REPUBLIC OF KENYA

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

Civil Case 518 of 2008

THIKA GENERAL WORKSHOP LIMITED (In receivership)……..…..…..1st PLAINTIFF

ANN NJOKI KAMU AND JOSEPH MWANGI KAMAU

Both suing as the administrators of the estate of the late WILSON KAMAU ITUME…..……2ND PLAINITIFF

VERSUS

KENYA COMMERCIAL BANK LTD…..
.....…1ST DEFENDANT

PONANGIPALI VENKATA RAMANA RAO and KOLLURI VENKATA SUBBARAYA KAMASASTRY……2ND DEFENDANT

RULING

The plaintiffs filed an amended chamber summons under the provisions of **Order XXXIX Rules 1 & 2** of the **Civil Procedure Rules** seeking temporary injunction to restrain the defendants, by themselves or through their agents from selling, alienating or in any manner whatsoever disposing off the 2nd plaintiffs' property known as LR. No.4953/427, Thika (*hereinafter referred to as the suit property*) pending the hearing and determination of the suit. The plaintiffs further prayed for an order of injunction to restrain the defendants from selling by public auction or private treaty, alienating, transferring and/or interfering with the plaintiffs' peaceful conduct of its business within the suit property pending the hearing and determination of the suit. The plaintiffs further prayed for the court to restrain the defendants from adversely dealing with the movable assets of the 1st plaintiff situate on the suit property pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application. The application is supported by several affidavits sworn by Ann Njoki Kuria, the 2nd plaintiff and also a director of the 1st plaintiff. The application is opposed. Chris Theuri, the relationship manager, credit support of the 1st defendant swore a replying affidavit in opposition to the application.

Prior to the hearing of the application, counsel for the parties to this application agreed by consent to file written submissions in support of their respective clients' cases. At the hearing of the application, I heard rival oral arguments made by Mrs. Othieno for the plaintiff and Mrs. Alele for the defendant. I have carefully read the pleadings filed by the parties in support of

their respective opposing positions. I have also considered the submissions made, including the authorities cited by learned counsel for the parties herein. The issue for determination by this court is whether the plaintiffs established a case to entitle the court grant them the injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled. The plaintiffs must establish that they have a prima facie case with a likelihood of success. They must also establish that they would suffer irreparable damage that cannot be compensated by an award of damages. If the court will be in doubt, it will determine the case on a balance of convenience (*see* **Giella vs Cassman Brown [1973] EA 358**).

In the present application certain facts are not in dispute. It is not disputed that the 1st plaintiff and Wilson Kamau Itume (*the deceased*) have been longstanding customers of the 1st defendant. According to the 1st defendant, the deceased secured a loan from the 1st defendant as far back as 1982 on security of the suit property. Over time, up to 1991, the 1st defendant advanced to the 1st plaintiff several loans including an overdraft facility of Kshs.3,000,000/= and fixed term loan of Kshs.8,500,000/=. The above sums were secured by various instruments including a supplementary debenture dated 18th October 1991, a fourth further charge dated 18th October 1991 and a guarantee executed by the deceased dated 19th November 1991 for the sum of Kshs.8,500,000/=. In the debenture, the 1st plaintiff charged "*all its undertaking goodwill assets books and property whatsoever and wheresoever both present and future including its uncalled capital for the time being (excluding its immovable property) with the payment and discharge of all moneys liabilities hereby agreed to be paid or discharged or intended to be hereby secured (including all expenses and charges arising out of or in connection with any of the acts authorized by the debenture*)." (*See clause 3 of the debenture dated 23rd September 1988 registered on 30th September 1988*). The suit property that was charged to the 1st defendant is registered in the name of the deceased. It was common ground that the 1st plaintiff fell seriously in arrears in repaying the sum that was advanced to it. The 1st defendant issued notices of default including the statutory notices seeking to realize the security.

The 1st defendant pursuant to the debenture, appointed the 2nd defendants to be the receivers and managers of the 1st plaintiff. It is not disputed that the 2nd defendants were so appointed as receivers and managers of the 1st plaintiff on 15th August 2008. On 8th September 2008, the 2nd defendants, on their own behalf and on behalf of the charge holder, published a notice in the Daily Nation inviting bids for the sale of the suit property, together with all the stocks in trade of the 1st plaintiff. It was this advertisement that provoked the plaintiffs to file the present suit.

According to the plaintiffs, the right for the defendants to sell the suit property and the assets of the 1st defendant had not accrued on account of the allegation that the 1st defendant had failed to make a lawful demand before the receivers and managers were appointed. It was the plaintiffs' case that the amount allegedly owed by it to the 1st defendant could not be ascertained. The plaintiffs submitted that part of the records of its loan account with the 1st defendant for the years 1988 to 1995 could not be traced. It was the plaintiffs' case that in view of the contradictory nature of the records kept by the 1st defendant, it was uncertain what amount was owed to the 1st defendant by the plaintiffs. The plaintiffs argued that, in the circumstances, the 1st defendant could not issue a lawful demand. In response to this submission, the defendants submitted that the records of the loan account of the plaintiffs were not in dispute. It was the 1st defendant's case that in the period that the plaintiffs maintained their loan account with the 1st defendant, the issue as to the amount that was owed had never been in dispute. The 1st defendant was of the view that the plaintiffs were raising the issue as to their alleged uncertainty of the amount owed as an afterthought.

On evaluating the rival arguments in this regard, I am inclined to agree with the 1st defendant. From the time the various loans were advanced to the 1st plaintiff and the deceased, the issue as to the amount owed had never been in dispute. In fact, for a period of over twenty (20) years, other than requesting for indulgence to be given time to pay the outstanding amount, the 1st plaintiff and the deceased did not generally dispute the amount that was demanded by the 1st plaintiff. I find no merit with the plaintiffs' complaint regarding the amount that was demanded by the 1st defendant prior to the appointment of the receivers and managers. This court is of the view that the right to appoint receivers pursuant to the debenture had accrued upon the 1st defendant being satisfied that the plaintiffs were no longer servicing the loan. It did not matter whether the amount owed was Kshs.19 million, 22 million or 27 million as at 1996. What is evident was that the 1st plaintiff was in default thereby entitling the 1st plaintiff to appoint the receivers – managers.

I was not persuaded by the argument advanced by the plaintiffs that the right by the 1st defendant to appoint receivers – managers had not accrued. As was held by the Court of Appeal in **J K Industries vs Kenya Commercial Bank Ltd & Anor [1987] KLR 506**, where debenture holder's right to appoint a receiver to manage a company's affairs accrues, it is a matter for the judgment of business whether the right should be exercised and it is not the business of the courts. Indeed, the courts have held that a debenture holder is under no duty to refrain from exercising its rights because by doing so it might cause loss to the company or its unsecured creditors. It was further held that a debenture holder may not be estopped from exercising its contractual right to appoint a receiver by the reason only that a formal demand for the repayment of the debt had not been made.

It was argued on behalf of the plaintiffs that the 2nd defendants, as receivers and managers, had purported to offer for sale the suit property which was not part of the property of the 1st plaintiff company. The plaintiffs submitted that it was only the 1st defendant, as the charge holders who had power to sell the suit property in exercise of it statutory power of sale. The plaintiffs took issue with the fact that the 1st defendant was seeking to realize the security on basis of a guarantee that had been given by the deceased long after the loan had been advanced. The plaintiffs submitted that no consideration was given for the guarantee. In response to these allegations, the defendants conceded that indeed the 2nd defendant did not have any power under the debenture to sell the suit property. They however submitted that the advertisement for the sale of the suit property clearly indicated that it was so placed on behalf of the charge holders. On the issue of the guarantee, the defendants submitted that the same was given when a further sum was advanced by the 1st defendant at the request of the 1st plaintiff and the deceased.

I have perused the exhibits annexed to both the plaintiffs' and the defendants' supporting affidavits. It was evident that the plaintiffs' assertion that the guarantee had been given without consideration is without foundation. The guarantee was given by the deceased to secure a further sum that was advanced to the 1st plaintiff as exhibited by the further charge and further debentures registered during the period contemporaneous with the time the guarantee was given. I find no merit with the argument advanced by the plaintiffs in this regard.

A further argument that was advanced by the plaintiffs was that the 1st defendant had failed to supply the statements and had further charged them interest that was non- contractual. The plaintiffs maintained that the interest charged by the 1st defendant was usurious and was therefore unlawful in terms of provisions of **Section 52** of the **Banking Act** and in light of the decisions made in the cases of **Mrao Ltd vs First American Bank Ltd [2003] KLR 125** and **Muiruri vs Bank of Baroda Kenya Ltd [2001] KLR 183**. The plaintiffs submitted that the 1st defendant had behaved in a manner that was oppressive and highhanded in charging interest that was too high and non-contractual to an extent that it made it impossible for the plaintiffs to

redeem the debt. In response to the plaintiffs' claim, the defendants submitted that the interest charged was contractual and infact the plaintiffs had never disputed the amount owed until 2007 when the 1st defendant made the demand. The defendants submitted that the amount demanded from the plaintiffs of Kshs.31 million was far less than the amount actually owed by the plaintiffs of over Kshs.151 million. The defendants were of the view that a dispute over accounts cannot form sufficient basis for the grant of an order of interlocutory injunction.

I considered the arguments made by the plaintiffs and the defendants in this regard. As stated earlier in this ruling, it was evident that the 1st plaintiff and the deceased fell in serious arrears and were unable to repay the amount that was advanced to them together with the accrued interest. I agree with the defendants that the issue of the interest charged has never been an issue between the 1st plaintiff and the 1st defendant prior to the death of the deceased. This court is of the view that the issue whether or not contractual rate of interest was charged was first raised by the plaintiffs when the present suit was filed. The plaintiffs would have had a case if the amount demanded by the 1st defendant was, say, the Kshs.151 million. As is the case, the 1st defendant is only demanding the sum of Kshs.31 million.

Even if this court were to form the opinion that there is dispute as to the amount owed, in law, that cannot constitute sufficient ground for this court to grant the interlocutory injunction sought by the defendant. In **Mrao vs First American Bank Ltd [2003] KLR 125** at page 127, Kwach JA held as follows:

"*The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in* ***Halsbury's Laws of England, Vol 32 (4th Edition****) paragraph 725 as follows:*

'***725 when mortgagee may be restrained from exercising power of sale.***

The mortgagee will 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, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.' (emphasis added**)."**

In **Habib Bank A.G Zurich vs Pop - In (K) Ltd CA Civil Appeal No.147 of 1989** (*unreported*) Kwach JA held at page 5 as follows:

"*…As I understand the law a dispute as to the exact amount owed under a mortgage is not a ground upon which a mortgagee, who has served a valid statutory notice, can be restrained from exercising its statutory power of sale. If any authorities were needed for this elementary proposition one need not look beyond* ***Bharmal Kanji Shah & Anor v Shah Depar Devji [1965] EA 91; J. L. Lavuna & Others V Civil Servants Housing Co. Ltd & Another*** *(Civil Application No. Nai 14/95) (unreported); and* ***Halsbury's Laws of England, volume 32, 4th Edition, paragraph 725****. I summarized the position in my ruling in* ***Lavuna*** *case in these terms:*

"*Notwithstanding the stand taken by Mr.Nagpal, in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under the charge executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage."*

In the present application, if I understood the plaintiffs' case correctly, they are contending that as the 1st defendant charged their account with non-contractual rate of interest, and therefore this court ought to restrain the defendants from realizing the securities charged pending the hearing and determination of the suit. It is this court's opinion that if the plaintiffs are of the view that there is dispute in regard to the amount owed, they should deposit the admitted sum in court for this court to exercise its discretion to grant them interlocutory injunction pending the hearing of the suit. Further, it was clear from the facts of this case that the plaintiffs have been in persistent default thereby entitling the 1st defendant to exercise the powers donated to it by the various charges and debentures to realize the securities charged. The plaintiffs, other than disputing the amount owed, did not deny that they were duly served with the requisite statutory notices. I think, if the plaintiffs are successful in their suit against the defendants, damages will be adequate remedy. The balance of convenience tilts in favour of the 1st defendant who has been kept out of its money by the plaintiffs.

In the premises therefore, having evaluated the facts of this case and the grounds put forward by the plaintiffs in support of their application, I am unable to reach the determination that the plaintiffs have established a prima facie case. I find no merit with their application for injunction. It is hereby dismissed with costs.

DATED AT NAIROBI THIS 21ST DAY OF JULY 2009.

L. KIMARU

JUDGE