

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

Civil Case 33 of 2007

EUNICE GATHIGIA GATHUA PLAINTIFF

VERSUS

JAMES GATHUA KIHORO 1ST DEFENDANT

CLEAR INSURANCE BROKERS 2ND DEFENDANT

STANDARD CHARTERED BANK KENYA LIMITED 3RD DEFENDANT

RULING

By a ruling delivered by Azangalala J on 20th September 2007 the plaintiff was granted an order of injunction on conditions that the plaintiff provides a written undertaking under oath as to damages within 7 days. Further the plaintiff pays to the 3rd defendant a sum of Ksh.97,000/- per month with effect from 30th September 2007 and thereafter on the 30th of every succeeding month until the hearing and determination of this suit. In default of compliance of any of the two conditions the injunction be discharged on the application by the 3rd defendant. On 29th June 2009 the 3rd defendant filed a notice of motion under order 39 rules 4 of the Civil Procedure Rules seeking for the discharge of the order of the injunction made on 20th September 2007.

This application is premised on the grounds stipulated on the body thereto and the supporting affidavit of Jane Chege sworn on 17th June 2009. She has deposed that the plaintiff has not made a single payment as ordered by the court. Secondly, the plaintiff has not made any effort to set the suit down for hearing. The plaintiff is comfortably enjoying the interim orders which remain in force to the detriment of the 3rd defendant. It is in the interest of justice that the order of injunction made by set aside.

Although counsel for the defendant did not file any replying affidavit or grounds of opposition, he urged the court to invoke the inherent powers under section 3A of the Civil Procedure Act and find that the suit shall be rendered nugatory if the order of injunction is to be discharged. Counsel further submitted that the 3rd defendant should have moved the court for contempt of court due to failure to comply with the court order.

Under order 39 rules 4 of the Civil Procedure Rules it is provided that:

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

The orders sought to be discharged were issued on conditions that the plaintiff will pay the outstanding loan by monthly installments of Ksh.97,000/- with effect from 30th September 2007. Two years down the line the plaintiff has not made a single payment. The 3rd defendant is obviously entitled to apply to discharge the orders. The plaintiff did not even bother to swear an affidavit and her counsel did not even file grounds of opposition. Accordingly the order issued on 20th September 2007, on conditions which have not been met by the plaintiff are prejudicial to the 3rd defendant and are hereby discharged and set aside.

The 3rd defendant will have the costs of this application.

RULING READ AND SIGNED ON 25TH NOVEMBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE