



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 214 of 2009

JOHN WALTER OWINO.....PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA.....1ST DEFENDANT

GEORGE N. MUIRURI T/A LEAKEYS AUCTIONEERS.....2ND DEFENDANT

RULING

By a chamber summons dated 30th March, 2009 the plaintiff sought for a temporary order of injunction restraining the defendants from attaching or repossessing his motor vehicle registration No.KAP 108V Mitsubishi Pajero and KAV 144L Toyota Corolla and the plaintiff's household goods.

The application is supported by the grounds stipulated on the body thereto as well as the supporting affidavit by the plaintiff. Briefly summarized, it is the plaintiff's case that he operated a current account No.0112098510000 at the Nairobi Business Centre branch of the first defendant. On the 27th August, 2008, the plaintiff applied for a loan called Biashara plus from the first defendant totaling to Kshs.600, 000/=. The loan was approved and the plaintiff was supposed to pay Kshs.59, 000/= per month from 30th September, 2008 and complete payment on 30th August, 2009.

The loan was advanced on the securities of the plaintiff's motor vehicle registration Nos. KAP 108V, KAV 144L and the plaintiff's attachable household goods. The plaintiff contends that he continued paying the monthly installments without fail. On the 7th February 2009, he withdrew Kshs.2.5 million from his account No.0112098510000. On 10th February, 2009, a representative from the first defendant called him and informed him that his account was overdrawn and he was required to put his account into credit. On 14th February, 2009, the plaintiff undertook to regularize his account and deposited a sum of Kshs.109,000/= on his Biashara plus loan account.

The plaintiff contends that he had deposited Kshs.500,000/= towards regularizing the overdrawn account but the first defendant amalgamated the overdrawn account with the Biashara plus loan account and demanded for immediate payment of Kshs.3,204,425/= from the plaintiff. The 1st defendant instructed the 2nd defendant to proclaim the plaintiff's property demanding for the said sum. The plaintiff's claim is that the overdrawn account was irregularly and unlawfully amalgamated with the Biashara plus account. He therefore sought for a declaration that the 1st defendant is not entitled to recover the sum of Kshs.2.5 million by way of attaching the properties which were given for another security.

In further arguments in support of the plaintiff's case, his counsel submitted that the first defendant had no rights to combine the securities to cover the overdrawn account. The security was a chattels mortgage that was for a specific loan account which was governed by the terms of lending. Counsel made reference to the case of; **Onjllah v Kenya Commercial Bank Ltd. [2004] 1 KLR page 702** in which the Court of Appeal held that:-

1. "Money paid under a mistake of fact is repayable. The position of a banker does not differ from that of any other recipient of money acting as an agent and, accordingly, money paid to a banker under a mistake of fact can be successfully re-demanded from the banker by the person who so paid it.
2. Money paid by a third person to the bank either directly or on account of a bank's customer is refundable if it is

established that it was paid under a mistake of fact and the mistake has been brought to its attention before the Bank has either paid it out to the customer, or settled its accounts with the customer in a manner which would amount to payment, or otherwise done something which has so prejudiced its position that it would be inequitable to require a refund.

3. The respondent/bank had not proved that the remission of the money into the appellant's account was mistaken and that the appellant was not entitled to the amount so deposited in the account. The bank was therefore in breach of its contractual obligation to its customer to pay out any deposits in the customer's account to the customer or to his order."

This application was vigorously opposed, Counsel for the 1st defendant relied on the replying affidavit sworn by Charity Mukunyi sworn on 3rd April, 2009. The matters deposed thereto confirms that the plaintiff applied for a loan of Kshs.600,000/= which was granted on following terms contained in the letter of offer dated 29th August, 2008 and among the conditions it is stated that:-

"In addition, the bank reserves the right to set-off (debit money from deposit accounts) or combine all or any securities held either in form of cash or property in order to liquidate any outstanding liabilities in the event of non-payment of any sums as and when they are due for the Borrower, Co-Borrower(s) and/or Guarantors."

In addition to the letter of offer, the plaintiff executed a letter of settlement which entitled the 1st defendant to set off or combine the accounts held by the plaintiff. This was also followed by another letter dated 1st September, 2008 titled "HYPOTHECATION OF GOODS" to secure all the overdrafts, loans and credit opened by the plaintiff. It is alleged that the plaintiff was operating his account and was involved in an activity called cheque kiting in which the plaintiff withdrew funds on the strength of cheques issued when there was no money in his account. By the time the first defendant realized, the plaintiff had overdrawn cheques amounting to Kshs.2, 980,000/= when there were no funds in his account. The bank reversed the debit entry and erroneously showed accredit balance which the plaintiff admits having withdrawn on 7th February, 2009.

When the bank discovered an unauthorized withdrawals, it moved to correct the error by debiting the plaintiff's account. The plaintiff admitted the withdrawal and undertook to pay and issued two cheques dated 19th February, 2009. However, those cheques were returned unpaid. Moreover the plaintiff has not even paid the Biashara plus loan account. Nothing stops the first defendant from combining the facilities and from repossessing the securities held in order to recover the amount due as a result of the default.

Having set out the summary and the background of this matter, the issues for determination is whether the plaintiff is entitled to the orders sought based on the evidence on record. The principles upon which a court can grant an interlocutory order of injunction are well settled; first the plaintiff has to establish a prima facie case with a probability of success. In the case of; **MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD AND 2 OTHERS (2003) KLR 125**, the court of Appeal explained what constitutes a prima facie case as follow;

"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"

It is not in dispute that the plaintiff overdrew his account to the tune of KSH 2.5 million. The plaintiff admitted this indebtedness and undertook to repay the overdrawn account and issued cheques which bounced. The plaintiff also executed the letter of offer and the letter of set off which authorized the 1st defendant to combine the accounts held by the plaintiff and also to set off. Apart from the express authorization, the plaintiff has not even honored the repayment schedules of the loan account called Biashara plus. Based on this default alone, the 1st defendant is entitled to realize the securities held.

The orders sought by the plaintiff are equitable remedies and the party who comes to equity must do so in clean hands. There are allegations that the plaintiff was involved in cheque kiting and as a result his account was erroneously credited in the process of reversing the payments. The bank is obviously entitled to recover this money which was paid to the plaintiff by mistake. Moreover, the plaintiff has not proved that he completed paying even the loan account, he issued bouncing cheques. For all these reasons, as well as the conduct of the plaintiff, he is not entitled to the orders of injunction.

Taking this matter in totality, the relationship between the plaintiff is clearly defined in the documents signed by both parties. The 1st defendant attachment of the securities arises from the rights conferred under the chattels mortgage. Accordingly, the application lacks merit and it is hereby dismissed with costs.

RULING READ AND SIGNED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2009.

M. K KOOME

JUDGE