi learned Advocate for the defendant. This court has carefully considered the submissions. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The court has further considered the cited authorities filed by both Counsel.

The issue for determination by this court is whether the plaintiff and defendant have laid sufficient basis for the court to grant interlocutory injunctions sought by the plaintiff and/or to stay the interim injunction orders granted *ex parte* against the defendant

The applicant/plaintiff in an application for injunction is required to satisfy the court that it has met the principles of granting an injunction as set out in the case of ***Giella vs Casman Brown & Co. Ltd (1973) E.A 358***. It was held in that case that an applicant seeking injunctive orders has to show that he has a *prima facie* case with probability of success.

It was also held in the said case that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. Finally, when court is considering an injunction application, if it is in doubt, it ought to decide the application on balance of convenience.

On the other hand court can vary or set aside an order of injunction where the court is satisfied the injunction order was obtained through concealment of material facts or through misrepresentation or non-disclosure of material facts or when the injunction orders are used to violate rights of others.

In this application I was referred to several authorities which authorities I have carefully considered.

In the case of *Commercial carpets Ltd and another v Cooperative Bank of Kenya Ltd [2009] IEA 106* in which case a prima facie case was defined as follows:

“A prima facie case in a civil application includes, but is not limited to a “genuine and arguable” case. It is a case 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 as to call for an explanation or rebuttal from the latter. Mrao Ltd V First American Bank of Kenya Ltd and others(2003) KLR 125;(2002) LLR 3801(CAK) adopted.”

Besides the above in the case of *Okliombo V County council of Narok and another [1991] KLR 561* Hon Justice Githinji, as he then, was held:-

“1. Where there is a plain and uncontested breach of a clear covenant not to do a particular thing and the covenantor promptly begins to do what he promised not to do, the issue of irreparable harm and balance of convenience does not arise and the covenantor should be restrained before the trial”

In addition to the above in the case of *Central Bank of Kenya V Uhuru Highway Development Ltd & 4 others (2000) KLR 382*, court of appeal state as follows:

“ The line of approach to the exercise of the court’s discretion whether or not an interlocutory injunction should be granted is that stated by Lord Denning MR in Hubbard V Vosper(1972) ALL ER 1023 at 1029.

In considering whether to grant an interlocutory injunction, the right course for a Judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint on the defendant but leave him free to go ahead..... The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.”

The advocates herein have in their submissions raised various issues. Most of the issues are issues to be determined on the trial of the suit but not at the interlocutory stage.

From the material placed before this court in this application, I am satisfied that the applicant has established a prima facie case.

It is not disputed that in the letter of offer it is clearly stated that in event of any inconsistency between the terms and conditions of the letter and the banks general terms of conditions, the terms and conditions of the letter shall apply. From the above it appears that there exists a right which has apparently been infringed by the opposite party and calls for rebuttal or explanation. This can only be rebutted or explained at the time of trial.

On the other hand if orders of injunction are not granted the plaintiff would suffer irreparable loss and damage by being charged higher interest contrary to what the letter of offer indicated and this may lead to the plaintiff’s business collapsing. That if the orders are not granted and the defendant continues to charging higher rates of interest the whole object of the plaintiff’s suit would be defeated.

Having carefully considered the plaintiff’s claim and the defendant’s defence, and the nature of the suit the best course is to grant injunction so as to preserve the subject matter and ensure that if the plaintiff succeed the suit won’t be rendered nugatory.

On the issue of the plaintiff's suit being not property before this court and being not properly filed; this court find that under Article 159(2) (d) of the constitution of Kenya 2010 the same cannot be defeated on grounds of procedural technicalities.

I therefore find that the plaintiff has demonstrated that it has a strong case which justify granting of orders of mandatory injunction. I therefore grant orders as follows:

- 1. An order of injunction be and is hereby issued restraining the defendant, its agents, servants and/or employees from charging and /or receiving or recovery from the plaintiff's account an amount of loan interest in excess of the rate of 10.5% chargeable on reducing balance of the loan agreement made between inter parties on 26/2/2011 pending hearing and determination of this suit.***
- 2. The defendant's application to stay the interim injunction orders granted to the plaintiff on 21st June,2012 be and is hereby refused.***
- 3. The plaintiff is awarded cost of the Notice of Motion dated 20th June 2012 and 3rd July 2012.***

Dated and delivered at Meru this 11th day of October 2012

**J. A. MAKAU
JUDGE**

DELIVERED IN OPEN COURT IN PRESENCE OF

- 1. Mr. Kaumbi hb Mr. Nyaga for applicant/plaintiff***
- 2. Mr. Simon Wekesa hb Mr. Sichangi for the defendant/respondent***

**J. A. MAKAU
JUDGE**