



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 387 of 2009

JORUTH ENTERPRISES LIMITEDPLAINTIFF

VERSUS

GROFIN KENYA LIMITED1ST DEFENDANT
GROFIN EAST AFRICAN FUND2ND DEFENDANT
WESTMINISTER COMMERCIAL TRADERS3RD DEFENDANT

RULING

1. The plaintiff admits that they entered into a loan agreement with the defendant in which the 2nd defendant agreed to advance them a sum of 17,500,000. However in breach of the loan agreement, only a sum of Ksh.12 million was advanced. As security for the loan, the plaintiff executed a debenture on all the movable assets and a charge over a piece of land KNOWN AS TITLE NO. GATARAKWA/GATARAKWA/BLOCK 2/205. The plaintiffs complain that the 2nd defendant refused to honor the loan agreement and purported to introduce new terms and conditions into the loan agreement.
2. On 19th May 2009, the 2nd defendant instructed the 3rd defendant to repossess Motor vehicle registration no. KBD 819D and trailer registration number ZC 9133. This is what triggered the filing of this suit and the notice of motion dated 27th May 2009 in which the plaintiffs seek for two principle orders. Firstly, a temporary injunction restraining the defendant from alienating, vandalizing, advertising for sale, or transferring the subject motor vehicle. Secondly, a mandatory order of injunction to compel the defendants to release the subject motor vehicle and trailer pending the hearing and determination of this suit.
3. This application is supported by the grounds on the body thereto and elaborated in greater detail by the matters deposed to in the affidavit of **Ruth Wangari Wachira** sworn on 27th May 2009. According to the plaintiffs, the defendants acts of repossessing the commercial vehicle was null and void for reasons that the defendant had not obtained any judgment, decree or order from the court authorizing them to repossess the plaintiff's commercial vehicle. Moreover, the plaintiff has not executed any chattels mortgage instrument or hire purchase agreement with the defendant which could have entitled them to repossess the subject motor

vehicle. Moreover, there was no money owing to the defendants because the plaintiff is not in breach of the loan agreement. The defendants failed to disburse the entire loan as per the loan agreement.

4. Although the defendants holds a debenture over the plaintiffs movable properties, the debenture had not crystallized because no notice was served by the plaintiff to the 2nd defendant and the defendants did not apply to the court for the appointment of an official receiver to manage the subject motor vehicle. It was further submitted that the debenture did not give the defendant the right to take possession of the charged property. The defendants remedy lay in pursuing remedies such as breach of contract and injunctions.
5. Counsel urged the court to grant the mandatory order of injunction to maintain the status quo which was prevailing before the wrongful act. Counsel put forward the case of **Gussi Mwalimu Investment Company Limited and another vs Mwalimu Hotel Kisii Limited EALR 1995-1998 EA** page 100 and argued the plaintiff's case is clear as the defendant took the law into their hands and took possession of the charged assets without following the laid down procedure when they had no legal authority to seize the motor vehicle.
6. Formidable opposition was put forth by the respondent. Counsel relied on replying affidavit sworn by **Kenneth Okoth Onyango** on 9th June 2009. According to the respondents, the plaintiff applied for a loan facility on 29th October 2007 for a sum of 17,500,000/- to facilitate the loan, the plaintiff executed several security documents as follows:-
 - (i) Standard Loan Conditions;
 - (ii) Undertaking by Shareholders/Directors of Company;
 - (iii) Incentive agreement;
 - (iv) 2 deeds of Guarantee and Indemnities by Joseph Wachira Njuguna and Ruth Wangari Wachira.
 - (v) 2 Deeds of Assignment of debtors and
 - (vi) 2 deeds of Assignment of Loan Accounts between Joseph Wachira Njuguna and Ruth Wangari Wachira & the 2nd Defendant.
7. As per the agreement the amount was supposed to be disbursement in tranches and the first tranche of 12,500,000 million was disbursed in August 2008 according to the terms of the request made by the plaintiff. After the disbursement, the plaintiff was supposed to provide monthly management account to the 2nd defendant. The plaintiffs failed to give a true account which was a breach of the provisions of the loan conditions. The plaintiff had also miss-represented material facts regarding a loan owing to Fina Bank Limited by the plaintiffs director one Joseph Wachira Njuguna.
8. The plaintiff also failed to make monthly repayment and notices were issued requesting the plaintiffs to regularize the account and as at 22nd May 2009 there was in the first loan account a sum of Ksh.6,968,378 outstanding,

while the second account under a sum of Ksh.5.690,324/- . Due to the plaintiff's failure to comply with the terms of the lending the floating charge created by the debenture crystallized and the 2nd defendant attached the plaintiff's assets. Under the debenture, all the movable properties of the plaintiff were charged. The 2nd defendant who is also a registered owner of the motor vehicle is entitled to repossess all the assets of the Plaintiff under the debenture. Counsel for the respondents argued that the plaintiffs failed to establish a prima facie case with a probability of success to warrant the granting of a mandatory order of injunction which is usually granted under special circumstances where the case is clear and the facts are not contravened.

9. Having set out the background information and the rival submissions of both counsel for the applicants and the respondents, the issue for determination is whether the applicant should be granted the orders sought. The principles to guide the court on whether or not to grant the orders are well settled in the oft cited case of **Giella v Cassman Brown & Co Ltd (1973) E A 358** The applicant must demonstrate a prima facie case with a probability of success. Secondly, irreparable harm which would not be compensated for in damages would arise, and if in doubt, then the court would determine the matter on a balance of convenience.
10. In this case the applicant is also seeking for a mandatory order of injunction. A further test is applicable in that mandatory orders at an interlocutory stage can only be issued in very clear cases where the facts are not contravened and where the case demonstrates special circumstances as the order is final in nature. See the case of **Kenya Breweries Limited vs Okeyo EALR (2002) 1 EA 110** in that case it was stated as follows:

“A mandatory injunction ought not be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being on a different and higher standard than was required for a prohibitory injunction.”

11. Is the plaintiff entitled to the orders? It is not disputed that the plaintiff's relationship with the 2nd defendant is governed by an elaborate set of documents that sets out clearly the obligations of each on them. These include a charge over the plaintiff's property and a debenture over all the movable properties owned by the plaintiff. The plaintiff was supposed to pay the loans according to those agreements. The 2nd defendant claims that the plaintiff was in breach of the agreement, failed to honor the installments, failed to provide the monthly accounts and failed to make disclosure of material matters which constituted a breach.
12. On the part of the plaintiff they claim to have paid the installments and blame the 2nd defendant for failing to disburse the entire loan of Ksh.17.500.000 million. Going by the material before the court, I find the plaintiff's relationship with the second defendant is a contractual relationship managed by the documents signed by both

parties which created obligations and gave rights to the 2nd defendant in the event of a breach by the plaintiff in particular the debenture gave the 2nd defendant rights over the all the movable properties of the plaintiff.

13. The 2nd defendant is also registered as co-owner of the subject motor vehicle. When the plaintiff failed to honor its obligations under the various agreements of lending, the debenture crystallized and the 2nd defendant under that debenture is entitled to the plaintiff's movable properties. It was argued that the 2nd defendant should have sought a court order or appointed a receiver manager. I consider those as moot court questions for reasons that the 2nd defendant is a co owner of the subject motor vehicle, there is no specific provision in the debenture that required them to appoint a receiver, and they chose to manage their own process without a receiver manager.
14. I find no fault with the 2nd defendant seizing possession of the properties as provided for in the agreements, those were the terms of the lending. If the plaintiff can prove their claim of breach of contract, that can be compensated for with damages. I am not persuaded that the plaintiff who has not shown any evidence of compliance in the loan repayment has established a prima facie case with a probability of success. Similarly they have not demonstrated a clear case with special circumstances to entitle them to a mandatory order of injunction. The plaintiff's case is founded on a claim for a breach of contract and damages would be an appropriate compensation for breach of contract when proved.
15. for the aforesaid reasons the application by the plaintiff is hereby disallowed with costs to the respondents.

RULING READ AND SIGNED ON 5TH FEBRUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE