



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Case 78 of 2007

BAWAN ROSES LIMITED PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD DEFENDANT

RULING

The plaintiff has brought this action and in its pleadings has alleged various wrong doings by the defendant in respect of the loan facilities granted to the plaintiff and the security documents in relation to those facilities. The plaintiff has sought an interlocutory judgment by a chamber summons dated 19th October 2007. The plaintiff prays for the following prayers:-

3. *That this court be pleased to issue a*

temporary injunction restraining the

defendant by itself, its servants,

employees and or otherwise howsoever from selling, offering for sale, disposing, transferring, or alienating by conveyance or entering into any agreement for sale or in any way interfering with the plaintiff's possession, ownership and occupation of L.R. No. 295/17 and 1087/7 or any part thereof pending the hearing and determination of this suit.

4. *That AN ORDER be made under Section 52 of the Indian Transfer of Property Act (Amendment) Act 1959 that during the pendency of this suit THAT ALL FURTHER REGISTRATION or change of the registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right title or interest in ALL THOSE pieces of land known as L.R. NO. 295/17 and L.R. NO. 10874/7 Thika with any Land Registry, Government Department, and all other registering authorities if hereby prohibited.*

The affidavit in support of the application is sworn by one of the directors of the plaintiff. In that affidavit he stated that prior to the year 2003 the suit properties were in the name of BAWAN HOLDING LTD. In that year it was transferred to the plaintiff company. Wilson Mboche Waithaka and Mrs. Mboche purchased the entire capital of the plaintiff company. The defendant offered the plaintiff by an

offer dated 29th January 2003 a facility of Kshs.70 million. The defendant as security for that facility created joint mortgage and a charge dated 1st April 2003 over the suit properties. The deponent stated that the said mortgage and charge were defective. He further stated that the previous shareholders of the plaintiff company had a Euro loan account with the defendant which was not taken over when the deponent and his co-director bought the entire capital of the plaintiff company. He stated that on plaintiff selling its product and on banking its proceeds of that sale into a Euro account No. 7333944, the defendant wrongly and illegally appropriated those deposits into the unsecured Euro account No. 7334029. The balance after that appropriation was then placed into the Kenya shillings loan account by the defendant. In total the deponents said that the defendant had credited kshs.58 million into that Euro account. It was further stated that the defendant by various acts had clogged the plaintiff's equity of redemption. This clogging was done when the defendant wrongly credited the unsecured loan account from the proceeds that were intended for the secured facility. Further the defendant levied on the plaintiff's account illegal uncontractual debits and penalties contrary to law. That the defendant also levied unconscionable rates of interest. That the defendant lumped unsecured debt of the previous shareholders with the secured account. That the buy out agreement with the previous shareholders did not bring in that liability to be taken over by the plaintiffs. The deponent stated that the deponent had issued statutory notices dated 15th September 2005 and that that notice was in varied because of illegalities such as that there was no consent of the land control board. The defendant in response to this particular issue did annex to the replying affidavit the relevant consent of the land control board. It was deponed that the plaintiff had fully paid the defendant the facility given to it. The deponent stated that the defendant had engaged the plaintiff in negotiations when they had already intimated their desire to exercise their statutory right of sale. In this regard what the deponent was alluding to was that having entered into those negotiations it was an indication that the defendants had accepted the illegalities in the process of realization of their security. My immediate response to this argument is that a party, in my view is not precluded from negotiating when it is intending to exercise its power of sale. The plaintiff finally stated that it had established that the defendant was in the process of seeking out a purchaser to sell the suit property by private treaty. The defendant in response did file a replying affidavit and confirmed that a facility was given to the plaintiff which was secured by a charge and mortgage over the suit property. The defendant disbursed the money to the plaintiff but the plaintiff had failed to make repayment. Accordingly by letter dated 15th September 2005 the defendant gave notice to the plaintiff of its intention to exercise its statutory right of sale in accordance with section 69 (1) TPA. It was denied that the defendant had agreed to finance the buy out agreement. The defendant also denied that there was an unsecured facility which was unlawfully amalgamated with the secured facility. The defendant stated that the truth of the matter was that that facility was secured. The defendant said they were not a party to the buy out transaction nor were they to acquire any right or responsibility under that agreement. That the plaintiff's allegation that the mortgage and charge were not according to the law was not backed up by details. The defendant annexed correspondence showing that the plaintiffs had previously admitted their indebtedness to the defendant. That the plaintiff had at one time made an offer to arrange to dispose of the suit properties to enable them clear their debt with the defendant.

The plaintiff's application was bulky but attempt has been made to reduce the salient points of the plaintiff's argument. The plaintiff when it came before court on 19th October 2007 obtained injunction to subsist upto the hearing interparties of the plaintiff's application. In approaching the court the plaintiff did not disclose to the court that it had admitted its indebtedness to the defendant. The plaintiff therefore did not fully make full disclosure to the court when it first approached the court. It is pertinent to reduce in this ruling the letters that were written by the plaintiff to the defendant before this action was commenced. The following letters were sent to the defendant;-

Roses Limited

P.O. Box 235 Thika, Kenya

Tel: 067 – 24271, 24272

Fax: 067 – 24272

E-mail: bawanroses@wanachi.com

November 30, 2005

Mr. Aden Mohammed

Managing Director

Barclays Bank of Kenya

Barclays Plaza, 8th Floor

P.O. Box 46661

Nairobi

Dear Mr. Mohammed,

RE: BANKING FACILITIES

We would like to once again thank you for making time to meet with us on the 7th of this month, we are most grateful.

Bawan Roses is currently 7 hectares in size, and we have the land area to expand to a 20 hectare. After our meeting with your managers in July this year, where they expressed their concern about our size, we immediately set out and hired a financial company prepare for us a Business Plan for the expansion. We have just about completed the plans and are ready to approach the Financial Institutions and Equity Partners to assist us. We are requesting that we be given an additional 6 months to your December 15th deadline, the time we require to get this financing in place.

We also request that the existing overdraft be changed to a loan so that all monies coming into the account can actually reduce both the Euro loan and the Kshs. Loan. Over the last one and a half years, only the Euro loan has been serviced and the balance of our revenue has been absorbed by the overdraft; as a result the Kshs loan has not been serviced.

Once again we would like to thank you very much for making the time to meet with us and we hope for a positive response from you.

Kind regards,

BAWAN ROSES LIMITED

signed

Betty-Ann Mboche

Managing Director

KITTONY

MAINA

KARANJA

A D V O C A T E S

COMMISSIONER FOR OATHS

Hazina Towers, 19th Floor

P.O. Box 74221 - 00200 Nairobi, Kenya

Tel: 247057/250868/229612

Fax: 020 245214

E-mail: kmk@mawakili.com

Our Ref: BRL/1/1/WMK

Your Ref: B1/54/319/AG

August 14, 2006

Walker Kontos

Advocates,

Hakika House,

Bishops Road,

P.O. Box 60680 - 00200

NAIROBI

ATTN: ALLEN W. GICHUHI

Dear Sir,

RE: BARCLAYS BANK OF KENYA LIMITED –versus- BAWAN ROSES LIMITED – SALE OF L.R. NO. 295/17

We act for Bawan Roses Limited and refer to your letter dated July 18, 2006 addressed to it and wish to respond as instructed.

Our client has informed us that it has now identified an interested buyer for the charged property who we shall also be acting for in this matter. We are in the process of taking instructions from our clients whereafter we shall respond with a detailed proposal.

Kindly confirm that you shall withhold any precipitate action until we revert in a few days time.

Yours faithfully

KITTONY MAINA KARANJA ADVOCATES

signed

C.J. WAIYAKI (MRS)

/ewn

CC Client

Roses Limited

P.O. Box 235 Thika, Kenya

Tel: 067 – 24271, 24272

Fax: 067 – 24272

E-mail: bawanroses@wanachi.com

28 February 2007

Alphonse Kisilu

Barclays Bank of Kenya Limited

Barclays Plaza,

Nairobi

Dear Sir

Re: Bawan Roses Ltd

This letter follows on from various discussions and correspondence relating to our outstanding facility with you.

We write to confirm that negotiations are at an advanced stage with our proposed financiers, K-Rep Bank Limited, to provide funding for our business operations. As you are aware, our proposed facility with them shall also be used to retire our existing borrowings with you, we acknowledge that you have held telephone conversations with their officers, as confirmation of this development, without prejudice.

We understand that the nature and size of the facility sought from our proposed financiers shall require credit approval from their Board of Directors. The process of underwriting this facility, and ultimate granting of the approval cannot be concluded in the short term. As a banker yourself, we know we can call on your appreciation of this loan approval process. We do not have an indication yet as to when a definite response to our loan request shall be provided. We believe that the Board determination should be concluded within March 2007, with the loan draw-down sanctioned the month after.

As we undergo this due diligence, we seek your support in order not to jeopardize what we believe is a

particularly sensitive negotiation. In turn, we pledge to keep you apprised of all developments, at all stages, with our proposed financiers. We strongly believe that a successful conclusion to this negotiation shall be of enormous benefit to all parties involved.

In seeking your support we reaffirm that your rights and recourse are not in any way prejudiced.

We look forward to your favourable response and remain,

Yours faithfully,

signed

signed

Mboche Waithaka

Betty-Ann Mboche

Director

Director

The plaintiff to succeed in its application needs to meet the principles of granting an injunction. The plaintiff needs to show that it has a prima facie case with a probability of success. The plaintiff in the right of the admissions made on its indebtedness fails to show a prima facie case with a probability of success. The plaintiff alleged illegality in the consolidation of secured and unsecured debt. It further claims that the security instruments are defective. Finally it claims that there was no consent from the land control board. These issues raised by the plaintiff were responded to by the defendant on a prima facie basis. I find that the plaintiff has failed to meet the first principle of granting an injunction. In this regard I would wish to rely on the case of *In the case of VIJAY MORJARIA & DARBAR CA 106 of 2000* the court of appeal had this to say;-

“If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.”

As I began to consider the application before me I find that it is important to remind myself of the finding in the case of *MBUTHIA VS JIMBA CREDIT FINANCE CORPORATION & ANOTHER [1988] KLR* which was in the following terms:-

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each sides proposition. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits.”

I remind myself of that holding because the plaintiff by the amount of argument brought in this application was seeming to require this court to make final findings of fact. That would not be proper at this stage. The second principal of injunction is that an injunction should not be granted unless damages would not suffice. The plaintiff in its argument did not bring before any evidence that damages would not be adequate if an injunction was not granted. That being the case and because I hold no doubt in respect of the two principles of injunction I do not have to consider where the balance of convenience lies. In the end the plaintiff’s chamber summons dated 9th October 2007 is hereby dismissed with costs to the

defendant. It follows that the injunction issued by this court on 25th October 2007 is hereby discharged. Orders accordingly.

Dated and delivered at Nyeri this 30th day of June 2008.

MARY KASANGO

JUDGE