



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL CASE NO. 300 OF 2008

BRIDGE-UP CONTAINER SERVICES LTD PLAINTIFF
VERSUS
CONSOLIDATED BANK OF KENYA LIMITED DEFENDANT

RULING

This is the Notice of Motion application dated 25th January 2010 and filed in court on 25th January 2010 in which the Plaintiff/Applicant seeks inter alia the following orders

“2. THAT pending the hearing of this application inter-parties, the court do order that there be an interim injunction restraining the Defendant from selling, transferring or disposing off the Plaintiff’s property namely L.R. No. Mombasa/Block X/264 & 295, L.R. No. Ngong/Ngong/6239 and L.R. No. Mainland North/Section II/148 with a view to realize their security.

3. THAT pending the outcome of the Appeal filed in the Court of Appeal, the court be pleased to order that the Defendant be restrained through a temporary injunction from interfering with the Plaintiff’s quiet and peaceful occupation of the plots above-mentioned and from selling, transferring or disposing the suit property.”

The application was opposed. It is important at this early stage to set out the history of this case – on 13th October 2006 the Plaintiffs obtained a loan facility from the Defendant bank in the sum of Kshs.10 million. This loan was secured by 3 charges over the Plaintiff’s properties namely

- (i) L.R.No. Mombasa/Block X/264 and 295.
- (ii) L.R. No. Ngong/Ngong 6239
- (iii) L.R.No. Mainland North/Section II/148

The Defendant bank avers that the Plaintiff defaulted in service payments for this loan so that by 27th May 2008 the amount outstanding stood at Kshs.13,452,507/- which amount continued to rise due to interest and other charges accruing to date. Whilst this first loan was still running the Plaintiffs sought an additional facility in the sum of Kshs.16,720,000/- from the Defendant bank to enable it inject new capital into its business. The Defendants declined to advance to the Plaintiffs this sum due to the latter’s failure to service the first loan. Instead the Defendants proceeded to call in the first loan. The Plaintiff/Applicant does not dispute its indebtedness to the Defendant bank, but disputes the amount due which the Defendant now claim stands at about Kshs.40 million.

In order to recover the debt due to them the Defendant bank instructed auctioneers **KINYUA AND CO. AUCTIONEERS** to sell by way of public auction the Plaintiff’s property L.R. No. MN/Section II/148 and so realize the securities they held for the loan. By way of a Chamber Summons dated 28th October 2008 the Applicant sought an interlocutory injunction to restrain the Defendant bank, its agents and/or servants from proceeding with any sale, transfer and/or disposal of any of the securities held, pending the hearing of their suit filed against the Defendant. This application was heard by Mr. Justice Leonard Njagi who declined to grant the orders sought. The Applicants then filed an appeal against the decision of the Honourable Judge and filed this present

application seeking an interim injunction to prevent the realization of any of the securities held by the bank pending the hearing and determination of their appeal.

I have carefully perused the written submissions filed by both counsel and have considered the oral highlighting of those submissions by **MR. GIKANDI**, Advocate for the Plaintiff/Applicant and **MR. MABEYA** counsel for the Defendant/Respondent.

Having read the ruling of my learned senior brother Hon. Justice Njagi delivered on 8th January 2009 I do agree with his finding at page 3 that

“At this juncture, it is prudent to note that the defendant’s threat to realize the above securities is confined exclusively to the alleged failure to service the facility accorded to the plaintiff in October 2006.”

The additional facility sought by the Plaintiff for Kshs.16,720,000/- and which was not granted by the Defendant bank is a totally different transaction altogether. The defendant’s claim from the Plaintiff a sum of Kshs.19,925,283.90 as at 31st January 2010. The Plaintiff admits their indebtedness to the Defendant bank but disputes the sum due and owing. It is now well established law that in order to qualify for an injunction the Applicant must satisfy the three conditions set out in the case of **Giella –vs- Casman Brown & Co. Ltd [1973] E.A. 358**. These are firstly that the Applicant must show a prima facie case with a probability of success, secondly, an interlocutory injunction will not normally be granted unless the Applicant stands to suffer irreparable injury which cannot be adequately compensated by way of damages. Thirdly where a court is in any doubt the application is to be decided on a balance of convenience.

Whereas the Applicant seeks to restrain the sale of all three properties which were offered by way of security to the bank, the fact of the matter is that it is only one such property L.R. Mainland North/Section II/148 which is at imminent risk of being sold. The Notification of Sale dated 3rd October 2008 issued by the auctioneers only lists this one property in its schedule of property for sale.

It is well settled in law that where a dispute between 2 parties is not over the fact of indebtedness, but only over quantum, this is not a valid ground for injuncting a mortgagee from exercising its power of sale. In the cited case of **MRAO LIMITED –VS- FIRST AMERICAN BANK LIMITED & 2 OTHERS (2003) KLR 125** it was held at page 127 that

“The mortgagee may not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has began a redemption action.”

Since the Plaintiff admits the debt due to the Defendants and in line with this **Mrao** case I find that the Applicants have not established a prima facie case.

On the issue of irreparable harm the Applicant submits that failure to grant the application sought will render their appeal nugatory as the property will have been disposed of by way of action, causing the Plaintiff to suffer irreparable damages which cannot be compensated by way of damages. At this juncture it is prudent to note that out of the 3 properties held as security for the Kshs.10 million loan only **one** is in danger of being alienated by way of auction. As such the prayer for an interim injunction with respect to the remaining two properties is premature as the Defendants have taken no steps to realize those securities. It is therefore misleading in my view to claim that the appeal will be rendered nugatory as the subject properties will have been disposed of. Possibly only one property may be disposed off and the others would remain intact. In any event even if the property is sold off and the Plaintiff eventually wins the appeal, I am not convinced that they would suffer irreparable harm. In my view the Defendant being a commercial bank would be well able to compensate the Plaintiff by way of appropriate damages. I therefore find that the second ingredient in the **Giella** case has not been met.

Thirdly I will consider the balance of convenience. This is a loan which was advanced to the Plaintiff in the year 2006. It remains outstanding to date almost six (6) years later. Commercial banks are in the business of advancing loans to clients for a profit. If clients who default in payments of such loans are permitted to block realization of securities by way of such injunction, then this automatically condemns the

bank to suffer a loss which will hamper their business yet the Plaintiff has benefited from the loan. The bank claims that the amount due is Kshs.19,925,283.90. The Plaintiff on his part denies quantum but does not counter what if any amount they feel is reasonably owed by themselves to the Defendant. This sum

claimed by the Defendant remains unchallenged in the circumstances. In my view the balance of convenience does not favour the Plaintiff in this case. As such I find that this application for injunction has no merit and I do hereby dismiss the same in its entirety. Costs to be met by the Plaintiff/Applicant.

Dated and Delivered in Mombasa this 22nd day of October 2010.

M. ODERO
JUDGE

Read in open court in the presence of:-

Mr. Gikandi for Plaintiff

Mr. Mabeya for Respondent

M. ODERO
JUDGE
22/10/2010

MR. GIKANDI: I apply for certified copies of proceedings and ruling. I apply for a stay for 21 days to enable my client to file their application under r5 (2) (b) of the Court of Appeal Rules in the Court of Appeal in Nairobi.

MR. MABEYA: On the issue of stay there is nothing to stay. This would be an act of futility. The Applicants can file within 4 days. I urge court to decline to order a stay.

MR. GIKANDI: The act of advertising for sale is a positive act. We ask court to stay for 21 days the auction.

COURT: Court grants a 14 day stay of its orders.

M. ODERO
JUDGE
22/10/2010