



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 891 of 2009

DICK MAINA GITHAIGA..... PLAINTIFF

VERSUS

IDB CAPITAL LTD.....1ST DEFENDANT

D.K. MWANGI T/A/ KENYA SHIELD AUCTIONEERS.....2ND DEFENDANT

RULING

This application is brought by a Chamber Summons dated 9th December, 2009 and taken out under **Order XXXIX Rules 1(a) and (b), 2 and 9** of the **(old) Civil Procedure Rules**, and **Sections 3A and 63(e)** of the **Civil Procedure Act**. The Applicant thereby prays for an interlocutory injunction to restrain the Defendants from inter alia, selling, disposing or alienating the property pending the hearing and determination of this suit.

The application is supported by the annexed affidavit of the Applicant, and is based on the grounds that no amount is outstanding from the Applicant as the Primary debt has been settled in full, but the Defendants have ignored to issue an accurate and true account from which the Applicant's indebtedness can be determined. The Applicant therefore contends that the attempted sale is premature as the amount of indebtedness is yet to be ascertained from the accounts maintained between the parties.

To that application, the 1st Respondent filed a replying affidavit sworn by Judith Omachar, its Credit Officer, on 15th April, 2010. The deponent avers in the said affidavit that the Applicant has also sued the 1st Respondent in **HCCC No. 2153 of 2000** at Milimani in which accounts are an issue. The application for injunction in the said suit was dismissed with costs and the 1st Respondent herein allowed to proceed with the sale of the company's assets and other securities. The deponent further avers that the 1st Respondent has always furnished the Applicant with statements of account including sale of assets update.

At the oral canvassing of the application, Ms. Mumbi appeared for the Applicant while Mr. Chege appeared for the Respondent. After considering their respective submissions in the context of the pleadings, I find that this application is primarily concerned with accounts. It is now trite law that a dispute as to the amounts due is not a ground for the grant of an interlocutory injunction. A mortgagee will not be restrained from exercising his power of sale merely because the amount due is disputed.

In the case of **GIELLA v CASSMAN BROWN & CO. LTD [1973] E.A. 358**, the then Court of Appeal for East Africa laid down the principles to be applied in considering whether to grant an interlocutory injunction or not. These are-

- (a) An Applicant must show a prima facie case with a probability of success.**
- (b) 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.**
- (c) If the court is in doubt, it will decide an application on the balance of convenience.**

I note from the plaint filed herein that one of the prayers sought by the Applicant is general damages for breach for contract. This is a clear indication that the Applicant would be contented if he were to be compensated in damages. Apart from pleading the dispute on the amounts due and payable, which disqualifies the grant of an interlocutory injunction, the Applicant's plea for damages flies right in the face of the 2nd condition since the Applicant can be adequately compensated by damages.

By reason of the foregoing, the Applicant has not satisfied the conditions for the grant of an interlocutory injunction and this application is hereby dismissed with costs.

L. NJAGI
JUDGE

DATED and DELIVERED at NAIROBI this 20th day of November, 2012.

MUTAVA
JUDGE