



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU Civil Suit 185 of 2009

KENYA FARMERS ASSOCIATION LTD.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

This suit and chamber summons to which this ruling relates were simultaneously filed on 1st July, 2009. An *ex parte* order of temporary injunction was granted to the applicant restraining the respondent from doing certain acts in relation to various properties belonging to the respondent located in Nakuru and Nairobi. The said chamber summons is yet to be heard *inter partes*.

The applicant has in the meantime brought the instant application seeking, in the main, leave to amend the plaint to include certain properties which have been advertised for sale by the respondent and which do not form part of the suit properties already in the suit. The applicant also seeks, at this stage an interim injunction to restrain the respondent from proceeding with the sale of those properties. The application is premised on the grounds that-

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- i) the respondent has not served the applicant with a valid statutory notice of sale or at all.
- ii) the applicant is not indebted to the respondent, having fully (indeed in excess) paid up the banking facilities extended to it by the respondent.
- iii) the applicant being a farmers organization with over 64,000 members and being of strategic importance to the country in matters of food security stands to suffer irreparable loss and damage should the intended sale of its assets proceed
- iv) the interest charged on the facilities and bank charges levied are exaggerated, unconscionable and illegal
- v) it is just and necessary to amend the plaint to include the properties presently threatened with sale.

The respondent has filed a notice of preliminary objection and a replying affidavit. Although not expressly stated, the grounds raised in the objection were subsumed in the arguments in opposition to the

application. The preliminary objection in my view is, therefore spent. The application is opposed on the grounds that-

- i) it is *res judicata*
- ii) it is *sub judice*
- iii) the respondent is still owed substantial sums of money

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- iv) the respondent is lawfully exercising its statutory power of sale having issued the requisite statutory notices
- v) the matters intended to be introduced by the amendment sought in this application has been canvassed and determined in Nakuru HCCC No.106 of 2004
- vi) the respondent has sought a review of judgment delivered in Nakuru HCCC No.106 of 2004 thereby reopening matters determined in the said Nakuru HCCC No.106 of 2004.

I have considered the foregoing rival arguments and the authorities cited by learned counsel for the applicant. I must start by warning myself that in considering this application, I must bear in mind the fact that a similar application for injunction is still pending in this file and further that a ruling on a preliminary objection is similarly pending hence I must strictly restrict myself to the issues before me. It is indeed an unusual, if not absurd situation.

I start with the prayer for leave to amend the plaint. It is clear to me that the original plaint contained a list of eight properties which were at the time the suit was filed threatened with alienation. Subsequently some more properties have been advertised by the respondent as the interim order of injunction issued on 1st July, 2009 only concerned the original

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eight properties. A temporary injunction will issue by dint of Order 39 rule 1, of the Civil Procedure Rules, only if the property in dispute in a suit is in danger of, among other things, being alienated by a party to the suit.

It follows that an injunctive relief can only be sought to preserve a property which is the subject matter of a suit, hence the instant application to include the rest of the threatened properties in the suit herein. The only difficulty I see is the omnibus framing of the prayers. In the normal circumstances, the applicant ought, in the first instance, to have sought leave to amend the plaint and only after that application is granted can the prayers for injunction be brought.

In terms of Order VIA of the Civil Procedure Rules and in accordance with numerous decisions both of the Court of Appeal and this court on the subject of amendment of pleadings, it is common ground that the power of the court to order amendment is discretionary. The discretion though wide is circumscribed by the above provision of the Rules and by the general principles annunciated in various case law.

Those powers (to amend pleadings) were sacinctly considered by the Court of Appeal in the case of **Joseph Ochieng' and 2 others** Vs. **First National Bank of Chicago**, Civil Appeal No.149 of 1991. Quoting from

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Bullen and Leak and Jacob's Precedents and Pleadings, 12th Edition, their Lordships delivered themselves as follows:

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case: amendments should be timeously applied for: power to so amend can be exercised by the court at any stage of the proceedings (including appeal stage): that as a general rule – however late the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side: that exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court: that adjournments should be given to the other side if necessary if an amendment is to be allowed: that if the court is not satisfied as to the truth and substantiality of the proposed amendment, it ought to be disallowed: that the proposed amendment must not be immaterial or useless or

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merely technical: that where the plaintiff's claim as originally framed is unsupportable, an amendment which would leave the claim equally unsupportable will not be allowed: that if the proposed amendments introduces a new case or a new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action: that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint, the defendant would be deprived of his right to rely on limitation: that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.”

I am satisfied that the applicant's prayer for amendment meets the above stricture for the exercise of the court's discretion in matters of amendment

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of pleadings. The prayer is allowed in terms of the draft amended plaint. The amended plaint to be filed and served within seven days of the date

of this order. The respondent will be at liberty to amend its defence within seven days of service.

I turn now to the crux of this application namely whether an injunction as sought herein can issue against the respondent. The application is expressed to be brought under Order 39 rules 1 and 2 of the Civil Procedure Rules. Recalling what I stated at the beginning of this ruling, and bearing in mind that leave to amend the plaint has been granted, effectively incorporating the present suit properties in this suit (although the amended plaint is yet to be filed), there is no doubt that these properties are, like the earlier ones threatened with sale by the respondent.

The conditions for the granting of an interlocutory injunction were set out in **Giella V. Cassman Brown & Co. Ltd.** (19723) EA 358 at P. 360 where it was stated:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not

adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will

decide the application on the balance of convenience (E.A. INDUSTRIES VS. TRUFOODS (1972 EA 420).”

In considering the first principle, I am not much concerned with the strength or weakness of the applicant’s case but with whether or not there is *prima facie case*, which is not the same thing as strength or merit of the case. As defined in ***Mrao Ltd Vs. First American Bank of Kenya Ltd. & 2 others*** (2003 KLR 125 a *prima facie case* means more than an arguable case. It means that the evidence must show an infringement of a right and the probability of success of the applicant’s case at the trial. In considering whether a *prima facie case* has been established the court must refrain from making definite findings of either fact or law as doing so would be to venture in the realm of the trial court.

The applicant’s case at the trial will be that it has settled fully the banking facilities granted to it by the respondent; that the intended sale by the respondent in the exercise of its statutory power of sale is irregular for want of statutory notice; and that the interest and bank charges are illegal and excessive. It was submitted for the applicant that the total disbursement was Kshs.137m and not Kshs.500m; that after selling

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various properties, the respondent realized Kshs.466m; that some other two properties have also been sold, the details which has not been

disclosed by the respondent (The applicant gives the total value of the two

properties as Kshs.238m); that the respondent cannot claim interest after this court (Musinga, J.) found that the same had ceased.

The respondent, on the other hand, is categorical that Kshs.450m was outstanding before the sale of six properties at Kshs.228m out of which only Kshs.72m has been received. Musinga, J. in his judgment in Nakuru HCCC No.106 of 2004 ***Kenya Farmers Association Ltd. Vs. National Bank of Kenya Ltd.*** found as a fact that:

“The plaintiff has come to court seeking an equitable remedy of an injunction, even when it admits that it has not paid hundreds of millions of shilling to the defendant. Even though the plaintiff seemed to dispute that the outstanding sum as at the date of filing the suit was nearly Kshs.500million, the concession made by the plaintiff’s Managing Director in his letter of 31st August, 2006 addressed to the defendant’s Managing Director is very telling.

In the relevant part of the said letter he stated:

‘As far as our records go, the debt has since 31/12/2002 when the Bank ceased charging

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interest, crystallized at approximately Kshs.450.4m. Your letter of demand dated

13/7/2005, however claimed Kshs.499.1m and we were under the impression that the bank had

settled the fertilizer liability of approximately Kshs.42.5m to the Treasury.’

In the light of such an admission, on what basis can the plaintiff resist the defendant’s move of selling the plaintiff’s properties that were lawfully charged to the defendant.....?”

If the court found as it did in the judgment that approximately Kshs.450.4m was outstanding, it was incumbent upon the applicant to present evidence in this application of how that debt has been liquidated between the time the judgment was delivered and when the present suit was brought. There is no such evidence.

On the statutory notice it was submitted that the notices annexed to the replying affidavit do not cover all the properties and further that they are invalid for not giving three months from the date of service but rather from the date of the notice. The third argument against the notice is that they were not served on the applicant.

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On behalf of the respondent it was submitted that for the last ten years when it has been attempting to sell the applicant's assets, statutory

notices have been issued and that it was unnecessary as there was no requirement to reissue notices each time it intended to sell. I have seen on record a letter from the respondent dated 7th August, 2006 giving the applicant notice of the former's intention to sell some thirty seven (37) properties including those the subject of this application. It was argued that that notice or any other has never been served upon the applicant. That contention is not borne by any evidence in rebuttal of the respondent's position that the same was duly served. That is supported by the applicant's stamp on that letter acknowledging receipt on 10th August, 2006. *Prima facie*, therefore, there was a notice which was received and acknowledged by the applicant. There was explicit reference in the notice that it was issued under Section 74 of the Registered Land Act – Cap 300. It went further to state that the funds due were payable within three (3) months from the date of service of the notice. There is no statutory requirement that the notice be reissued if the sale is suspended or stopped. See **George Gikuru Mbutia Vs. Juika Credit**, Civil Application No.111 of 1986.

Finally, on the question of *prima facie* case, it was submitted that the interest charged and the bank charges levied were unconscionable,

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exaggerated and illegal. The direct answer to that is the finding in Nakuru HCCC No.106 of 2004 where Musinga, J. stated that –

“On the basis of the evidence before me, I cannot declare that the defendant's charges on interest are oppressive, unfair and unconscionable. I therefore dismiss the second prayer in the plaint.”

I come to the conclusion on the first principle (condition) of **Giella** that the applicant has not demonstrated, for the reasons stated, a *prima facie* case with a probability of success.

The conditions for granting an interlocutory injunction are sequential so that the second condition can only be addressed if the first one (*prima facie* case) is satisfied and only when in doubt will the court consider the third one. But traditionally, the courts have addressed all the three and I will not depart from that practice.

On the question of irreparable injury to the applicant, I can only say that the respondent has not been shown to be incapable of compensating the applicant. The applicant has not been servicing the facilities granted by the respondent, as was found by Musinga, J. in Nakuru HCCC No.106/2004 since 1996. A huge portion of the facility advanced remains

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unsettled yet the applicant has assets which can be disposed of to liquidate the same. The respondent is

also a public body with shareholders just like the applicant. Its loss is no less important than that of the applicant. Justice, like a Samburu traditional knife, cuts both sides. The balance of convenience tilts in favour of the respondent.

I have deliberately endeavoured not to address in this ruling the grounds raised in the notice of preliminary objection which were argued as part of a reply to the application for the reason that there is a ruling pending before the Hon. Lady Justice Mugo on those very grounds.

In the result, I find no basis for restraining the respondent from exercising its statutory power of sale. This application must fail and is dismissed with costs to the respondent.

DATED, SIGNED and DELIVERED at NAKURU this 22nd day of October, 2009.

W. OUKO

JUDGE