



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(*Coram: Ojwang, J.*)

CIVIL SUIT NO. 15 OF 2010

1. MASUMBUKO YERRI KOMBE

.....PLAINTIFFS/APPLICANTS

2. BAY METALS RECYCLERS LTD.

-VERSUS-

1. DIAMOND TRUST BANK LTD

.....DEFENDANTS/RESPONDENTS

2. ISMAEL AMIRALI GULAMALI

RULING

The plaintiffs, moved the Court by Notice of Motion of **26th May, 2010**, brought under ss. 1A, 1B, 3A and 63 (e) of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Order **XXXIX**, rules 2, 2A and 3 of the old Civil Procedure Rules. The outstanding prayers are as follows:

(i) that, a temporary injunction do issue restraining 1st defendant and 2nd defendant from alienating an interest in L.R. Nos. MN/V/12336, MN/V/1050 and MN/I/12338 either by way of a public auction advertised for 27th May, 2010 or on any other day;

(ii) that 2nd defendant's/respondent's account No. 5200476001 held with 1st defendant be frozen pending further orders of the Court.

The grounds for the application are as follows:

(i) 1st defendant has advertised 2nd plaintiff's property for sale on 27th May, 2010;

(ii) 2nd Plaintiff has no debt or any money owed to 1st defendant;

(iii) 1st plaintiff and 2nd defendant are joint-directors of 2nd plaintiff and had guaranteed an overdraft to 2nd plaintiff – hence the need to release them from liability;

(iv) 1st defendant has released 2nd defendant from all obligation, and 1st defendant is treating 1st

plaintiff as the only debtor (through a guarantee to 2nd plaintiff);

(v) no demand to pay a specified sum, and no valid statutory notice was given by 1st defendant – which violates ss. 65 (2) and 74 (1) of the Registered Land Act (Cap. 300, Laws of Kenya);

(vi) the transfer of monies from 2nd plaintiff's account to the account of 2nd defendant and his wife, was a breach of the conditions of operation of the account by 1st defendant;

(vii) the orders sought will serve the ends of justice.

The 1st plaintiff, *Masumbuko Yerri Kombe* swore a supporting affidavit on *26th May, 2010*, and for the material part, depones as follows:

(i) the deponent was served with notice-of-sale-by- public auction, by Dalali Auctioneers, in respect of L.R. No. MN/I/12338, allowing 45 days to redeem the said properties;

(ii) the said notice of sale did not specify the sum of money being demanded;

(iii) the deponent checked with his co-director, 2nd defendant (Ismael Amirali Gulamali), and found that 2nd defendant had not been served with the notice;

(iv) on 17th May, 2010 the deponent was informed by his company workers that 1st defendant was going to sell the suit properties by public auction on 27th May, 2010;

(v) in the meantime, 2nd defendant had assured the deponent that he had paid all pending claims in the loan account;

(vi) 1st defendant was reluctant to give the state of the loan account standing in the name of 2nd plaintiff (Bay Metals Recyclers Ltd.);

(vii) When 1st plaintiff was shown 2nd plaintiff's financial accounts for September, 2007 (by which time the loan should have been fully repaid), he “discovered that 2nd [defendant] had colluded with 1st [defendant] to transfer from Dollar account No. 0201559019 a total of U.S. \$ 288,000 on various dates in that [month]”;

(viii) 2nd plaintiff had successful trade activity during the said month, September, 2007 and overseas customers paid in time a sum of money which breaks down to Kshs. 23,000,000/=;

(ix) the deponent, on scrutinizing the bank documents, discovered that the whole turnover of Kshs. 23,000,000/= was appropriated by 2nd defendant, purportedly on the instructions of 2nd plaintiff where, though the deponent is a director, he had given no such instructions;

(x) 2nd plaintiff had borrowed from 1st defendant on the strength of 2nd plaintiff's own assets: L.R. No. MN/V/1050 and MN/V/12336;

(xi) on 21st February, 2007 2nd plaintiff had obtained overdraft facilities for Kshs. 5,600,000/=, on a mortgage created on L.R. No. MN/V/1050 which was redeemable within five years;

(xii) a further mortgage was later created on L.R. No. MN/V/12336 which was sub-divided, and L.R. No. MN/I/12338 was sold to a third party – the proceeds of sale being used to pay the mortgage, which now decreased to Kshs. 2,250,000/=;

(xiii) hence the property L.R. No. MN/I/12338 does not belong to 1st or 2nd plaintiffs, but instead, belongs to a third party (sale agreement dated 17th November, 2008).

The two defendants/respondents filed replying affidavits, the essential contents of which may be summarized here.

For 1st defendant/respondent, **Stephen Kodumbe**, that entity's Company Secretary, swore an affidavit on **23rd June, 2010** deponing as follows:

(i) the 1st defendant had extended several banking facilities to 2nd plaintiff, and there were written agreements on the terms of repayment;

(ii) 2nd plaintiff had given certain securities for the banking facilities;

(iii) “in breach of the terms and conditions of the various facilities[2nd plaintiff] defaulted in paying the monthly instalments on the Term Loan and Hire Purchase Loan as and when required to do so”; 2nd plaintiff also “caused its Overdraft facility to exceed the approved limit”;

(iv) as at 18th August, 2009 –

· the Term Loan Facility was in arrears by a sum of Kshs. 275,753/27;

· the Current Account operated by 2nd plaintiff was overdrawn by a sum of Kshs. 5,629,158/50 which was Kshs. 1,129,158/50 above the approved overdraft limit of Kshs. 4,500,000/=;

· the Hire-Purchase Facility was in arrears by the sum of Kshs. 45,517/26;

(v) owing to the several defaults, 1st defendant requested 2nd plaintiff “to pay up the arrears on the Term Loan and Hire Purchase Loan as well as regularize the Current Account that had been overdrawn beyond the approved limit”;

(vi) 1st plaintiff, as guarantor to 2nd plaintiff, undertook to remedy the default by paying the

outstanding amounts due under the various facilities (letter of 6th August, 2009 from 1st plaintiff to 1st defendant);

(vii) by the said letter of 6th August, 2009 “the 1st plaintiff expressly authorized the Bank [1st defendant] to proceed with the realization of the Bank’s securities, should he be unable to personally remedy the default by [2nd plaintiff] on the aforesaid facilities”;

(viii) “despite 1st plaintiff’s acknowledgment of debt and personal undertaking to remedy the default, no attempt was made by 1st plaintiff to remedy the default. Similarly [2nd plaintiff] declined to remedy the default.....”;

(ix) as a result of the continued default, 1st defendant instructed its advocates to issue a formal demand letter to 2nd plaintiff, dated 5th September, 2009 and copied to 1st plaintiff and 2nd defendant in their capacity as guarantors;

(x) several months later, neither 1st plaintiff nor 2nd defendant [the guarantors] had taken any action to remedy the default, “leaving the Bank with no option but to realize its security”;

(xi) the Bank [1st defendant] instructed its advocates who issued three-month notices of intention to sell by public auction the various properties charged to the Bank;

(xii) the plaintiffs took no action, notwithstanding the issuance of the statutory notices;

(xiii) upon the expiry of the statutory notices the Bank instructed M/s. Dalali Traders to issue 45-day notifications of sale for the various charged properties, to 2nd plaintiff and its directors and to proceed with sale “if [2nd plaintiff] did not remedy the default”; the notices were duly received by 1st plaintiff on 5th March, 2010;

(xiv) upon expiry of the notifications of sale, Dalali Traders proceeded to advertise the charged properties for sale by public auction on 27th May, 2010 – Daily Nation of 11th May, 2010;

(xv) on scrutiny of the auctioneer’s advertisement, the Bank realized that L.R. No. 12336 had also been included in the list of properties to be sold; that this property had been charged to the bank, but it was discharged and sold, and proceeds in the sum of Kshs. 3,130,000/= duly credited – and so this particular property should not have been included in the list of properties under the redemption notices; owing to this error, a corrected advertisement was published in the Daily Nation of 24th May, 2010; and it is recognized that to-date, the only properties charged to 1st defendant are: L.R. No. MN/V/1050 and L.R. No. 12338;

(xvi) 1st defendant is “neither involved in, nor interested in the day-to-day running of 2nd plaintiff”.

Ismail Gulamali [2nd defendant], in his replying affidavit of 23rd August, 2010 averred that 2nd plaintiff had joined in the suit “without the authorization of [the] directors or its shareholders”. The deponent deposes that he is a fifty-percent shareholder of 2nd plaintiff, the only other shareholder being 1st plaintiff; and the two shareholders are the directors. He deposes further that he knows, no meeting of the company, 2nd plaintiff, ever took place to authorize lodgment of a suit against 1st defendant.

The deponent avers that 1st plaintiff has been running the affairs of 2nd plaintiff “*single-handedly*”, and he “*worked from 2nd plaintiff’s office within the godown which is the subject-matter of these proceedings*”; and 1st plaintiff “*had custody and possession of all the 2nd plaintiff’s documents, including cheque-books*”. The 2nd defendant denies ever having written “*any cheque from 2nd plaintiff’s account*”; all cheques “*were written and signed by 1st plaintiff*”. How did this come to be? The deponent avers:

“I absolutely trusted the 1st plaintiff to run the affairs of the 2nd plaintiff honestly and properly and to honour his fiduciary duty as a director of the 2nd plaintiff. I run my other businesses and I did not have the time, nor did I see the need, to review the 2nd plaintiff’s books of account on any occasion”.

In mid-2007, 1st plaintiff requested 2nd defendant to advance to 2nd plaintiff the sum of Kshs. 23,000,000/=, for use in the scrap metal business; and the deponent provided this without any formalities. The 1st plaintiff managed 2nd plaintiff’s finances in a manner that called for 2nd defendant’s intervention, to secure a financial accommodation with 1st defendant. The deponent avers:

“The monies would be transferred or deposited [with 1st defendant] and then I would take it out soon thereafter. The bank statement will bear me out. Unfortunately I would deposit monies to regularize the account [of 2nd plaintiff] as a shareholder to save 2nd plaintiff, but 1st plaintiff would immediately withdraw most of it.....”

The 2nd defendant deposed that 2nd plaintiff’s account “*is grossly overdrawn*”, and that company’s debt has not been paid.

Although 2nd defendant has, in effect, dissociated himself from any notion that 2nd plaintiff has a proper case before the Court – as 2nd plaintiff is a company in which he holds 50% of the shares and is a director, but gave no authority for the filing of suit – learned counsel, **Mr. Kadima** made joint submissions for both plaintiffs.

It is submitted for the plaintiffs that the notice of sale by public auction, emanating from 1st defendant, did not disclose the amounts of money owing; and so, the intended sale is defective.

Counsel urged that the plaintiff had made a ***prima facie*** case, for the grant of interlocutory orders.

The plaintiffs contended that the suit premises is the place of business of 2nd plaintiff; and if it is sold by auction, then the business would lose its base, “*the land would be lost forever, and the image of the company would be tarnished*”.

For 1st defendant, it was urged that 1st plaintiff had expressly instructed the Bank [1st defendant] to sell the securities held for the banking facilities availed, in the event that due payment was not made; but 1st plaintiff then “*failed, refused and/or neglected to honour his own undertaking*”; the statutory notices issued by the Bank lapsed, with no action taken by the plaintiffs; and hence the planned auction – sale.

Counsel urged that the plaintiffs are not entitled to injunctive relief: they have no ***prima facie*** case; they had charged their property to secure banking facilities; they failed to repay the loans; the Bank is entitled to exercise its statutory power of sale.

Counsel relied on the Court of Appeal decision in ***Mrao Ltd v. First American Bank of Kenya Ltd & Two Others*** [2003] KLR 125, and urged that in a clear case of default in making payment, the Court has no basis for granting an injunction to prevent a mortgagee/chargee from exercising the statutory power of sale which has accrued.

If the plaintiffs won their case, ultimately, would an award of damages be an adequate remedy? Counsel submitted that the charged properties, in this case, are in respect of a specific sum of money – or a value

that is ascertainable. In such a case, by established authority, it is inappropriate to grant an interlocutory injunction. A typical case is **Andrew Ouko v. Kenya Commercial Bank & Three Others** [2005] eKLR, in which **Azangalala, J** thus held:

“Turning to the second condition for the grant of an interlocutory injunction the record of this matter shows that both sides to the dispute put a valuation to the suit property. It therefore follows that the plaintiff could be adequately compensated in damages. The suit property was charged to the defendant for a known sum. It has also been sold to the 2nd defendant for a specific sum. Accordingly, the plaintiff’s application would fail on this second test also”.

On that basis, counsel urged that the plaintiff, in the instant case, can be adequately compensated by an award of damages. The plaintiffs have not, besides – it was urged – demonstrated the irreparable harm that they stand to suffer if the charged properties are sold.

It was urged for 1st defendant that the plaintiffs, in this case, have acted unconscionably and are undeserving of equitable relief; and in this regard, it was submitted that the plaintiffs had come before the Court making allegations of fact that lacked a factual basis; in particular, the plaintiffs did not disclose that: they were indebted to the Bank; they were in default in repaying the facilities extended to them by the Bank; they took no action to rectify their default; the Bank had a right to exercise the statutory power of sale; the Bank did issue the requisite statutory notices.

Counsel urged that the interim orders currently favouring the plaintiffs were procured by misrepresentation, and the same should be set aside; and that the plaintiffs are *“using the suit herein to prevent the Bank from exercising its lawful right to call in its securities”*.

Learned counsel, **Mr. Kinyua** for 2nd defendant asked that the plaintiffs’ case be dismissed: the suit premises belong to a limited liability company, and there is no evidence at all that 2nd defendant had attempted to sell the same; the suit premises are charged to 1st defendant – and 2nd defendant is not the proprietor of the charge; 2nd defendant is not a director or other officer of the chargee; so there is no way in which 2nd defendant can exercise a statutory power of sale over the suit premises.

Counsel contested the plaintiffs’ prayer (c), for an order *“freezing forthwith account number 5200476001 held by 2nd defendant and his wife at 1st defendant Bank”*. The 2nd defendant’s case was that his wife is not a party in the instant proceedings: and so, the prayer for the freezing of the said account *“is...ill-conceived, and meant to harass or embarrass 2nd defendant by dragging his wife’s name into this dispute”*. Counsel urged that the Court *“must not make any order touching on property to parties not before it”*; although the plaintiffs had been aware at the time of filing suit that the said account belonged to 2nd defendant and his wife, they elected not to sue her – and so they cannot obtain any order against her interest.

Counsel submitted that since the suit property is not registered in the name of 1st plaintiff, he cannot obtain any order in his private capacity, concerning that property – and consequently, his application must be dismissed.

Although the Notice of Motion of **26th May, 2010** is expressed to emanate from **two** co-plaintiffs – the first being an individual person, and the second being a corporate body – I have found no basis to conclude that, truly, **two plaintiffs** are validly on record. The second plaintiff, to whom the properties in question belong, was not lawfully joined, as required by the company law – and this issue may ultimately determine the fate of the main cause. The party behind the instant application is **1st plaintiff**; and for the purpose of the application, this Ruling limits itself to the merits at this stage.

It is clear from the record that 2nd plaintiff is indebted to 1st defendant, in respect of banking facilities which 1st defendant had granted on terms well spelt out in relevant documentation; this fact is acknowledged by 1st plaintiff, as emerges from the correspondence on record. Although repayment has been due for a long time, neither of the plaintiffs has responded to the call for repayment. In these

circumstances, 1st respondent, certainly, had a right to call in the assets which had been given as security for the financial facilities. Although 1st plaintiff contends that due notices have not been furnished prior to the intended sale-by- auction, the evidence on record shows otherwise.

The position of the Court, where a person who fails to repay mortgage- debt seeks interlocutory injunction, is clear: see **Andrew Ouko v. Kenya Commercial Bank & Three Others** [2005] eKLR (**Azangalala, J.**); **Thathy v. Middle East Bank (K) Ltd & Another** [2002] 1KLR 595 (**Ringera, J.**); **Polycap Okumu Ochola & Another v. Dubai Bank Kenya Ltd**, Mombasa HCCC No. 17 of 2010. To offer a property as security for a mortgage loan, or any other kind of banking facility, is to **place that property on the market**, allowing for its monetary evaluation, and is to commit the proprietor to a **cash recompense**, if need be. Generally, therefore, the person who gives such property as security, should not be seeking injunctive relief, save where there is some very weighty cause justifying a contrary inference.

No such special case has, in this case, been place before the Court; and so, **ex facie**, the plaintiffs were, and are, not entitled to injunctive relief. The facts are clear: they did not pay-up the secured banking facilities; and therefore it is just for the Bank to secure its interests by obtaining sale of the properties in question.

I will order as follows:

- (1) *The interim injunctive orders granted the plaintiffs in this case, on 26th May, 2010 are hereby discharged.*
- (2) *The plaintiffs' prayer for temporary injunction is disallowed.*
- (3) *The plaintiffs' prayer for the freezing of bank account in the name of the 2nd defendant and his wife, A/c No. 5200476001 is disallowed.*
- (4) *The plaintiffs shall bear the costs of this application.*

SIGNED at MOMBASA

J. B. OJWANG

JUDGE

DATED and DELIVERED at MOMBASA this 30th day of June, 2011.

M. A. ODERO

JUDGE