



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 424 of 2008

LEAH NYAMBURA MBURUPLAINTIFF/RESPONDENT

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT/APPLICANT

RULING

When the application dated 22nd September 2008 came up for hearing on 29th September 2009, only counsel for the Plaintiff/Respondent attended Court and the Court upon hearing the said counsel granted prayer (2) of the said application with the result that the defendant by its director's officer's servants and/or agents Garam Investments Auctioneers or any other auctioneers purporting to act on the defendant's behalf were restrained from advertising, selling or otherwise dealing with the property known as Kiambaa/Thimbigua/3299 (hereinafter referred as the suit premises) pending the determination of this suit or until further orders of the Court. On 1st October 2010, the defendant filed a Notice of Motion dated 29th September 2010 expressed to be brought under the provisions of Order XXXIX Rule 4, Order L Rule 1 of the Civil Procedure Rules Sections 3 and 3A of the Civil Procedure Act and all enabling provisions of the law seeking that the said injunctive orders be discharged as well as for provision for costs. It is important to note that Order XXXIX Rule 4 is now Order 40 Rule 7 of the Civil Procedure Rules. The said application which is the subject of this ruling is based on the following grounds:

- a) That the Respondent despite having admitted the debt has not made any effort whatsoever to reduce her liability to the Applicant and has not paid a single cent since the orders were granted two years ago and her conduct is undeserving of an equitable relief.**
- b) That the issues of the Respondent's employment with the Applicant and the Applicant's exercise of a statutory right arising out of a contract are two distinct issues.**
- c) That the Applicant's failure to respond to the Application was not intentional but was due to a breakdown of communication.**
- d) That the Respondent's Application did not warrant the grant of an order restraining the Applicant from exercising its statutory power of sale over the Respondent's property.**
- e) That the Respondent's Application was not based on legal issues and principles required to obtain the aforesaid restraining order against the Applicant.**
- f) That the Respondent has no prima facie case with a probability of success in trial having admitted being indebted to the Applicant.**

g) That any injury that may be occasioned to the Respondent can be adequately compensated in damages.

h) That the grant of this application will operate to meet the ends of justice.

The said application is supported by an affidavit sworn by **Allan Onyango**, the Defendant's Legal Officer on 29th September 2010. According to the deponent, the defendant is truly and justly owed the sum of Kshs. 2,949,890.45. It is submitted that in consideration of facilities granted to the plaintiff by the defendant, the defendant charged his suit parcel of land to the defendant. However, the plaintiff defaulted in repaying the said facilities as a consequence whereof the defendant proceeded to exercise its statutory power of sale to recover the sum secured. The plaintiff however moved to court and obtained the said restraining orders. The defendant's failure to respond to the application was due to breakdown of communication by the Bank which instructions were received after the application had been heard and the said orders granted. It is the deponent's position that the plaintiff's contention that her failure to service the loan was occasioned by her dismissal does not merit the grant of the injunction and further that a dispute as interest is no bar to the exercise of statutory power of sale in light of the fact that the debt was acknowledged as well as service of the statutory notice. It is the defendant's position that the plaintiff's contention that she became aware of the sale in the media was incorrect and that the application was incompetent as the orders sought therein were not supported by the plaintiff. Since the defendant's had complied with all the requirements necessary for the exercise of statutory power of sale, it is submitted that it is in the interest of justice the orders sought are granted.

In opposition to the application, the plaintiff filed grounds of opposition dated 10th November 2010 on 11th November 2010 in which she stated as follows:

- 1. The Application is misconceived and bad in law.**
- 2. The orders sought to be discharged were confirmed by this Honourable Court and the application made is misplaced and bad in law.**
- 3. The application is an abuse of court process as the import of the orders sought are to vary court and/or set aside appeal against the orders of 29th September, 2008 which is not available to them.**
- 4. There is inordinate delay in bringing up the Application and no reasonable explanation has been given for the delay.**

The plaintiff also filed a replying affidavit on 13th March 2012 in which she deposed that she had approached the defendant with a proposal to continue servicing the loan as she had been doing during her employment by way of Kshs. 20,000.00 per month but the same was unilaterally and arbitrarily and without reasonable excuse turned down. Later she was informed that her account had been closed and that servicing of the loan was impossible. And that the defendant failed to furnish her with statements a sign that the applicant is not interested in recovering the loan but simply selling her matrimonial property in order to recover a sum of Kshs. 2,949,890.00 yet the property is valued at Kshs. 5,000,000.00. According to her it is not true that she has made no efforts to repay the loan since on 9th March 2012 she proposed to pay Kshs. 50,000.00 per month. Instead of filing its documents, the applicant has instead made the present application. In her view, no notice of sale has been issued and she stands to suffer irreparable loss and damage if the application is allowed and hence it is in the interest of justice that the application be dismissed with costs.

In its submissions, the defendant while reiterating the contents of the supporting affidavit, contends that since the grant of the said injunctive orders the plaintiff has not made any effort whatsoever to pay and/or liquidate the outstanding debt owed to the defendant. It is further submitted on the authority of **Nahashon Njage Nyaggah vs. Savings & Loan Kenya Limited Nairobi HCCC No. 251 of 2006** that the Court is empowered under Order XXXIX Rule 4 of the Civil Procedure Rules to set aside injunctive orders where the same were obtained by suppression of the truth. It is further submitted the loan facility was not

dependent on the plaintiff's continued employment and hence her dismissal from employment ought not to have been made a consideration in the said application and based on **Elijah Kipngeno Arap Bii vs. Kenya Commercial Bank Ltd Nairobi HCCC No. 324 of 2000** it is submitted that a lender who happens to be the employer of the borrower cannot be restrained from exercising his contractual or statutory powers merely because the borrower has brought into question the lawfulness of his dismissal from the lender's service. On the same issue the defendant relies on **Paul Muhoho Kihara vs Barclays Bank (K) Ltd Nairobi HCCC No. 33 of 2002**, and submits that since the plaintiff is no longer an employee of the defendant, she is no longer entitled to staff interest rate and in any case based on **Elijah Kipngeno Arap Bii vs. Kenya Commercial Bank Ltd** (supra) and **Paul Muhoho Kihara vs Barclays Bank (K) Ltd** (supra), a dispute as to interest is not a bar to the exercise of statutory power of sale. It is further submitted that the plaintiff's depression and matters relating to her divorce are irregular and inappropriate to suffice as valid grounds for the grant of an injunction. Citing **Commercial Exchange Limited and Another vs Barclays Bank of Kenya Ltd Civil Appeal No. 136 of 1996** it is submitted that the plaintiff has bought time without making attempts to repay the loan to the detriment of the defendant and that the world of business cannot survive if such frivolous applications are allowed.

On the part of the plaintiff it is submitted while reiterating the contents of the replying affidavit that the grounds upon which the present application are based amount to an appeal against the order granting the injunction. It is further submitted that the defendant has, in effect frustrated the plaintiff's efforts to repay the loan with a view to unlawfully, unjustly and without any conscience made more financial gain than is really due to it. Since the plaintiff has already filed her witness statements, the plaintiff's suit is ready for hearing and ought to be heard in order to save costs and for expeditious determination. It is further submitted that the plaintiff's employment and the exercise of the statutory right are correlated since the employment was the plaintiff's main source revenue for the repayment of the loan. Since the defendant has not complied with the provisions of Order 11 and the plaintiff has amended her plaint which now contains an order for injunction, the matter ought to proceed to trial in the interest of justice.

Order 40 rule 7 of the Civil Procedure Rules aforesaid states as follows:

Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.

From the foregoing it is clear that the conditions under which an order of injunction may be discharged, or varied, or set aside are not stipulated thereunder. It is, however, clear that the said rule does not limit the Court's powers to discharge, vary or set aside an order of injunction to *ex parte* orders. Accordingly, it is my view and I so hold that the Court has power to discharge, vary or set aside any interlocutory order granted under Order 40. Dealing with *ex parte* orders of injunction, the Court of Appeal in **Kenya Commercial Bank Ltd vs. Kipsang Sawe Sisei Civil Appeal No. 53 of 2002** held:

“Where the reason for refusing an application to set aside an order of injunction is that the application is unnecessary because the order of injunction was only meant for the sale on the particular day, while in fact the injunction was granted until the hearing and determination of the suit, that amounts to a misapprehension and misdirection on the purport of the order...The judge must consider and evaluate the reasons given for an application for setting aside an order of injunction and give reasons for his decision...In an application seeking to set aside an order of injunction the Court must consider that the Appellant genuinely intended to oppose the application for injunction as the applicant's advocate had applied for adjournment to file a replying affidavit and had proceeded to file the application to set aside the order for injunction with promptitude... The judge must appreciate that an order of injunction is an equitable remedy and that the Court can only exercise its equitable jurisdiction judicially, if all the parties have been fully heard and if all the material facts are before the Court...The judge should appreciate that the policy of the law does not favour the grant of *ex parte* injunction except in extremely urgent cases where the purpose of the injunction would be defeated by delay or the sustenance of an *ex parte* injunction beyond 14 days.

In **Thande vs. Housing Finance Company of Kenya Limited [2007] 1 EA 386** Ochieng, J expressed

himself as follows:

“An appeal would ordinarily be lodged in a Court whose jurisdiction was superior to that of the Court, which passed the verdict that was being challenged. In effect, the High Court would ordinarily constitute an Appellate Court over decisions emanating from the Courts subordinate to it and also from courts-martial. Therefore it is incomprehensible how the defendant would have been expected to invoke the court’s appellate jurisdiction in relation to a decision of a Judge of concurrent jurisdiction since one Judge cannot sit on an appeal over another Judge of concurrent jurisdiction, or over his own decision...Therefore it would be erroneous for any party to entertain the notion that by seeking to discharge an injunction, he or any party seeking the said discharge was invoking the court’s appellate jurisdiction. If the Court were to be persuaded to discharge such orders as it may have granted earlier, the court’s authority to do so would emanate from Order 39, rule 4 of the Civil Procedure Rules which provides that any order for an injunction may be discharged, varied, or set aside by the court on application made thereto by any party dissatisfied with such orders...When seeking the discharge, or variation or setting aside of an injunction, the party who is dissatisfied with it is told that he can do so by making an application. The rule does not state that he has to lodge an appeal. Therefore when the court is asked to adjudicate on such an application, the court would not be constituting itself as an Appellate Court...Furthermore, it would be expected that the party who is asking that the injunction be discharged, or varied, or set aside, would not be challenging the validity of the order itself. If he were to assert that the Court which gave the injunction erred in so doing, the party may be deemed to be proceeding as if he were appealing against the decision to award the injunction. So, if the said party could not show that he was seeking a review (in such circumstances) it might be possible for his efforts being curtailed by the kind of objection, which was raised herein...The defendant herein does not purport to challenge the accuracy of the decision to grant an injunction but instead, the defendant appears to be doing no more than drawing the Court’s attention to the failure by the plaintiff, to fulfil the terms and conditions which formed the foundation for the injunction and that exercise cannot constitute an appeal. Therefore the defendant does not need to invoke the Court’s appellate jurisdiction before it can prosecute the application”.

What comes out from the foregoing decision is that in an application for setting aside an order of injunction, the application is not permitted to question the merits of the order granting the injunction since to invite the Court to reconsider the merits of the decision would be tantamount to inviting the Court to sit on appeal on a decision of a judge of concomitant jurisdiction and that the Court cannot do. Accordingly the grounds advanced by the applicant that go to the merits of the decision such as whether or not the statutory notice was duly served; whether or not the grant of injunction was merited in the light of the acknowledgement of the debt; whether or not the Court ought to have granted injunction based on the contentions touching on the applicant’s employment relationship with the defendant; and whether or not a dispute as to the interest charged would not strictly speaking be grounds for setting aside an injunction under Order 40 rule 4. They would, no doubt, be grounds of an appeal.

However, it is my view that an application under Order 40 rule 7 may be based on the events subsequent to the grant of the injunction such as the conduct of the applicant which conduct make the sustenance of the injunctive orders unwarranted. This may occur where for example the applicant’s subsequent conduct is meant to frustrate the hearing and determination of the suit or where the applicant goes to sleep after the grant of the said injunctive orders. The Court does recognise that injunction is an equitable remedy and the subsequent events may render the continued retention of the injunction unreasonable or unjustifiable.

Again the Court may be justified where there is evidence that the orders of injunction were obtained without disclosure of material facts or by distortion or deliberate misrepresentation of the facts. To obtain equitable orders of injunction by misleading the Court would justify the court in setting aside the orders. In *Devani vs. Bhadresa and Another* [1972] EA 22 the East African Court of Appeal held that the learned judge was right in holding that he would never have granted the injunction had the appellant made a full and fair disclosure of the material facts at the time of granting the ex parte order of injunction and that the judge was entitled to set aside the injunction if satisfied that the status quo could be preserved without the injunction. In that case the Court found that respondent had already been in occupation for three months and that a full and fair disclosure was not made to the court and that had such a disclosure been made the learned Judge would not have granted the injunction. Accordingly the Court of Appeal agreed with the learned

Judge's decision to set aside the injunction and dismissed the appeal.

In this suit the orders of injunction were granted on 29th September 2008. Thereafter the plaintiff took no step in the matter until 22nd June 2009 when she filed her list of documents. She then filed an application dated 6th August 2009 seeking for discovery. That application which was fixed for hearing on 10th December 2009 was not prosecuted on that date and no step seems to have been taken in the matter until 4th October 2010 when the defendant fixed its present application for hearing on 2nd December 2010. On that date the plaintiff raised a preliminary objection which was heard and eventually dismissed on 8th April 2011. Thereafter no step was taken in the matter until 24th January 2012 when the defendant fixed the present application for hearing on 19th March 2012. Once again the plaintiff plaintiff filed an application dated 14th March 2012 and when the present application came up for hearing on 19th March 2012 the plaintiff's said application was directed to be heard first and on 23rd April 2012, the said application was allowed by consent and the plaintiff ordered to file the amended plaint within 14 days. From the record the amended plain was filed on 25th April 2012 while the amended defence was filed on 10th May 2012. Since the grant of the injunction herein on 29th September 2008, more than 4 years have lapsed. By the advent of the Civil Procedure Rules 2010 on 17th December 2010, the Rules Committee provided that the lifespan of an interlocutory injunction is one year after which the said order automatically lapses unless the Court orders otherwise. The said Rules, under Order 54 of the Civil Procedure Rules, apply to pending proceedings as well. One would have expected the Plaintiff to move the Court for the necessary orders as soon as the said Rules came into effect.

Therefore taking into account the conduct of the plaintiff herein since the grant of the injunction more than 4 years ago, I am convinced that there is no justification to retain the injunctive orders granted herein more so in light of the fact that the plaintiff has not made any effort to repay the loan contrary to the contents of her letter dated 24th June 2008 in which she admitted receipt of the statutory notice dated 21st April 2008 and requested for more time till end of July 2008 to start loan repayment.

In the foregoing premises, I am satisfied that the application dated 29th September 2010 is merited which I hereby allow and set aside and discharge the injunctive orders granted on 29th September 2008. The costs of this application are awarded to the Defendant.

Dated at Nairobi this 16th day of November 2012

G V ODUNGA
JUDGE

Delivered in the presence of:

Miss Nyaidho for Mr. Tolo the plaintiff/respondent

Mr. Gikonyo for the Defendant/applicant