



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Case 283 of 2009**

**HEIWA AUTOSPARES & DISTRIBUTORS LTD.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD.....DEFENDANT**

**CIVIL PROCEDURE RULES - An interlocutory pleading not depart from primary pleading - Civil Procedure Rules, Order VI, Rule 6.**

**RULING**

By an application brought by way of a Chamber Summons dated and filed 8<sup>th</sup> October 2009(*the Application*), the Plaintiff (*Applicant*) sought the following orders-

(a) *that pending the inter partes hearing of the application, the court do grant an order to restrain the Defendant/Respondent, its servants and/or agents from selling the Applicant's parcel of land (known as Title No. Nakuru/Municipality Block 4/54 held as collateral against the loan and overdraft facility;*

(b) *that this court do restrain the Defendant/Respondent its servant and/or agents from selling or disposing, alienating the Applicant's parcel of land (known as) Title Number Nakuru Municipality Block 4/54 held as collateral against the loan and overdraft facility with the Respondent/Defendant pending the hearing and determination of this suit;*

The application was supported by the Affidavit of one Samuel Mbugua Ikumbu, the Applicant's Director, sworn on 8<sup>th</sup> October 2009, and the grounds on the face of the Application, that -

(a) *the Defendant/Respondent has acted in breach of the terms and conditions of the charge;*

(b) *the Applicant has a prima facie case with a high probability of success;*

(c) *that unless the injunction is granted the Applicant is likely to suffer irreparable loss and injury which cannot be adequately compensated by an award of damages.*

By a Replying Affidavit sworn on 13<sup>th</sup> January, 2010 by one Neria Okanga, the Defendant/Respondent's Legal Counsel, and filed on 18<sup>th</sup> January 2010, the Defendant/Respondent averred on the advice of the Defendant/Respondent's Counsel that the Plaintiff's application lacks merit and ought to be dismissed for the reasons that -

(a) *the Plaintiff has not established a prima facie case with any probability success;*

(b) *the Plaintiff has not presented any evidence to demonstrate that the actions of the Defendant are illegal to warrant interference with the Defendant's right to realize the security given for the facility taken by the Plaintiff.*

(c) *the Plaintiff admits indebtedness to the Defendant.*

When this matter was argued before me on 1<sup>st</sup> February 2010, Mr. Nderitu who argued the application on behalf of the Applicant, relied on the Applicants' Director's Supporting Affidavit and the grounds thereof. Mr. Nderitu also referred to the cases of **MARGARET**

**NJERI MUIRURI VS. BANK OF BARODA (KENYA) LTD. [2000] KLR 183; SAMUEL MBUGUA IKUMBU VS. BARCLAYS BANK OF KENYA LTD. (Nakuru HCCC No. 147 of 2002), JIMMY R. KAVILU & 14 OTHERS VS. STANBIC BANK KENYA LTD (Nairobi, HCCC 983 of 2004), and NATIONAL BANK OF KENYA LTD VS. PIPEPLASTIC SAMKOLIT (K) LTD & ANOTHER [2001] eKLR** in all of which cases the courts gave interlocutory orders of injunction. Counsel for the Applicant urged me to do the same.

On his part, Mr. Mogere relied on the Replying Affidavit of the Respondent's Legal Counsel, Neriah Okanga referred to above, and urged that the prayers sought should not be granted, *firstly* because the Plaintiff has not shown which charge has been breached, and in what manner, *secondly* there was no challenge that the statutory notice was illegal, *thirdly* disputes as to amount of loan outstanding is no ground for granting an injunction. *Fourthly*, willingness to pay a loan is not a ground for granting an injunction. Lastly Mr. Mogere argued that even though the Defendant had not filed a defence, the burden is still on the Plaintiff/Applicant to establish a *prima facie* case, that there was no evidence of any unlawful interference, or of malice, and that mere allegations were inadequate grounds for grant of an injunction. Relying on the second limb of the holdings in **GIELLA vs. CASSMAN BROWN & CO LTD [1973] E.A. 358**, Mr. Mogere submitted that the Defendant was a sound and profitable Bank, and that damages would be adequate compensation, that a property charged is at a risk of sale if there is default, unless there are allegation of any defect in the charge.

Mr. Mogere also reiterated the third principle in the decision of **Giella vs. Cassman Brown & Co. Ltd** - that on the balance of convenience, the Bank had been kept out of its money for a long time, and the dispute of consolidation of accounts does not arise in this suit, but in Nakuru HCCC No. 147 of 2002 (*which is still pending hearing and determination*).

On their part, the Defendants Counsel relied on the cases of **Charles Njihia Ng'ang'a vs. Barclays Bank of Kenya Ltd & Another (Nakuru H.C.C.C. No. 136 of 2008)**, **Daniel Kiplagat Bor vs. Agricultural Finance Corporation (Eldoret H.C. C.C. No. 134 of 2001)**, **Giella vs. Cassman Brown & Co. Ltd [1973] E.A. 358; SOPHIA HOUSE LTD vs. BARCLAYS BANK OF KENYA LTD (Milimani Commercial Courts H.C.C.C. No. 435 of 2004)**, **NATIONAL BANK OF KENYA LTD vs. PIPEPLAST SAMBOLIT (K) LTD & ANOTHER (Nairobi Civil Appeal No. 95 of 1999)**, **Mwangi Kirignei vs. National Bank of Kenya Ltd (Milimani Commercial Courts H.C.C.C. No. 611 of 2005)**, and **Mrao Ltd vs. First American Bank Kenya Ltd & 2 Others [2003] KLR 123**. Needless to say, but necessary to do so, in all these cases the courts declined to grant an injunction. Because the decision in **Mrao Ltd** is symptomatic of all the other cases cited, I set herein the principal holdings therein -

"3. The principles for granting an interlocutory injunction are that -

(a) the 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 be adequately compensated by an award of damages/

(c) if the court is in doubt it will decide an application on the balance of convenience.

4. A *prima facie* case in a civil application includes but is not confined 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."

I have considered arguments and authorities cited to me by Mr. Nderitu learned counsel for the Appellant, and I am satisfied that there is no *prima facie* and arguable case as defined above in the **Mrao Ltd** case.

*Firstly* the Applicant admits indebtedness to the Respondent. *Secondly* the Applicant has not cited any illegality or wrongfulness on the part of the Respondent in exercise of its statutory right to realize the security, or that the charge instrument is in some material or other way defective and therefore unenforceable, or any of the special circumstances cited in the authorities relied upon by the Applicant. In the

absence of any such grounds, I find and hold that the Applicant has not established the first threshold in the **Giella vs. Cassman** trilogy - there is no prima facie with a probability of success. And even if there were such a case, and there is none here, the Applicant has not said that the Defendant is unable to compensate the Plaintiff by an award of damages. Being of this mind, the third ground, in the trilogy, the balance of convenience does not arise.

If I am wrong on the above grounds, there is another reason why the Application herein should fail. The Application should fail because it is a departure from the Applicant's primary pleading, namely the plaint. The Application seeks reliefs which are not prayed for in the Plaint. The Plaintiff prays for a declaration, a perpetual injunction, a discharge of the charge over Title No. Nakuru Municipality Block 4/54, general damages, costs and interest. It does not seek or pray for any order of a temporary injunction as is envisaged under **Order XXXIX rule 1, 2 & 3 of the Civil Procedure Rules**. The application therefore offends the provisions of **Order VI, rule 6** of the **Civil Procedure Rules** which says -

*6(1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.*

*(2) Sub-rule(1) shall not prejudice the right of a party to amend or apply for leave to amend his previous pleading so as to plead the allegations or claims in the alternative.*

Rule 12, of the said Order that no technical objection may be raised on any pleading on the ground of any want of form does not help the Applicant. Failure to plead a particular claim or prayer is not part of form but a matter of substance. Having failed to plead and pray for an order of temporary injunction, in his plaint, the primary pleading, the Applicant by purporting to claim for such relief in a chamber summons under **Order XXIX rule 1** departed from his primary pleading and thus offended the provisions of **Order VI, rule (6)** of the **Civil Procedure Rules**.

For those reasons, the Applicant's Chamber Summons dated and filed on 8<sup>th</sup> October 2009 is incompetent and the same is struck out with costs to the Defendant. For the avoidance of doubt any temporary orders granted herein are consequently vacated forthwith.

There shall be orders accordingly.

Dated, delivered and signed at Nakuru this 22<sup>nd</sup> day of April, 2010

**M. J. ANYARA EMUKULE**

**JUDGE**