



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 606 of 2004

JOHN CHUCHU MUCHAI.....1ST PLAINTIFF

SAMUEL MBURU MUCHAI.....2ND PLAINTIFF

NELLIWA BUILDERS & CIVIL ENGINEERS LIMITED.....3RD PLAINTIFF

VERSUS

EURO BANK LIMITED (IN LIQUIDATION)

THRO' DEPOSIT PROTECTION FUND BOARD-LIQUIDATOR....DEFENDANT

RULING

Before me is an application made under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules, Section 3A of the **Civil Procedure Act, Sections 60 and 69A** of the **Indian Transfer of Property Act, 1882** by which the plaintiffs seek to be granted an order of interlocutory injunction restraining the defendant by itself or by its agents from advertising, selling, offering for sale or in any manner interfering with the plaintiffs' properties, namely **LR No.14968/39** and **LR No.36/1/1011** (*hereinafter referred to as the suit properties*) pending the hearing and determination of the suit. The plaintiffs further sought an order of the court to compel the defendant to execute a discharge of charge and deliver the titles of the suit properties to the plaintiffs.

The grounds in support of the application are on the face of the application. The plaintiffs contend that the purported exercise of statutory power of sale by the defendant was null and void since such power had not arisen. The plaintiffs contend that they had paid the debt due and owing from them long before the defendant issued the statutory notice and the notifications for sale. They complained that the notifications for sale issued on 13th September, 2004 were fatally defective for non-compliance with the **Auctioneers Rules, 1997**. They contend that the purported exercise of power of sale was a clog and fetter to the plaintiffs' equity of redemption which had not been extinguished. They complained that the purported exercise of statutory power of sale by the defendant was oppressive, unconscionable, high handed and void *ab initio*. The plaintiffs stated that they would suffer irreparably if the defendant was allowed to proceed with the said sale. They were of the view that they had established a prima facie case to enable this court issue both interlocutory and mandatory injunction. The application is supported by the annexed affidavits of John Chuchu Muchai, the 1st plaintiff and Peter Muthengi.

The application is opposed. M. A. Mohammad, the liquidating agent of the defendant bank swore a

replying affidavit in opposition to the application. He deponed that the 3rd plaintiff borrowed a sum of KShs.8,000,000/= which was secured by the suit properties. The suit properties were charged to the bank by the 1st and 2nd plaintiffs. Thereafter the 3rd plaintiff made requests to be granted further overdrafts for the period between April, 1997 and July, 2001. He deponed that the 3rd plaintiff defaulted in repaying the loan advanced together with the overdrafts even before the defendant bank was placed under liquidation. He deponed that the bank statements exhibited together with other supporting documents clearly established the amount that was advanced to the 3rd plaintiff. He deponed that after the 3rd plaintiff defaulted in repaying the loan advanced, it made proposals to liquidate the amount then owed. He deponed that the 3rd plaintiff did not honour the proposals made to settle the loan amount. He swore that the 3rd plaintiff operated three accounts at the bank which accounts all evidenced the transactions that took place at the time. He denied the suggestion by the plaintiffs that they had paid the loan advanced to them. He asked the court to differentiate between the loan that was advanced to the 3rd plaintiff and was secured by the suit properties and the loans which were advanced to the 1st and 2nd plaintiffs which were unsecured. He urged the court to consider the documents annexed to his affidavit and find that all the entries reflected in the bank statements were correct and established that the plaintiffs owed the defendant and were in default. He deponed that the defendant had legally exercised its statutory power of sale. He urged the court to dismiss the application with costs.

At the hearing of the application, Mr. Njuguna learned counsel for the plaintiffs reiterated the contents of the application and supporting affidavits. He submitted that the plaintiffs' claim was unique and unusual. He explained that the plaintiffs suit was based on the relationship of a bank and a customer – it was the plaintiffs' claim that they had paid the debt owed to the defendant and were in fact claiming a refund of the sum of KShs.78,000,000/= which was overpaid. He maintains that the threat by the defendant to sell the suit properties had no basis in law as the defendant had made unexplained internal debits, unexplained transfers and unexplained deposits in the plaintiffs' account. It was submitted that the plaintiffs' complaint as regard the irregular manner in which their account were operated were not addressed nor was there an explanation for the said anomalies in the said accounts.

Mr. Njuguna submitted that the plaintiffs instructed a firm of Certified Public Accountants who audited and reconciled the said accounts and reached the conclusion that the plaintiffs had infact overpaid the defendant. He explained that the report of the said accountant was availed to the defendant but to date the defendant had not given any response. He reiterated that although the bank statements were admissible in evidence, the plaintiffs had raised queries in the figures contained in the said statements that required an explanation to be given by the defendant regarding discrepancies evident in the said statements. He submitted that the plaintiffs had raised seven issues relating to fraud in their plaint which had not been controverted by the defendant. He maintained that the defendant had shown no justification for wanting to sell the suit properties for an amount of KShs.500,000,000/= yet the value of the said properties was KShs.15,000,000/=.

Mr. Njuguna submitted that if the plaintiffs were to be successful in their suit, they would be unable to recover any amount from the defendant since the defendant was under liquidation and could only pay up to a sum of KShs.100,000/=. He urged the court to find that the plaintiffs had established a prima facie case to entitle them to be granted the order of interlocutory injunction sought. He referred the court to several decided cases which in his view should persuade the court to rule in favour of the plaintiffs. He submitted that the balance of convenience tilted in favour of the plaintiffs since they were in danger of losing their properties without the possibility of being paid anything in the event that their suit is determined in their favour. He prayed for the application to be allowed with costs.

Mr. Bundotich for the defendant opposed the application. He submitted that the dispute in court was in respect of the suit properties which were mortgaged by the 1st and 2nd plaintiffs in respect of a loan which was advanced to the 3rd plaintiff. He explained that the 3rd plaintiff defaulted in paying the loan advanced to it hence the defendant's decision to realize the securities mortgaged. He reiterated that the complaints made by the plaintiffs that there were illegal entries made in their accounts was incorrect since the defendant had clearly established that the said amount was advanced to the plaintiffs and further that the plaintiffs had made proposals to settle the said debt. He urged the court to separate the issue of the

suit properties which were mortgaged in respect of a loan advanced to the 3rd plaintiff, and the issue of the unsecured loan which was advanced to the 1st and 2nd plaintiffs. He submitted that the defendant legally invoked its statutory power of sale. He maintained that no allegation of irregularity in the exercise of the said statutory power of sale had been made. In his view, no prima facie case has been established to enable this court grant the interlocutory injunction sought. He urged the court to dismiss the application with costs.

I have carefully considered the rival submission made by counsel for the plaintiffs and counsel for the defendant. I have also read the pleadings filed by the parties, including the affidavits in support of their respective clients' cases. The issue for determination by this court is whether the plaintiffs have established a case to enable this court grant the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant an interlocutory injunction are well settled. In **Michael Gitau –vs- Pamela Salvage & 4 others CA Civil Appeal No. 244 of 1999 (Nairobi)** (unreported), the Court of Appeal held at page 7 of its judgment as hereunder:

*“The principles which guide the court in dealing with such an application are well settled and are clearly spelt out in the often cited case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A. 358**. The applicant must first show he has a prima facie case with the probability of success upon trial. Secondly, he must show that in the event that he is refused an injunction and he were eventually to succeed that damages would not adequately compensate him for any loss which he would have suffered. Thirdly, that if the court is in doubt on either of the two principles above then it should consider the application on the balance of convenience.”*

In the present application, certain facts are not in dispute. It is not disputed that the 3rd plaintiff borrowed a sum of KShs.8,000,000/= from the defendant in 1996. The said loan was secured by the title in respect of LR No.14968/39 owned by the 1st plaintiff. The 3rd plaintiff was advanced a further sum of KShs.15,000,000/= in 1997 on security of a title of LR No.36/1/1011 owned by the 1st and 2nd plaintiffs. The two properties were mortgaged to secure the said loans. Whereas the defendant contends that the 3rd plaintiff defaulted in repaying the loan advanced to it, on their part, the plaintiffs have insisted that they owe nothing to the defendant having in fact overpaid the defendant by a sum of KShs.78,000,000/=.

The plaintiffs contend that the defendant made fictitious entries in their accounts which did not reflect the true state of affairs of the said accounts. They argued that, due to the discrepancy in the said bank statements, they instructed a Certified Public Accountant to audit the said accounts and who in fact established that the plaintiffs had overpaid the defendant. At this stage of this ruling, I wish to state that the defendant is seeking to realize the security in respect of the suit properties that were mortgaged to it in respect of the loan advanced to the 3rd plaintiff. This court is not being called upon to make a decision in respect of the loan which was advanced to the 1st and 2nd plaintiffs which was unsecured. The plaintiffs invited this court to peruse the bank statements annexed to their application and that which was annexed to the defendant's replying affidavit to confirm that indeed the figure stated in the statutory notice varied with the figures in the said bank statements.

I perused at the said statements and confirmed that they were in respect of several accounts namely; A/c Nos. 100038-021, 100038-005 and 0100038-013. These accounts were maintained by the 3rd plaintiff. I also saw several letters which were written by the 1st plaintiff in his capacity as the managing director of the 3rd plaintiff. The said letters were addressed to the defendant. The said letters were addressed to the managing director of the defendant bank before it was placed in liquidation. They were annexed to the affidavit of M. A. Mohammud, who swore a replying affidavit on behalf of the defendant as annexures “MAM7”. In the said letters, the 3rd plaintiff gave instructions to the defendant to pay certain cheques despite their being no funds in the accounts of the 3rd plaintiff. Perusing through the said letters, it was evident that the 3rd plaintiff was in constant need of finances to settle the dues of its suppliers and workers whilst the 3rd plaintiff awaited payment from the persons that it had been contracted to work for. There is a constant thread running through the said letters which basically point to the fact that the 3rd plaintiff always sought financial accommodation from the defendant to tide it over the

financial difficulties that it was experiencing at the time.

All along, while being financially accommodated by the defendant, the debt was increasing without the 3rd plaintiff making any appreciable effort to settle the loan and the interest which accumulated to an astronomical proportion. The 3rd plaintiff pleaded with the defendant to allow it to sell its assets to enable it pay off the debt that was then owing. The 3rd plaintiff, in desperation gave the defendant a list of its debtors whom it claimed it was seeking legal intervention to be paid its debt. Now, if the 3rd plaintiff was in constant need of money at the material period, could it be possible that the 3rd plaintiff, with the assistance of the 1st and 2nd plaintiffs, who were unsecured debtors of the bank, could have overpaid the defendant to the tune of KShs.78,000,000/= ? I think the evidence before the court clearly points to the contrary.

Why did the plaintiffs take no action to rectify the “irregularities” in the bank statements in the period of 8 years before the defendant decided to exercise its statutory power of sale in 2004? It is evident that the audit prepared by the plaintiffs was specifically for the purposes of this suit. In any event, the evidence of the Certified Public Accountant is subject to scrutiny by the court to establish its veracity. I do hold that the said audit report does not, prima facie, accord with the evidence that has been placed before the court by the defendant particularly, the correspondence exchanged between the 3rd plaintiff and the defendant during the material period.

It is clear from the foregoing that the allegation by the plaintiffs that the bank statements prepared by the defendant bank in respect of the accounts of the 3rd plaintiff were fictitious and further that fraudulent entries were made therein, is not supported by evidence. They are mere allegations. The plaintiffs have failed to establish a prima facie case with a probability of success. This court sees no legal reason to prevent the defendant from exercising its statutory power of sale in view of this court’s finding that the 3rd plaintiff indeed owes the defendant. It is unnecessary for this court to consider the other principles for the grant of interlocutory injunction in view of its finding that no prima facie case has been established.

The application by the plaintiffs filed in court on 2nd November, 2004 lacks merit. It is hereby dismissed with costs.

DATED at NAIROBI this 27th day of MAY, 2008.

L. KIMARU

JUDGE