



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 498 of 2007

WAJIR BAKERY LTD..... 1ST PLAINTIFF

HASSAN MOHAMMED ABDI 2ND PLAINTIFF

FARAH MOHAMMED ABDI 3RD PLAINTIFF

VERSUS

GIRO COMMERCIAL BANK LTD..... 1ST DEFENDANT

KHEIRA OMAR MAALIM 2ND DEFENDANT

RULING

(1) Wajir Bakery Ltd., Hassan Mohammed Abdi and Farah Mohamed Abdi, the Plaintiffs in this case, filed an application on the 26th September 2007, and asked the Court to issue an order of injunction against Giro Commercial Bank Ltd. (“**the Bank**”) and Kheira Omar Maalim to restrain them from *inter alia*:

“(a) Interfering with the Plaintiff’s rights of possession, advertising for the sale, disposing off, selling by public auction or otherwise however at any other time concluded by auction or private treaty, leasing, letting or otherwise howsoever interfering with the ownership of to and/or interest in all that piece of land known as Plot L.R. No. 13768/152 and L.R. No.13768/153 and L.R. No 13800 and L.R. No.9742/4 Karen Nairobi, pending the hearing and final determination of this suit.

(b) Transferring, charging, taking possession or otherwise howsoever from exercising proprietary rights over those titles.”

(2) The order is sought on a number of grounds. The Defendants allege that with the **consent** of the Bank, the duty to repay the debt was placed on the second Defendant as the principal debtor. That no attempt was ever made to enforce the **consent decree** of the Court against the second Defendant. That the Applicants did not take any money from the Bank. That the Bank secured the charges by fraud which rendered them unenforceable.

The Plaintiffs also say that the Bank did not obtain the approval of the Minister of Finance in regard of Section 44 of the Banking Act (Cap 487).

The first supporting affidavit was signed by Hassan Mohammed Abdi, the second Defendant. He is a Director and shareholder of Wajir Bakery Ltd., the first Plaintiff. According to him, the credit facility of Kshs. 14 Million was given to the second Defendant who requested him his titles (L.R. Nos. 13768/152 and 153) to give the Bank as Guarantees.

(3) The other supporting affidavit was signed by Farah Mohamed Abdi, and third Plaintiff. He too says that he was approached by the second Defendant to give him his titles (Plot LR. Nos. 9742/4 and LR. No.13800) as security for money lent to the second Defendant by the Bank. According to him, the principle security was to be provided by the second Defendant and his titles were to be used only as collateral. In paragraph 20 of the affidavit dated the 26th September 2007, he deponed:

“(20) That after settling my previous suits, it was agreed that the second Respondent would pay off the first Defendant. A copy of the filed Consent Order is found on page 104 – 106 of the bundle.”

(4) The consent in question was filed in Court on the 21st July, 2006 and related to **HCCC. No. 304 of 2006** in which Kheira Omar Maalim was the Plaintiff and the Defendants were the Bank and Joseph Gikonyo t/a Garam Investments.

Paragraph 1 of the consent order was in the following terms:-

“(1) The Plaintiff’s indebtedness including that of the companies and individuals related to her and in particular Wajir Bakery Limited, Hassan Mohammed Abdi, Farah Mohammed Abdi, Mohammed Abdi Mohammed to the first Defendant is hereby agreed to be Kenya Shillings Ninety Five Million (Kshs.95,000,000/-) together with interest at the rate of 15% per annum from the 1st June, 2006.”

(5) The order also referred to Advocates costs to be paid to the Bank by the Plaintiffs in 3 other cases, that is to say:-

“(i) High Court Civil Case No. 564 of 2005 between Mohammed Abdi versus Giro Commercial Bank Limited, Joseph Gikonyo t/a Garam Investments and Kheira Omar Maalim.

(ii) High Court Civil Case Number 563 of 2005 between Farah Mohammed ABdi, Kheira Omar Maalim and Hassan Mohammed Abdi.

(iii) High Court Civil Case Number 557 of 2005 between Farah Mohammed Abdi versus Giro Commercial Bank Limited, Joseph Gikonyo t/a Garam Investments and Wajir Bakery Limited.”

(6) There was a default clause in paragraphs 9 and 10 as follows:-

"9. In default of the Plaintiff paying the agreed

sum on the conditions set out herein above

stated:-

(i) The entire agreed sum will become immediately due and payable and execution to issue pursuant to the decree.

(ii) The Plaintiff will in any event be entitled to sell the property known as Plot Number 4 Eastleigh Section II.”

“10. The parties agree that this consent does

not in anyway vary or affect the securities given by the Plaintiff to the 1st Defendant and the same shall remain in force and shall only be discharged upon full payment of the entire debt due to the defendant.”[Emphasis Added]

(7) The Advocates for the parties (Gichuki King’ara & Co., Advocates and Hamilton Harrison & Mathews, Advocates) signed the consent order. The entire debt was to be paid on or before the 1st October, 2006. It was also agreed that the Plaintiff would execute a debt repayment agreement for Kshs. 95,000,000 /=-.

(8) If the terms of consent decree had been honoured, the debt owed to the Bank by the Plaintiff and the second Defendant would have been repaid and the matter would have ended there. Unfortunately, payment was not made as agreed. That prompted the Bank to invoke paragraph 10 of the consent and move to exercise its statutory power of sale.

(9) Instead of doing what was agreed, the Plaintiffs, albeit belatedly, instructed their Advocates (Gichuki King’ara & Co., Advocates) who had acted for all of them in the cases which were the subject of the consent order to file the present suit. The Plaintiffs seek virtually the same relief and a couple of declarations.

(10) The suit was lodged on the 26th September 2007. The Plaintiff covers twenty one pages, contains 48 paragraphs and seeks 10 reliefs. In paragraph 46 of the Plaintiff, the Plaintiffs averred:-

“46. There is no other suit pending and there have been no previous proceedings in any Court between the

Plaintiff and the Defendants herein over the same subject matter.”[Emphasis Added].

The Verifying Affidavit was made by Hassan Mohamed Abdi, the second Plaintiff in this suit. In paragraph 2 thereof, he confirmed that the Plaintiff has instructed the firm of Gichuhi King’ara & Co., Advocates, to file the suit on their behalf. And in paragraph 3 of the Affidavit sworn on the 26th September, 2007, he deponed:-

“3. THAT I have read and understood the contents of the Plaint hereto and I hereby verify the correctness and truthfulness of the averments contained therein.”

(11) Obviously, one of the averments Hassan Mohammed Abdi was verifying to be true and correct was paragraph 46 of the Plaint which I have already set out hereinabove. By so saying, he deliberately and knowingly told a lie on oath. Both he and his Advocate well knew that there had been previous proceedings involving the same parties over the same subject matter.

(12) I entertain no doubt at all that in failing to disclose that there had been previous cases between the parties over the same subject matter, the Plaintiffs failed to disclose a material fact. They concealed a material fact. It was done on purpose and misled the court. On the strength of that concealment, the Plaintiffs obtained an *ex parte* order of injunction before Lesiit J, on the 26th September 2007. That is an advantage they obtained by concealment of a material fact. As the Court of Appeal held in the celebrated case of **The Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**, it is axiomatic that in *ex parte* proceedings, there should be full and frank disclosure to the court of facts known to the applicant and that failure to make disclosure may result in the discharge of any order made upon the *ex parte* application.

(13) Apart from concealment of a material fact, it seems to me at a casual glance that the matters in issue between the parties in this suit over the same subject matter have been heard and finally determined in previous proceedings.

(14) In the circumstances, therefore, the Chamber Summons filed on the 26th September 2007 must fail and it is accordingly hereby dismissed with costs. The *ex parte* order of injunction issued by Lesiit J. on the 26th September 2006 be and is hereby set aside and vacated.

Orders accordingly.

Dated and delivered at Nairobi this Second day of May, 2008.

P. Kihara Kariuki

Judge