REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 158 of 1998

M'NG'ONDU ISAIAH PAUL …….....……. PLAINTIFF

VERSUS

STANDARD CHARTERED BANK LTD …….. 1ST DEFENDANT

ELIZABETH NCORORO ISAIAH …….... 2ND DEFENDANT

RULING

I find it necessary to set out the history of this matter before I consider the application before me. By a charge dated 14th July 1993 the applicant secured the payment of a sum of Kshs. 800,000/= advanced by the 1st respondent to the 2nd respondent who is his wife. To effect this, the applicant executed a legal guarantee. Following a default by the 2nd respondent to service the facility the 1st respondent commenced the exercise of its statutory power of sale by demanding the immediate payment of the amount due and owing. When no response was forthcoming the 1st respondent attempted to realize the security by way of public auction after due notification of sale. That was in May 1996.

The sale did not proceed as the 2nd respondent made proposals for payment. The proposals were not honoured and by 8th September 1998 the debt stood at Kshs. 1,198,086.70. Notification of sale was once again issued for the sale of the security. On 9th December 1998 the applicant filed this suit simultaneously with an application seeking to restrain the 1st respondent from advertising, selling and/or dealing with the charged property, being No. NJIA/BURI-E-RURI/3189 pending the determination of the suit. Temporary restraining orders were issued pending inter partes hearing by Etyang, J on 9th December 1998. Interpartes hearing was slated for 17th December 1998, but was adjourned several times with the interim orders being extended until 12th April 2000, a period of one year and five months, when the application was withdrawn by consent.

Subsequently, the case was fixed for hearing and 22nd June 2000. Todate, nearly eight years later it has not been heard. Instead on 18th January 2001 parties recorded a consent before Tuiyot, J as follows:-

"***By consent, the plaintiff do deposit Kshs. 100,000/= with 1st defendant on or before 28.2.2001. Meanwhile, the plaintiff or accountant to join the 1st defendant's Accountant. Accounts be done at Meru Branch. Accounts be filed before 1st March 2001. Each Accountant to audit his account. M. 1.3.2001.***

W. K. Tuiyot

Judge

18.1.2001."

On 1st March 2001 when the matter came up for mention as directed above it was stated that the 2nd respondent had paid Kshs. 70,000/= and had made a proposal of a monthly payment of Kshs. 50,000/= while another Kshs. 100,000/= was expected from outside Kenya.

Several adjournments and mentions followed. On 18th July 2001 the court directed that the consent order of 18th January 2001 be complied with failing which execution to follow. There was a lull until 3rd February 2004 when the 2nd respondent brought summons seeking restraining orders against the 1st respondent in respect of selling the charged property. Once again interim orders were issued by Onyancha, J. pending interpartes hearing on 17th February, 2004.

There is no record for 17th February 2004 as clearly the matter did not come up. But after two adjournments, the interim orders were vacated on 8th June 2005. Four months later on 25th October 2005 the present application was brought. In it the applicant is seeking injunctive orders to restrain the 1st respondent from advertising, selling, alienating and/or dealing with the charged property pending the hearing and determination of the application. It also seeks that the 1st respondent be compelled to comply with the consent recorded on 18th January 2001 and further that the 1st respondent be ordered to supply a firm of accountants with all bank statements and other relevant documents relating to the applicant's account with the 1st respondent.

The instant application is premised on the grounds that the consent of 18th January, 2001 was breached by the 1st respondent by failing to supply the applicant's appointed accountants with the necessary documents for the purpose of reconciling the account. It is also averred that the sum of Kshs. 100,000/= payable under the terms of the said consent order was in fact paid to the firm of M/S Mbae Mwarania & Co. Advocates who were then acting for the 1st respondent. That subsequently the 2nd respondent paid Kshs. 285,000/= and Kshs. 120,000/= to the said firm of Mbae Mwarania & Co. Advocates.

Apart from these payments to the 1st respondent's erstwhile counsel, the applicant deposes that the 2nd respondent had on several occasions made payments directly to the loan account, while in one instance, the insurance claim for burglary in the sum of Kshs. 125,000/= was paid into the loan account. In a nutshell, the applicant, concludes, the loan has been fully paid – in fact over paid by over Kshs. 100,000/=. He was therefore supposed that all the foregoing notwithstanding the 1st respondent still went ahead to advertise the charged property in a purported exercise of its statutory power of sale. The application was strongly opposed. It was argued for the 1st respondent quite ably that the present application is an abuse of the process of the court.

That there is an application (erroneously stated to be dated 9th December 1998 – which was withdrawn) for injunction pending, which the applicant ought to have prosecuted instead of instituting a fresh application for the same relief.

I can confirm that the application pending is that dated 2nd February 2004 – brought by the 2nd respondent. It is also denied that any funds were paid to the firm of Mbae Mwarania & Co. Advocates. Further that the applicant failed to comply with the consent order by failing to deposit the funds and sending his accountants to the 1st respondent as agreed. I believe the foregoing sets out clearly the back ground to this dispute.

I have anxiously and most carefully considered these rival positions of the parties as well the many useful authorities cited and hold the following view of the matter.

From the plaint it is clear that the applicant granted the 2nd respondent a loan from the 1st respondent charging his property NJIA/BURI-E-RURI/3189 for Kshs. 800,000/= (and not Kshs. 600,000/=). It is also a fact that there was default on the part of the 2nd respondent to service the loan facility hence this suit.

The first prayer being an order of injunction, must be considered within the strictures enunciated in the famous ***Giellas V. Cassman Brown Ltd*** (1973) EA 358, namely, the applicant must establish a *prima facie* case with a probability of success, show that he will suffer irreparable harm which cannot be adequately compensated by an award of damages and finally, if the court is in doubt the application should be decided on a balance of convenience.

The above principles are sequential and ought to be approached as such. However, the traditional approach is to consider all the three. When considering whether the applicant has demonstrated the existence of a *prima facie* case with a probability of success, the court must ensure that no definite findings on points of law or fact are made in order to avoid deciding the matter with finality at an interlocutory stage.

The standard of *prima facie* case must be that set in the case of ***Mrao Ltd V. First American Bank of Kenya Ltd,*** 2003 KLR 125. The applicant insists that the 2nd respondent has fully paid the loan yet that is not what he states in the plaint, where he admits that the 2nd respondent is in arrears. Secondly, the applicant backs his claim that the loan account is settled with annextures M.I.P 4 (a) to M.I.P. 4(f) – deposit slips. The first slip is for Kshs. 200,000/= dated 22nd October, 1992 – one year before the loan was advanced. That slip clearly does not relate to this dispute. There are the following slips:

(i) 28th June 1999 – Kshs. 5,000/=

(ii) 29th July 1999 – Kshs. 10,000/=

(iii) 9th November 1999 – Kshs. 15,000/=

(iv) 17th February 2000 – Kshs. 30,000/=

(v) 21st March 2000 – Kshs. 40,000/=

These slips support payment amounting to Kshs. 100,000/= yet according to the bank statement annexed to the affidavit of Jan N. Chege, the 1st respondent's Account Manager sworn on 11th June 2004 the balance due as at 4th February 2004 was Kshs. 1,608,121.20. The slips the applicant is relying on do not explain the short fall of over Kshs. 1.5m.

Thirdly, if indeed the 2nd respondent had fully paid the loan, of what use was the consent of 18th January 2001?. The consent in which the applicant undertook to pay Kshs. 100,000/= to the 1st respondent was a manifestation indeed on admission of indebtedness. Then there is the question of payment of a total of Kshs. 505,000/= to the firm of Mbae Mwarania & Co. Advocates. The firm of Mbae Mwarania and Co. Advocates was wound up following the death of its proprietor. But the most fundamental question is why the 2nd respondent opted, for the first time since the loan was advanced to her, to make payment to the advocates for the 2nd respondent.

I ask why, again, particularly when the consent order was explicit that payment be made to the 2nd respondent. Three affidavits were filed in reply to the application dated 2nd February 2004 where similar allegations of payment to the 1st respondent's advocates were made. The affidavits were sworn by two former employees of the firm of Mbae Mwarania & Co. Advocates to the effect that the receipts annexed to proved payment were forgeries on account of the nature of the receipt issued, the address of the firm and the actual name of the deceased counsel, among other anomalies. These are serious allegations that

one would have expected a rebuttal from the applicant or the 2nd respondent – but the same remained unchallenged. The applicant and the 2nd respondent conveniently brought in the deceased advocate into this to make a claim which they knew very well could not be substantiated by the deceased as dead men do not tell tales.

Then there is the question of the suit and the application of 3rd February 2004. Both remain pending for the last 9 and 3 years respectively. Instead prosecuting the suit or the application of 3rd February 2004 the applicant is determined to engage the court in a rat-race game with no end, benefiting from interim orders and going to sleep. That kind of wastage of judicial time and other party's resources must be discouraged. It amounts to abuse of the court's process.

The consent the applicant is now keen on was recorded seven years ago. He was the first to violate it by not paying the Kshs. 100,000/= to the 1st respondent in time and for failing also to send his accountant to the 1st respondent.

On a *prima facie* basis, I find no case with a probability of success at the trial. The value of the charged property can be ascertained and the 1st respondent, being a reputable banking institution, is capable of compensating the applicant by way of damages. The balance of convenience also tilts in favour of the 1st respondent who lent funds and for over eight years has not reaped any benefit from that lending.

All the relief sought in this application must fail as the applicant has not come to equity with clean hand. He has also not done equity and cannot seek equity.

The application, for these reasons, must fail. It is dismissed with costs to the 1st respondent.

Dated and delivered at Meru this 17th. day of April 2008.

W. OUKO

JUDGE