



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 252 OF 2008

HUSSEIN DAIRY LIMITED..... PLAINTIFF

VERSUS

SOUTHERN CREDIT BANKING CORPORATION LTD.....1ST DEFENDANT

AKBAR K. KURJI.....2ND DEFENDANT

RULING

The plaintiff filed suit against the defendant seeking various reliefs from the court. Contemporaneous with filing suit, the plaintiff filed an application under the provisions of **Sections 3 and 3A** of the **Civil Procedure Act**, **Order XXXIX Rules 1, 3 and 9** of the **Civil Procedure Rules**, **Section 15** of the **Hire Purchase Act** and **Section 52** of the **Indian Transfer of Property Act**. The plaintiff sought orders of injunction to restrain the defendants whether by themselves or through their agents from selling, disposing off, offering for sale or in any manner whatsoever alienating or repossessing the trucks and trailers that are the subject of Hire Purchase Agreement reference Nos. HP/02/3779 and HP/02/3780 dated 7th June 2002 and 11th June 2002 respectively pending the hearing and determination of the suit.

The plaintiff further prayed for an order of injunction to restrain the defendants, either by themselves or through their agents from offering for sale, disposing off, selling, alienating or in any manner whatsoever adversely dealing with LR No.1196/1/Mainland Mombasa (*hereinafter referred to as the suit property*) pending the hearing and determination of the suit. The plaintiff further sought an order to be made by the court under **Section 52** of the **Indian Transfer of Property Act** that during the pendency of the suit further registration change of registration in respect of the ownership, leasing, sub-leasing, user, occupation or possession or in any kind of right of title or interest in respect of the suit property with the land registry be prohibited. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of Mahmood Kassam Miyanji, a director of the plaintiff. The application is opposed. Wilfred Nyasimi Oroko, the manager legal services of the plaintiff swore a replying affidavit and a supplementary affidavit in opposition to the application.

Before the hearing of the suit, the parties to the suit agreed to file written submissions in support of their respective clients' cases. Counsel for the parties to this suit filed a list of authorities in support of their respective cases. The said counsel appeared before the court to make oral submissions highlighting the written submissions made. Mr. King'ara for the plaintiff submitted that the plaintiff's contends that it had paid each and every penny owed to the 1st defendant. He explained that according to a re-calculation made in respect of the plaintiff's loan account by the **Interest Rates Advisory Centre (IRAC)**, the plaintiff had overpaid the 1st defendant by over KShs.3 million. He submitted that the said report by IRAC had not been controverted by the defendant. He maintained that since the plaintiff had established that it had repaid the loan, the court should safeguard the suit properties pending the hearing and

determination of the suit. He submitted that the interest rate applied on the hire purchase accounts of 48% per annum was unconscionable and illegal. He urged the court to declare the charging of the said interest rate by the 1st defendant to be unlawful. He reiterated that the court should not overlook the fact that the 1st defendant was trying to take advantage of an unconscionable bargain. He submitted that although the hire purchase agreement entitled the 1st defendant to vary the terms of interest, the court should find the said clauses in the agreement to be an unlawful. He explained that due to the excessive interest rates charged, the plaintiff was unable to repay the amount demanded by the 1st defendant despite repaying a sum of KShs.1 million per month for thirty six (36) months. He urged the court to order the release of the motor vehicle that was attached.

Mr. King'ara reiterated that the plaintiff had established a prima facie case to enable this court grant the injunction sought. He submitted that the 1st defendant breached the provisions of **Section 39(1)** of the **Central Bank Act** which outlawed the issuing of directors' guarantees. He maintained that the interest rate that was applied on the loan was unconscionable and therefore unlawful. He submitted that the remedy of repossession of the trucks that were purchased on hire purchase agreement was not available to the 1st defendant since the hire purchase agreement and the debenture were not properly executed. He maintained that the hire purchase agreement was sealed by an illegal seal that did not belong to the plaintiff. He reiterated that in law, the said document was not therefore sealed.

He further submitted that since the plaintiff had paid two thirds of the purchase consideration under the hire purchase agreement, **Section 15** of the **Hire Purchase Act** protected the plaintiff since it prohibited the suit motor vehicles from being repossessed. He submitted that the plaintiff was willing to give an undertaking not to sell the trucks pending the hearing and determination of the suit. He reiterated that according to the statement of accounts and the report prepared by IRAC, the plaintiff had already repaid the loan that was advanced to it by the 1st defendant. He urged the court not to overlook the fact that the requirement regarding the execution of the hire purchase instruments was statutory and could not be explained away by invoking the doctrine of estoppel. He urged the court to allow the application with costs.

Mr. Wameyo for the defendant opposed the application. He relied on the replying affidavits sworn in opposition to the application. He also relied on the skeleton submissions filed. He submitted that the main argument raised by the plaintiff revolved around the issue whether legal interest was applied on the loan account. He maintained that a dispute over interest cannot institute a ground for the grant of an injunction. He submitted that there was a valid charge in respect of the suit property and valid debentures in respect of the trucks. He explained that the values of the properties were ascertainable since the valuation reports had been filed.

Counsel for the defendant reiterated that the plaintiff will not suffer any irreparable damages. He submitted that the plaintiff had committed the suit properties to secure the loan granted and has benefited from the transaction – the plaintiff cannot therefore turn around and claim that he would suffer irreparable damage in the event the 1st defendant realizes the security after the plaintiff had defaulted in repaying the loan that was advanced to it. He submitted that **Section 44** of the **Banking Act** and **Section 39 (1)** of the **Central Bank Act** was not applicable in the circumstances of this application since the interest that was charged by the 1st defendant was contractual. He further submitted that the claim that the charge was not properly attested to was misleading since as was clear from the charge document, the same was attested to by an advocate. He maintained that the plaintiff was guilty of material non-disclosure of facts relevant to the case when it failed to annex a true copy of the charge that was executed in respect of the suit property. He urged the court to disallow the plaintiff's application on the basis of non-disclosure of material facts.

He reiterated that the claim by the plaintiff that the charge document was not properly sealed with the seal of the plaintiff's company should be discounted by the court since the plaintiff should not be allowed to benefit from its wrongdoing. He submitted that it was the plaintiff's directors who affixed the seal on the instruments and they cannot therefore be allowed to disclaim the same on the basis of an alleged use of the wrong seal. He maintained that the plaintiff had not serviced the loan in accordance with the loan

agreement. He explained that even after the plaintiff was granted indulgence by the defendant by having its terms of repayment varied by a deed of variation, the plaintiff contravened the said agreement by failing to pay the agreed sum.

Mr. Wameyo submitted that if the plaintiff had indeed made payment to the defendant, nothing would have been easier than for the plaintiff to attach documentary proof in support of such allegations. He maintained that the plaintiff had failed to establish a prima facie case to enable this court grant the injunction sought. He urged the court to dismiss the application with costs.

I have carefully considered the rival submissions made on behalf of the parties to this application. I have also considered the written submissions filed on behalf of the plaintiff and on behalf of the defendant. I carefully read the pleadings filed by the parties in support of their respective opposing positions. 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, there are several issues which came to the fore for determination by this court. The first issue for determination was whether the instrument of charge dated 18th June 2002 created in respect of the suit property i.e. LR No. 1196/Section 1/MN, Mombasa was valid. According to the plaintiff the said charge was invalid since it was not properly attested in accordance with **Section 59** of the **Transfer of Property Act**. The plaintiff argued that the instrument of charge was improperly executed since the seal of the plaintiff company was not endorsed on the charge instrument.

The plaintiff further stated that the charge was not witnessed as provided by **Section 69 (4)** of the **Transfer of Property Act**. The plaintiff urged the court to find that the charge did not comply with the mandatory provisions of **Section 46** of the **Registration of Title Act** which requires the charge in form J (1) or J(2) to be registered. This court was unable to verify the claims by the plaintiff regarding the charge instrument since the charge annexed in support of the plaintiff's application was a draft charge and not the actual charge which was registered. According to the submissions made, there is no dispute that the charge in respect of the suit property was registered. Nothing could have been easier than for the plaintiff to annex a copy of the actual document that was registered in order to establish the alleged breaches of the law as regard the said instrument of charge. This court is therefore unable to reach a finding in support of the claim made by the plaintiff challenging the validity of the charge.

The plaintiff argued that the interest and other penalties charged on the plaintiff's account by the 1st defendant were usurious and unconscionable. It was submitted on behalf of the plaintiff that the interest charged by the 1st defendant was contrary to **Section 39** of the **Central Bank Act** and **Section 44** of the **Banking Act**. It was evident that in advancing this argument, the plaintiff is seeking the grant of an order of injunction by this court by challenging the 1st defendant's right to exercise of its statutory power of sale on account of a dispute over the amount owed. As was held by Kwach JA in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others [2003] KLR 125** at page 126:

“The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England, Vol 32 (4th edition) paragraph 725 as follows:-

“725 When mortgagee may be restrained from exercising power of sale.

The mortgagee will not be restrained from exercising his power of sale because the amount due is dispute, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”

In the present application, it was clear that the plaintiff's complaint in regard to the interest charged under the instrument of the charge is not sustainable in light of the deed of variation of charge and further charge which was executed between the plaintiff and the 1st defendant on 16th December 2004. In the said deed of variation, the 1st defendant did, at the plaintiff's request, waive part of the interest charged and further rescheduled the repayment of the loan that was advanced to the plaintiff. In the said deed of variation, the interest rate charged on the reduced amount was between 14% and 19% per annum. The plaintiff's claim that the 1st defendant charged an interest rate that was at 33% per annum therefore falls flat on its face.

It was evident that the plaintiff raised the complaint regarding whether the 1st defendant had charged interest contrary to the **Banking Act** and the **Central Bank Act** deliberately to divert the court's attention from the actual facts of the case which is that the plaintiff was advanced a loan by the 1st defendant, defaulted in repaying the same, and is now rushing to the court in a bid to frustrate the plaintiff from realizing its security. The plaintiff may have a case regarding whether the interest and other penalties charged by the 1st defendant was in accordance with the instrument of charge. However, that is not an issue that can be considered by this court in determining whether or not to grant the order of injunction sought. That is an issue which will be determined by the court hearing the substantive suit. In this regard, the report prepared by **Interest Rates Advisory Centre (IRAC)** will be of use to the plaintiff. As regard whether the plaintiff established that it had paid two-thirds of the value of the trucks and trailers that were the subject of the hire purchase agreements, it was evident that the plaintiff placed no concrete evidence before the court that would persuade the court that indeed such payment had been made. In any event, it was apparent from the bank statements of the plaintiff that the 1st defendant did not discriminate in the said accounts maintained between the loan advanced on security of the suit property, and the amount owed in respect of the loan advanced for purchase of the trucks and trailers.

Having carefully evaluated and analyzed the facts of this case, it is clear that the plaintiff failed to establish a prima facie case to entitle this court grant it the order of injunction sought. On its part, the 1st defendant was able to establish that it advanced certain sums of money to the plaintiff at the plaintiff's own request. The plaintiff offered the suit property as a security. The plaintiff further offered the trucks and trailers to secure the amount that was advanced to it to purchase the same. The plaintiff defaulted in repaying the loan that was advanced to it together with interest as provided by the charge, further charge and debentures that were duly registered. The 1st defendant further accommodated the plaintiff by rescheduling the repayment of the loan and further waiving a substantial part of the interest which had accrued when it became apparent that the plaintiff was unable to pay the contractual amount. The plaintiff cannot therefore restrain the 1st defendant from exercising its statutory power under the charge and debentures which were duly registered. The said instruments allowed the 1st defendant sell the suit property and further repossess the trucks and trailers that were the subject of the hire purchase agreement in the event that there was default.

The upshot of the above reasons is that the plaintiff's application dated 12th May 2008 fails. It is hereby dismissed with costs. The interim orders granted pending the hearing of this application is hereby vacated.

DATED at NAIROBI this 27th day of NOVEMBER, 2008.

L. KIMARU

JUDGE