



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 159 of 2008

ELIZABETH A. OMORO.....APPELLANT

VERSUS

EQUITY BANK LIMITED.....RESPONDENT

RULING

The Appellant/Applicant had moved to the Chief Magistrates Court at Milimani vide a plaint dated 20th December, 2007 and filed the same date. She sued the defendant respondent claiming among others:-

- (a) A permanent Injunction to restrain the defendant, themselves, its agents and/or servants from alienating, disposing auctioning or in any way interfering with the plaintiffs motor vehicle registration number KAS 866 N.
- (b) An order compelling the defendant to restore motor vehicle registration number KAS 866 N to the plaintiff.
- (c) Damages
- (d) Costs

Although a copy of the interim application to the suit in the lower Court is not annexed to the supporting affidavit, the hand draft proceedings and hand draft ruling annexed reveals that, the said application had been brought under Order 39 rule 2 Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking an injunctive order seeking to restrain the respondent by themselves, their servants and or agents from alienating, disposing Or in any way interfering with the plaintiff's motor vehicle Reg. No. KAS 866 N pending hearing and final determination of the case.

The same hand written ruling reveals that the said application was dismissed by the lower court on 27.3.2008.

The appellant/applicant became aggrieved by those orders and moved to this court invoking its appellate jurisdiction vide a memorandum of appeal dated 28th March 2008 and filed the same date.

The memorandum is accompanied by an interim application by way of Notice of Motion brought under order XLI 4 (6), 24 (1) Civil Procedure Rules, Section 63 (e) and 3A Civil Procedure Act. It seeks 6

prayers prayer 1 is spent.

- (1) That an order of an injunction to issue restraining the Respondent by themselves, their servants and/or agents from alienating, disposing, auctioning or in any way interfering with the appellants motor vehicle Registration Number KAS 866 N.
- (2) That there be a declaration that the appellants' is not liable to pay a 3rd party's loans.
- (3) That the Respondent to release the appellant motor vehicle Registration Number KAS 866 N back to her.
- (4) That the ruling issued on 27th March 2008 be set aside. That costs of this application be provided for.

The grounds are found in the body of the application, supporting affidavit, written skeleton arguments and oral submissions in court. The salient features of the same are:-

- (1) One Caleb Omoroh had signed a sale agreement to purchase the suit motor vehicle but failed to raise the purchase price.
- (2) The applicant did raise the purchase price hence the execution of the second purchase agreement.
- (3) They contend that the second sale or purchase agreement which depicts the applicant as the sole purchaser supercedes the first purchase agreement.
- (4) That both the applicant and one Caleb Omoroh Owuor were once Directors of Toshe Construction and Engineering Ltd. By virtue of that capacity both guaranteed a loan to the said company advanced by the Respondent.
- (5) It is the applicants stand that she dutifully saw to it that this first loan was serviced and as at that time they came to seize her vehicle she was remaining with only a balance of Kshs 262,000.00 upon the said vehicle being seized, she paid 200,000.00 and was in the process of preparing to clear the balance of Kshs 62,000.000.
- (6) She was surprised to learn that her new estranged husband Caleb Omoroh Owuor without her knowledge took an additional loan facility against the security of the said motor vehicle.
- (ii) The said Caleb Omoroh Owuor had no authority to use the said value for the taking of the said additional loan.
- (7) That she is not bound to meet the second additional loan and as such she is not bound to repay it.
- (8) That the notification of sale by the Auctioneers which was served on her indicates that the indebtedness leading to the advertisement of the properties for sale relates to the indebtedness attributable to the second loan for which the defendant should follow the said Caleb Omoroh Owuor and recover the same from him.
- (9) That she is aware of indebtedness to the defendant to the tune of Kshs 62,000.00 being the balance of the amount due and owing from the applicant to the respondent. On account of the first loan, which she is willing to pay and or deposit in Court upon being ordered to do so.
- (10) It is her stand that on the facts demonstrated herein she is within the ambit of the principles governing the granting of an interim injunctive relief and she should be accorded the same.
- (11) That if the said relief is not granted the appeal filed herein will be rendered nugatory.

The respondent on the other hand has opposed the said application on the basis of the grounds in the replying affidavit, annexures, skeleton arguments and oral high lights in court. The major ones are:-

- (1) That an entity by the name of Toshe Construction and Engineering Ltd approached the institution with a view to obtaining a loan to purchase a vehicle subject to these proceedings.
- (2) The Directors duly filled the application for annexure SM1 and signed it.
 - (ii) The form was accompanied by a Directors resolution SM2 dated 28th April, 2005.
- (3) The Respondent duly acceded to the said request of the loan vide SM 3 dated 29th April, 2005 approving a loan of Kshs 650,000.00 to purchase KAS 866 N.
 - (i) That the said loan facility was being given to Toshe Construction and Engineering Company Ltd.
 - (ii) That the company resolution reads that what was being bought was a company car.
- (4) The sale agreement demonstrates that the parties to it were James Mitambo Maina as the vender and Caleb Omoroh Owuor T/A Toshe Construction Co Ltd as the purchaser as shown by SM4.
 - (ii) That the transactions in number 1,2,3, and 4 above took place in the year 2005.
- (5) In the year 2006 and in particular 2.11.2006 one Caleb Omoroh Owuor applied for a loan to the tune of Kshs 700,000.00 and gave motor vehicle registration number KAS 866 N as security as shown by SM6.
 - (ii) The loan agreement for this second facility is annexed as SM7. It shows that it is signed by one Caleb Omoroh Owuor and it is not endorsed by a witnesses.
- (6) SM8 shows that the registered owner of the said vehicle is Elizabeth Atieno Oyoo.
- (7) SM9 shows that the said vehicle has been attached in connection with an outstanding loan to the defendant of Kshs1,030,313.76.

In reply Counsel for the applicant reiterated her earlier submissions and then stressed:-

- (i) That indeed one Caleb Omoroh Owuor signed an agreement to purchase the said motor vehicle but failed to raise the requisite fee, necessitating the appellant, applicant to execute another sale agreement between her and the seller for the purchase of the said motor vehicle
 - (ii) Joint signatory for the loan by appellant and one Omoroh only applies to the first loan facility and not the second one.
- (2) She maintains the appellant/applicant is the owner of the said motor vehicle with the full knowledge of the defendant/respondent.(i) The applicant also fully paid for the insurance cover.
 - (3) That the applicant never gave consent for the vehicle to be used as security for the 2nd loan whose proceeds was paid into the personal account of one Omoroh, which account receives large amounts of money which the respondent could have laid hands on to recover the loan but allowed the said Omoroh to withdraw the whole of it.
 - (4) Since she did not authorize the taking of the second loan, it will be unfair for her vehicle to be auctioned.

On the Court's assessment of the matter herein, it is clear that the issue as regards the rights of the

appellant/applicant and the respondent in so far as motor vehicle registration number KAS 86 6 N in concerned have not been judicially determined. This arises from the fact that when the respondent. agents moved and seized the said motor vehicles in a bid to recover indebtedness owed to it by the applicant and another.

The seizure of the said motor vehicle prompted the appellant to file suit in the lower court, which suit was accompanied by an interim application seeking restraint orders. The matter was argued and the lower court gave a ruling on 27.3.07.

The said interim application had been anchored on a plaint dated 20th December, 2007 and filed the same date. The said plaint as well as its resultant ruling are part of an unmarked bundle of exhibits to the supporting affidavit. They are also not referred to in the supporting affidavit, hence they cannot be referred to by this court. It is therefore enough just to say that the resultant ruling grieved the appellant who moved to this Court vide a memorandum of appeal dated 28th March 2008 and filed the same date. For purposes of determining the existence or satisfaction of the ingredient of there being a prima facie case with a probability of success, the complaints intended to be raised on appeal are that the learned magistrate erred both in law and in fact in that:-

- (a) She failed to note that the appellant is a different legal entity from the 3rd party who took the second loan from the Respondent for which her motor vehicle had been attached.
- (b) Failed to note that here is no privity of contract between the 3rd party who took the second loan with the respondent and the appellant who is the owner of the motor vehicle.
- (c) Failed to appreciate that the appellant guaranteed the first loan taken from the Respondent as a director of Toshe Construction and Engineering which has been substantially paid leaving a small balance of Kshs 90,000.00.
- (d) Failed to note that the second loan on account of which the applicant's motor vehicle had been proclaimed responded and advertised for sale was a personal loan credited into the personal account of one Omoroh.
- (e) Erred in law and fact when she declined to grant the restraining order.
- (f) Erred when she failed to note that Section 75 of the Constitution of Kenya guarantees freedom of ownership of property and that the same cannot be arbitrarily interfered with.
- (g) Failed to note that the first proclamation was in the correct name of Caleb Omoroh Owuor and that the same loan could not have been taken by the appellant personally.
- (h) Failed to note that the appellant has never owned a personal account with the Respondents, neither has she ever taken a personal loan from the Respondent for which her properties could be attached.

Having lost in the subordinate Court the appellant/applicant wishes to have a second bite of the same reliefs from this exercise of its appellate jurisdiction. The power invoked is found in order 41 rule 4(6) which reads

“Notwithstanding any thing contained in sub rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with”.

The first requirement that this court has to take note of before embarking on the consideration of the application on merit is to ensure that the procedure for lodging of the appeal from the lower court has been complied with. Herein there is a memorandum of appeal on record. No complaint has been raised to the effect, that the same was not filed in time. The court therefore makes a finding that, its appellate

jurisdiction has been procedurally invoked and it is therefore properly seized of this matter.

As for the merits since the relief sought is one of a temporary injunction, the court, is of the opinion that whether invoked in its original jurisdiction or appellate jurisdiction the ingredients for granting of a temporary injunction remain the same. These are

- (a) Establishment of a prima facie case with a probability of success.
- (b) Demonstration that irreparable damage which cannot be compensated for by way of damages will be occasioned.
- (c) Where (a) and (b) do not apply a demonstration that the balance of convenience tilts in favour of the applicant.

These have been applied to the facts herein and the court proceeds to make findings on the same. In doing so the Court has to bear in mind that the issues before the lower court have not been disposed off on merit, they are still pending. Issues taken up on appeal are also yet to be disposed off on merit. This being the case the Court has to ensure that it does not usurp the powers of both the subordinate court and the appellate court to decide the issues before then on merit. It therefore follows that it can satisfy those ingredients by high lighting whether the issues before the lower court and which are now before this court in its appellate capacity are capable of forming a basis for a reasonable argument. In other words are they triable for purposes of determining each of the three ingredients set out above.

On the ingredient of existence of a prima facie (case) now appeal, with a probability of success, the court has identified the following issues for interrogation:-

- (1) The subject matter of the dispute both in the subordinate court as well as on appeal is motor vehicle registration number KAS 866N.
 - (ii) Annexure SM1 and 2 annexed to the respondents replying affidavit, shows that it was purchased as a company car for Toshe Construction and Engineering company Ltd.
 - (iii) The vehicle formed the sole security for the purchase loan advanced on the strength of annexure SM1.
 - (iv) The said loan was to be repaid as per the terms of the loan, shown in annexure SM3. The terms are addressed to Toshe Construction and Engineering Ltd. The signatories to it signed on behalf of Toshe Construction & Engineering. As per the deponement of the applicant, these were the applicant in her capacity as a Director of the said company and one Caleb Omoroh Owuor as the Managing Director.
- (2) Having been purchased as a company car, one would expect it to be brought and be subjected to rules and procedures governing use and disposal of company property under the general relevant law. This court has judicial notice to the effect that these are normally found in the Memorandum and Article of Association as well as general provisions under the companys' Act.
 - (ii) It is to be noted that these were not excluded by SM3.
 - (iii) Terms of acceptance of the loan facility and mode of payment are set out in terms number 1, 2, 3 a – d on page 1.
 - (iv) Other terms and conditions are found in no.4 on page 2. The Respondents reservation is found in 4(c) it reads:-

“We reserve the right to combine accounts, the right to consolidate all securities held for any account, to constitute for all accounts also held. The continuance of this facility will depend upon your account conducted to our satisfaction on the understanding that the facility so granted payable on demand in full

should the bank deem it necessary to make such a demand”.

(v) It is not in dispute that this facility had not been fully repaid.

(vi) It is the opinion of this court that clause 4(c) of SM3 gave authority to the Respondent to combine accounts of liabilities. But did not reserve the right to use the security for additional loan facility.

(3) Annexure SM4 is a sale agreement for the suit property executed between the seller and one Caleb Omoroh Owuor t/a Toshe Construction ltd. The same was endorsed by the appellant/applicant as a witness. SM5 is copy of the log book while still in the name of the seller.

(ii) SM6 is a loan application form under the hand of Caleb Omoroh Owuor whereby he was applying for a loan facility of 700,000.00 using the suit property as security. It is signed by Caleb Omoroh Owuor. It is not even witnessed by the credit officer as required by the same form.

(iii) The terms and conditions governing the same are in SM7 Clause 2 which specifies the amount of the loan facility does not specify that this is a loan facility additional to the loan facility which had been advanced vide SM3.

(iv) Clause 5 which talks about the security does not state that the security is company property and it is meant to cover both loan facilities.

(v) Clause 6(b) provides: *“in the case of a company a certified copy of a resolution of the borrowers board of directors authorizing acceptance of the proposed facility on the terms and conditions set out in this letter authorizes one or more of the borrower directors and the secretary to sign on its behalf the enclosed copy of this letter by way of acceptance and authoring one or more of the directors and secretary to operate and sign all documents, notices and communications in respect of the proposed facility (together with a certified document containing his/their specimen signature”*

Clause 7 (b) (c) on other hand its conditions read.

(b) The performance by the Borrower and the Lender of the obligations herein is subject to all the applicable laws, regulations decrees administrative rules and orders of the Republic of Kenya now or herein after affecting the same.

(c) The Lender reserves the right to combine accounts, the right to consolidate all securities held for any account to constitute security for all accounts so held”

Clause 11. *“Law. This letter shall be construed in accordance with the law of the Republic of Kenya and the borrower hereby submits to the jurisdiction of the Kenyan Courts”.*

(vi) SM7 is not witnessed.

(4) Annexure SM8 indicates that the appellant/applicant is now the registered owner of motor vehicle registration number KAS 866 N. where as SM 9 is the notification of sale.

(5) Along side matters in number 1,2,3 and 4 above are additional exhibits introduced by the applicants further affidavit, the first one is annexure EA01 which is an affidavit by the seller who has deponed that the purchaser of the said motor vehicle is the applicant. The first one is annexure EAO1 which is an affidavit by the seller who has deponed that the purchaser of the said motor vehicle is the applicant.

(ii) EAO2 is the sale agreement between applicant and the seller witnessed by one Caleb Omoroh.

(iii) EA0 3 are insurance covers in the name of the applicant.

The questions that will arise for determination are whether:-

- (1) The suit property subject of these proceedings belongs to the company or the applicant.
- (2) Whether since the same was purchased on the strength of a company resolution and used as security in the first instance on the strength of a company resolution of the Directors, a similar resolution of the company was required to advance a second loan facility using it as security.
- (3) Considering that the entries on SM1 which is the first loan facility which was duly witnessed by the credit officer, where as the entries on SM6 which is the basis for the second loan facility is not witnessed by the Respondents credit officer while in this instance and by virtue of lack of this signature, the same is irregular and therefore challengeable.
- (4) Going by the fact that the applicant had executed SMI 1 for the first loan facility whether it was necessary for her to be consulted and either her objection or no objection obtained before advancing any loan facility on SM6.
- (5) Whether clause 4(c) on SM3 and clause 10 on SM 7 on combinations of accounts are absolute or are challengeable in certain circumstances, and if challengeable whether the applicants complaints herein meets such challenge.
- (6) What is the effect and or weight to be attached to the two sale agreements exhibited herein in SM4, EA 02 which of these two is to hold.
- (7) What is the effect of the appellant/applicant being registered as owner of the suit property before clearance of the indebtedness to the Respondent as regards the first loan facility.
- (8) Which of the two parties rights namely those of the applicant now registered owner, and the respondent as the loan provider are to be upheld. If so when a re these to be upheld, after a trial or summarily through realization of security and sell of the subject property.
- (9) What is the effect of the absence of one Caleb Omoroh Owuor from these proceedings.

All these questions go to show that the appellant/applicant has some arguable points to raise on appeal, the success of which is the preserve of the appellate trial judge.

Turning to the second ingredient of whether damages will be an adequate compensation as opposed to the granting of the relief of an injunction, there is no dispute that the subject matter of the dispute namely KAS 866 N can be valued and its value paid for in monetary terms. It is also not disputed that the Respondent as a sound financial institution will have no difficulty meeting that requirement. Therefore in order to succeed the applicant has to demonstrate that she is within the exception to this general rule developed by case law.

This exception is found in one decision by the superior court under the hand of Ringera J. as he then was in the case of *WAITHAKA VERSUS INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION* [2001] KLR 374 in which the central theme is that even if damages can be adequate compensation where the opponent has acted in a high handed and oppressive manner an injunction will issue.

Herein being in fact that the applicant had signed for the first loan facility, it should have been fair for her to be alerted as regards the taking of the second loan facility. Secondly there are now new developments in the matter in that the applicant is now the registered owner of the subject motor vehicle. It will be highly oppressive if the Respondent were to be allowed to realize the security before her challenge on the taking of the second loan facility against the said motor vehicle as security.

Further on this, the Respondent, will not be greatly prejudiced as he can pursue Caleb Omoroh Owuor the party who took the second loan facility as an alternative. They also have a right to follow funds in other accounts held by them on account of the said Caleb Omoroh Owuor.

It is this Courts finding therefore that although damages would be adequate compensation, nonetheless, facts demonstrated herein favour the exception to that rule in favour of the applicant as stated above.

On the balance of convenience, the court is also satisfied that on the facts demonstrated above the balance of convenience tilts in favour of the applicant because:-

- (a) She is now the registered owner of the said motor vehicle subject of these proceedings and as such she needs to be heard before the same can be realized as security.
- (b) Having been purchased as company property an issue arises as to whether a company resolution and authorization for the taking of the second loan facility was necessary.
- (c) Issue arises as to whether the documentation for the second loan facility which does not bear the signature and approval of the credit officer is challenge able or not.
- (d) Issue arises whether in view of the fact that applicant is now the registered owner of the suit property, whether it will be oppressive if the same is to be disposed off before the applicant is heard on her rights.
- (e) The issue that the respondent is not left remediless as the pendency of the proceedings, will not bar him from following one Caleb Omoroh Owuor, the sole signatory and beneficiary of the second loan for the recovery of the same. Or alternatively turn to the other saving accounts held by them on account of the said Caleb Omoroh Owuor to recover the loan.

Lastly having come to the conclusion that an injunction is an appropriate relief herein, the court has to bear in mind that the same can be granted on terms as it deem fit.

For the reasons given above the court makes the following orders:-

- (1) Prayer 2 of the applicants/application dated 28th day of March 2008 and filed the same date be and is hereby allowed, to the effect an injunction be and is hereby issued restraining the Respondent by themselves, their servants and or agents from alienating, disposing, auctioning or in any way interfering with the motor vehicle registration number KAS 866 N pending the hearing and determination of the appeal on the following conditions.
 - (i) That the said applicant do proceed to give an undertaking either to pay off or deposit into court the balance of money outstanding on the first loan facility taken in pursuance to SM1.
 - (ii) The said undertaking to be filed in Court and served on to the respondent within 14 days from the date of the reading of this ruling.
- (2) Upon receipts of the service upon them of the applicants' undertaking as in number 1(ii) above, the respondent do file and serve upon the applicant within 14 days from the date of service upon them of the undertaking, a statement of the outstanding loan balance on the first loan facility granted in pursuance to SM1.
- (3) Upon receipt of the statement of the loan balance on the loan account in pursuance of the loan granted vide SM1, the said applicant do file a second undertaking within 14 days from the date of receipt of the said statement, to liquidate the said balance either in lump sum or reasonable instalments agreed upon between the parties or in their disagreement the same to be fixed by the court.
- (4) Upon compliance with number 3 above the applicant do proceed to deposit into court the Auctioneers charges accrued so far to be agreed or assessed by the Deputy Registrar within 30 days of such agreement or assessment as the case may be.
- (5) Upon such compliance in number 4 above the vehicle to be released to the applicant upon an

undertaking that the same be kept in good mechanical condition, and secondly that the said applicant not to divest herself of its ownership pending hearing and determination of the appeal.

(6) The applicant will have costs of the application.

(7) In default of the conditions set above meant to be complied by the applicant, the injunctive relief to stand discharged.

(8) There will be liberty to apply by either party.

DATED, READ AND DELIVERED AT NAIROBI THIS 23RD DAY OF May 2008

R. N. NAMBUYE

JUDGE