



**REPUBLIC OF KENYA**

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

**Civil Appeal 257 of 2008**

**VENUE COMPANY LTD .....APPLICANT**

**VERSUS**

**MADATALI CHATUR.....1<sup>ST</sup> RESPONDENT**

**K. WANJOHI T/A KINDEST AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

By a notice of motion filed on the 19<sup>th</sup> May, 2008, Venue Company Ltd (hereinafter referred to as the applicant) has come to this court under Order XLI Rule 4 (6) of the Civil Procedure Rules. The applicant seeks *inter alia*, an order of temporary injunction restraining Madatali Chatur and K. Wanjohi T/A Kindest Auctioneers, (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> respondents), their servants or agents or anyone acting under their authority from proclaiming, attaching, or in any way dealing with the applicant's property pending the hearing and determination of the appeal which has been lodged by the applicant.

The background to the application is that the applicant filed a suit in the CM's court at Milimani seeking damages and orders of permanent injunction restraining the respondents from proclaiming, attaching or in any other way interfering with the applicant's business. Filed simultaneously with the plaint, was an application for a temporary injunction under Order XXXIX of the Civil Procedure Rules. The application was heard and dismissed by the resident magistrate. The applicant being aggrieved by the order dismissing its application for temporary injunction filed this appeal and now seeks orders of temporary injunction pending appeal. The applicant maintains that the 2<sup>nd</sup> respondent has unlawfully proclaimed the applicant's goods on instructions from the 1<sup>st</sup> respondent in contravention of the provisions of the Chattels Transfer Act Cap 28 Laws of Kenya. The applicant maintains that following the order of the lower court, dismissing his application for injunction, there is a danger that unless this court grants a temporary injunction pending the hearing of its appeal, the proclaimed goods may be sold and the applicant will suffer substantial loss. The applicant further contends that its appeal has overwhelming chances of success as the 1<sup>st</sup> respondent is trying to enforce a mortgage which was neither registered nor stamped nor executed by the directors of the applicant. It was maintained that such a mortgage has no force of law. In this regard the following cases were relied upon:

- ***HC (Nakuru) Civil Appeal No.191 of 2002 Simon Muiruri Wanjohi vs Resma Commercial Agencies Ltd and Another.***
- ***HCCC (Milimani) No.134 of 1999 Nyali Chemicals Ltd vs Thugi River Estate Ltd and Another.***

The court was urged to grant an order for temporary injunction to avoid this meritorious appeal being rendered nugatory.

The respondents have objected to the application through three affidavits sworn by the 1<sup>st</sup> respondent. It is contended that the application is incompetent, ill advised and misconceived. The 1<sup>st</sup> respondent maintains that the applicant is indebted to it to the tune of Kshs.2 million plus costs. The 1<sup>st</sup> respondent further contends that the charge over the applicant's chattel mortgage was properly executed and came into effect long after the loan was given. It was submitted that Section 2C of the Chattels Transfer Act came into effect in 2005 after the execution of the chattels mortgage herein and that, that law could not act retrospectively. It was further submitted that the applicant not having denied being indebted to the respondent, is not coming to this court with clean hands and does not deserve an order of injunction. Relying on the case of **Bob Morgan Systems Ltd & Another vs Jones (2004) 1 KLR 194**, it was submitted that the applicant's appeal has no merit nor has the applicant demonstrated that it will suffer irreparable loss or that the appeal will be rendered nugatory if the orders of stay of execution pending appeal is not granted.

I have carefully considered this application. The applicant is seeking an order of temporary injunction pending appeal. The principles upon which such an order can be granted are generally the same as those for granting an order of interlocutory injunction i.e. the applicant must show that he has a *prima facie* case (in this case, arguable appeal) with a probability of success; that if the temporary injunction is not granted the applicant will suffer irreparable loss; and where the court is in doubt it decide the application on the balance of convenience. (*Giella vs Casman & Brown Co. Ltd [1973] EA 358*). In this case, the applicant's contention appears to be that the chattel mortgage upon which the respondents have proclaimed the applicant's goods is invalid, first, because it was not properly executed by the applicant's directors, and secondly, because it was not registered as required under the Chattel Transfer Act. A copy of the chattel mortgage has been annexed to the supplementary affidavit sworn by the applicant's director on 11<sup>th</sup> June, 2008. There are two signatures on the instrument purporting to be that of the applicant's directors. The applicant contends that one of the signatures is that of a shareholder who has no authority to act on behalf of the company. That of course is a contentious issue which will have to be dealt with at the hearing of the appeal. However, what is clear is that on the face of the instrument, there is no evidence of any registration of the instrument. *Prima facie* the applicant has demonstrated that it has an arguable appeal with probability of success in regard to the validity of the instrument which is the basis of the respondent's authority to attach the applicant's property. From the proclamation it is obvious that the attached goods if sold will cripple the applicant in its business and this will expose the applicant to irreparable loss.

In the circumstances it is only fair that an order of temporary injunction do issue pending the hearing of the appeal. However, in order to ensure that such an order is not abused, and in order to protect the interests of the respondent, I do order that an order of a temporary injunction shall issue pending the hearing and determination of the appeal herein on the following conditions.

- (1) The applicant shall file and serve a record of appeal within 60 days from the date hereof.
- (2) The applicant shall liaise with the executive officer of the lower court and ensure that the original record of the lower court is forwarded to this court within 60 days from the date hereof.
- (3) The applicant shall take all necessary action to facilitate the speedy disposal of this appeal.
- (4) The guarantee for the sum of Kshs.2 million provided as security by the applicant shall remain in force until 26<sup>th</sup> May, 2009.
- (5) In the event that the appeal is not disposed off by 26<sup>th</sup> of May, 2009, the order of temporary injunction shall lapse.

Those shall be the orders of this court.

**Dated and delivered this 30<sup>th</sup> day of September, 2008**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ms Gichuki for the appellant/applicant

Advocae for the respondent absent