



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 407 of 2009

GREENHAM MURAGE GACHENGO1ST PLAINTIFF

GEORGE GACHENGO MURAGE *t/a*

GAVI STORES 2ND PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION DEFENDANT

R U L I N G

1. The Chamber Summons dated 28th May, 2009 seeks for an order of injunction restraining the Defendant from alienating, disposing off, or dealing with the Plaintiff's property known as Molo South/Ikumbi/Block 1/232 pending the hearing and determination of the suit. This application is premised on the grounds that on/or about 12th January, 1996, the 2nd Plaintiff charged his property to secure a loan from the Defendant for a sum of Kshs.2 million. The 2nd Defendant is said to have paid the loan to a tune of Kshs.1.7 million but fell in arrears. He approached the Defendants and negotiated a settlement that the Plaintiffs would pay a sum of Kshs.2.5 million as follows:-

(a) A sum of Kshs.1,000,000/= to be paid within seven (7) days;

(b) A sum of Kshs.590,000/= interest to be paid within ninety (90) days; but

(c) The settlement proposal was subject to the Respondent's Board's approval.

2. That proposal was forwarded to the Defendant by a letter dated 17th August, 2006. However, as the Plaintiffs were waiting for the

approval of the proposal they were surprised to receive a letter threatening to recover an outstanding sum of over Kshs.7 million. Thus the Plaintiff makes allegation of fraud on the part of the Defendant for enticing the Plaintiffs to make payment and for charging exorbitant interests contrary to the terms of the Charge. It was further submitted that the suit premises is the Plaintiff's only possession and if it is sold, the Plaintiff will suffer irreparable harm.

3. This application was opposed; Counsel for the Respondent relied on the replying affidavit sworn by Grace Maguga sworn on 6th June, 2009. It was contended that the Plaintiff admitted having borrowed a loan of Kshs.2 million. It is also admitted that the 2nd Defendant fell in arrears and failed to repay the loan. The 2nd Plaintiff requested for a partial settlement of the loan as per the letters addressed to the Defendant after which the Defendant indulged the Plaintiffs and suspended the date of the auction. However, the 2nd Plaintiff failed to honour the undertaking and by a letter dated 3rd May, 2006, he apologized for the delay in fulfilling the proposed settlement. The Defendant informed the Plaintiff that his request was submitted for approval by the Board of Directors. It is denied by the Defendant that they abandoned the partial settlement. It is clear it is the Plaintiffs who failed to adhere to the proposal of payments.

4. According to the replying affidavit, the Plaintiffs owe the Defendant the balance of the loan according to the Charge and the Defendant is entitled to exercise its Statutory Power of Sale in accordance with the Charge document. The Plaintiffs were faulted for abusing the Court process by asking the Court to rewrite a Contract or depart from the terms of the Contract.

5. The principal element to determine in this application is whether the Applicants have established a *prima facie* case with a probability of success. Secondly, whether irreparable harm which cannot be compensated for in damages would arise and if in doubt, the Court is supposed to determine the matter on a balance of probability. In the case of **MRAO LTD. V. FIRST AMERICAN BANK OF KENYA LTD. & 2 OTHERS [2003] KLR 125** the Court of Appeal explained what constitutes a *prima facie* case in the following:-

“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.”

6. Applying the above principles to the present case, it is not disputed that the Plaintiffs borrowed a loan of Kshs.2 million from the Defendant. They also defaulted in the loan repayment and as it can be discerned from the communication exchanged, the Plaintiffs have perpetually been seeking for indulgence after falling into arrears. It is also common ground that the Plaintiff has not completed paying the loan. This application is solely based on the contention that there was an Agreement to allow the Plaintiffs settle an outstanding loan revised to Kshs.2.5 million on the terms stated above. However, there is no evidence to show that the proposal to pay a sum of Kshs.2.5 million as full and final settlement was accepted by the Defendant.

7. For those reasons, I am not satisfied that the Plaintiffs' case demonstrates a *prima facie* case with a probability of success to warrant the granting of an order of injunction. The Plaintiff also seeks to challenge the loan on account of interests that was allegedly imposed on their account contrary to the Loan Agreement. It is now a settled principle that a dispute regarding the charge of interest is not a ground for granting an order of injunction. The Plaintiffs' application lacks merit. It does not meet the threshold of granting an interim order of injunction. It is dismissed with costs to the Defendants.

RULING READ AND SIGNED ON THE 17TH SEPTEMBER 2010.

M. K. KOOME

JUDGE