



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 572 of 2007

MALDE TRANSPORTERS LIMITED.....PLAINTIFF

VERSUS

SOUTHERN CREDIT BANKING

CORPORATION LIMITED.....1ST DEFENDANT

CONVERTERS EAST AFRICA LTD.....2ND DEFENDANT

RULING

The plaintiff filed suit against the defendants seeking several reliefs from the court. The reliefs sought are in relation to certain motor vehicles enumerated in the plaint which the plaintiff alleged were fraudulently transferred to the joint names of the defendants. The plaintiff further sought an order of the court for the cancellation of the said transfers to the defendants. Contemporaneous with filing suit, the plaintiff filed an application under the provisions of **Order XXXIX Rule 1(a)** of the **Civil Procedure Rules** and **Sections 3A and 63(e)** of the **Civil Procedure Act** seeking the following order of the court;

“A temporary injunction do issue to restrain the defendants by themselves, their agents, servants and/or employees from seizing, taking possession of, interfering with or in any way whatsoever dealing with the plaintiff’s motor vehicles and trailers registration KAE 308B, KAE 314B, KAE 309B, KAE 315B, KAE 316B, KAE 321B, KAE 307B, KAE 317B, KXT 818, KAG 112D, KAE 319B, ZB 8960, KAE 092S, KAE 311B, ZA 4486, KAG 108D, KXE 570, KVM 523, ZA 4307, ZA 5751, KAE 312B AND KAE 313B pending the hearing and determination of this suit.”

The application is supported by the annexed affidavit of Virchand Mulji Malde, a director of the plaintiff and the grounds stated on the face of the application. The plaintiff claimed that the defendants had fraudulently procured the transfer of the suit motor vehicles jointly to themselves. The plaintiff contends that no agreement whatsoever existed between the plaintiff and the defendants to have the said motor vehicles transferred to their joint names. The plaintiff averred that it had never executed any transfer forms in respect of the said motor vehicles in favour of the defendants. The plaintiff further stated that it was not indebted to the 1st defendant to entitle the said defendant to purport to attach the suit motor vehicles. The plaintiff argued that if the said motor vehicles are attached and sold by the 1st defendant, it would suffer irreparable loss and damage since its transportation business would be incapacitated by the loss of the suit motor vehicles. Virchand Mulji Malde swore several other affidavits in support of the plaintiff’s application.

The application is opposed. Azmina Mulji, the debt recovery manager of the 1st defendant swore several

affidavits in opposition to the application. In brief, she deponed that the 2nd defendant had charged the said motor vehicles to the 1st defendant to secure certain loans facilities. She deponed that the 2nd defendant was granted a loan facility to the sum of KShs.39,500,000/= and an overdraft facility of KShs.500,000/=. She annexed a copy of the letter of offer made to the 2nd defendant and a copy of the debenture which was executed by the directors of the 2nd defendant. She denied the allegation by the plaintiff that the said motor vehicles were fraudulently transferred to the joint names of the 1st and 2nd defendants. She deponed that the directorship and the shareholding of the plaintiff and the 2nd defendant were similar and therefore it could not be said that there was fraud involved in the registration of the said motor vehicles in the joint names of the 1st and 2nd defendants pursuant to the debenture. She further deponed that after the said loan was advanced to the 2nd defendant, the 2nd defendant defaulted in repaying the same hence the 1st defendant's decision to realize the security that was charged to it. She reiterated that the securitization of the suit motor vehicles was done in accordance with the law the transfers and the debentures having been properly executed by the directors of the 2nd defendant. She deponed that the 1st defendant was unaware of any defect in title in respect of the suit motor vehicles at the time the debenture was registered.

Pere Ramakrishna, a director of the 2nd defendant swore a replying affidavit which appeared to support the plaintiff's case. He deponed that the 2nd defendant was unaware of any transaction in which the suit motor vehicles were transferred from the plaintiff to the defendants. He denied any knowledge by the 2nd defendant of the transfer of the suit motor vehicles from the plaintiff to the defendants. He opined that if there was any fraud involved in the transfer of the said motor vehicles, then the 2nd defendant was not party to it.

At the hearing of the application, I heard submissions made by Mr. Oyatta on behalf of the plaintiff, Mr. Nyaoga on behalf of the 1st defendant and by Mr. Nyawara on behalf of the 2nd defendant. The issue for determination by this court is whether the plaintiff established a case to enable this court grant him the injunction sought. The principles to be considered by this court in determining whether or not to grant the order of injunction sought are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

In the present application, certain facts are not in dispute. It is not disputed that the plaintiff and the 2nd defendant have at one time or the other had common directorship and common shareholding. Although the plaintiff denied that it had nothing to do with the 2nd defendant, from investigations conducted by Simon Nyongesa Musamali, on instructions of the 1st defendant, it was clear that the two companies are housed in the same premises. The directorship of the 2nd defendant was changed sometime in 2003, but the shareholding of the company remained virtually the same. Pere Ramakrishna, a director of the 2nd defendant swore an affidavit on 18th October, 2005 confirming the shareholding of the 2nd defendant. In the said affidavit, he deponed that the shareholders of the 2nd defendant were Ms Nayna Shah and Mr. Dinit V. Malde. Dinit Virchand Mulji Malde (*presumably the same person as Mr. Dinit V. Malde*) is a director of the plaintiff. The said Dinit V. Malde, according to the investigations, is a son to Virchand Mulji Malde, the director who deponed the affidavits in support of the plaintiff's application. There is therefore substance to the 1st defendant's assertion that the plaintiff and the 2nd defendant are companies which are connected by their directorships and their shareholding.

Now, the plaintiff's alleged that the motor vehicles which were offered as security to the 1st defendant

by the 2nd defendant were fraudulently transferred to the defendants. The plaintiff claimed that it had not participated in the transfer the said motor vehicles to the 2nd defendant. The 2nd defendant on its part denied that it had procured the motor vehicles in question from the plaintiff. The 1st defendant adduced affidavit evidence in support of its case to the effect that the plaintiff transferred the said motor vehicles to the 2nd defendant who in turn charged them to the 1st defendant to secure loan and overdraft facilities. I have carefully perused the disputed logbooks, letters of offer, the guarantees and the debenture. It was clear to the court the sequence of events in respect of how the said transactions allegedly entered between the parties to this suit took place raises suspicion as to the circumstances which the said motor vehicles were charged to the 1st defendant to secure the loan that was advanced to the 2nd defendant.

It was apparent that the plaintiff had previously charged the said motor vehicles to the 1st defendant to secure a loan which it later repaid. The 1st defendant apparently did not release the logbooks to the plaintiff upon the plaintiff repaying the loan in full. It was when the 2nd defendant sought financial accommodation from the plaintiff, that the suspicious transfer of the suit motor vehicles took place. While it is acknowledged that the court may well reach a determination during trial that the directors of the plaintiff and the 2nd defendant may have put in place a scheme to defraud the 1st defendant, the facts before the court clearly indicate that the claim by the plaintiff that the suit motor vehicles were fraudulently transferred to the 2nd defendant and thereafter charged to the 1st defendant cannot, in the circumstances, be ignored or overlooked. Matters were not helped by the fact that it appeared to the court that the 1st defendant was not careful on the documentation of the separate transactions involving the two companies i.e. the plaintiff and the 2nd defendant, presumably due to the fact that the two companies had at the material time common directorships and common shareholding.

In the premises therefore, I do hold that the plaintiff has established a *prima facie* case to entitle this court grant it the interlocutory injunction sought. I am persuaded that damages would not be an adequate remedy in the circumstances since if the 1st defendant is allowed to dispose off the suit motor vehicles, the plaintiff's transport business would be paralyzed. If this court were later to find in favour of the plaintiff, it would be difficult to quantify the damages that the plaintiff would have incurred in terms of loss of business opportunity. The balance of convenience tilts in favour of maintaining the *status quo* pending the hearing and determination of the suit. Temporary injunction is therefore granted in terms of prayer 3 of the plaintiff's application dated 15th September, 2005. The plaintiff shall have the costs of the application.

So that the court process may not be abused by the plaintiff, I hereby direct the parties to conclude all preliminary issues, including discovery of documents and settlement of agreed issues within thirty (30) days of today's date. Thereafter I direct the registry to fix the hearing of the case on priority basis. In the event the plaintiff shall fail to abide by the directions of this court, the 1st defendant shall be at liberty to apply.

It is so ordered.

DATED at NAIROBI this 10th day of July, 2008.

L. KIMARU

JUDGE