REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 533 of 2005

PATRICK KIRONO MWAURA ……..…….....…… PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK ….....…….....…… DEFENDANT

RULING

The plaintiff has brought this application dated 11th October 2006, seeking a stay of execution of the orders issued on 2nd October 2006, pending the hearing and determination of his intended appeal.

As far as he is concerned, the intended appeal would be rendered nugatory if the orders sought were not granted. He feels that if stay was not granted, he would "**suffer grievously irreparable financial and emotion losses."**

When canvassing the application the plaintiff urged the court to invoke its authority pursuant to Section 3A of the Civil Procedure Act, so as to order that the status quo be maintained until the intended appeal was heard and determined.

The reason for asking for the maintenance of the status quo was that unless that is done, the defendant would take steps to carry out a valuation of the suit property with a view to exercising its statutory power of sale.

In other words, unless the defendant was stopped from taking those steps, the suit property would soon be put up for sale. If that were to happen before the plaintiff's intended appeal was heard and determined, he believes that he would have suffered a grave loss.

Yet, the plaintiff feels that his intended appeal has good prospects of success. And in an endeavour to demonstrate his case, the plaintiff pointed out that this court had arrived at its earlier decision, without due regard to the provisions of Sections 176 and 177 of the Evidence Act.

It was submitted that without the bank producing its banker's books in which at the time the entries were made, were ordinary books of the bank, which were in their custody and control; and also that the entries were made in the usual and ordinary course of banking business; the court should not have accepted the figure cited in the Notification of Sale as reflective of the balance of the debt owed by the plaintiff.

First, I must say that in my understanding, Section 176 of the Evidence Act expressly provides that a copy

of any entry in a banker's book was admissible in all legal proceedings. In other words, the said section provides an exception to the general rule on the admissibility of documentary evidence.

Ordinarily, contents of documents can only be proved by way of either primary or secondary evidence, as provided under Sections 64 to 68 of the Evidence Act. Therefore, by allowing copies of banker's books to be used in evidence, Sections 176 and 177 of the Evidence Act are making an exception.

Now, in this case, the piece of evidence which the court is accused of having wrongly admitted in evidence is the Notification of Sale. Insofar as the said document cannot be deemed to be amongst banker's books I am unable to appreciate why the plaintiff feels that it could only be admissible in evidence, if it complied with Sections 176 and 177 of the Evidence Act.

Secondly, the plaintiff submits that the court was obliged to inquire from the defendant wherefrom it derived the information that the plaintiff owed it Kshs.1,369,079.05. It is his case that it was wholly insufficient for the defendant's Corporate Credit Analyst, Ms. Beth N. Kombo, to have deponed as follows;

"I wish to state that the balance outstanding as demanded in the Notification of sale is correct."

To my mind, that deposition must be put within its proper context, for it to be fully appreciated. First, it must be borne in mind that when Ms Beth N. Kombo swore the affidavit in question, it was in response to the plaintiff's application for an injunction, which application is dated 19th December 2005. By that application, the plaintiff had, inter alia, asserted that the bank had refused or declined or failed to give the full details of the alleged indebtedness of the plaintiff.

As part of her answer to the application, Ms Beth N. Kombo stated that her colleague, Mrs. Bertha Oduor, had provided the plaintiff with statements of account. She also deponed that the plaintiff ought not to keep on repeating his allegations about the statement of accounts, when he had already admitted the debt in both the Plaint as well as in a supporting affidavit, filed in an earlier suit. The said earlier suit is **HCCC NO 1023 OF 2002.**

In my ruling dated 9th February 2006, I noted as follows;

"It is therefore my understanding that if the plaintiff had wanted to challenge the 1st defendant's accounts, for whatever reasons, he could have, and should have done so in the previous suit."

I then went on to state as follows;

"I therefore hold that it is not open to the plaintiff to re-open any of the issues which he had raised in the previous suit, and which had been adjudicated upon. Those issues include the finding by the Hon. Ondeyo J. that the plaintiff severally acknowledged his indebtedness to the 1st defendant. At this interlocutory stage of these proceedings, it is not open to him to cast doubt on that finding."

Having arrived at that decision, the court upheld the preliminary objection of the 1st defendant, and thus declined to delve into the issue of accounts. That being the position, I hold the view the court could not, at the same time start questioning the 1st defendant about the source of its information regarding the plaintiff's indebtedness. I say so because, if the court were to carry out that inquisitory exercise, it would have re-opened an issue which it had already held to be res judicata.

The plaintiff seems to be no more than speculating, when he now suggests that;

"the amount on the Notice of Sale could as well have been single officer's decision with consultation with the 2nd defendant or somebody else as to amount inserted by the 2nd defendant, and therefore the amount inserted does not prove the alleged indebtedness."

Perhaps it is necessary to once again state the court's finding, to the effect that I do believe that the plaintiff cannot challenge the ruling of the Hon. Ondeyo J. through another application, in the High Court. The said learned judge did make an express finding to the effect that the plaintiff had severally admitted his indebtedness. If the plaintiff wished to challenge that finding, he should have preferred an appeal to the Court of Appeal.

But because he failed to appeal against that finding, I believe that the issue of his indebtedness is not so much in the statements of accounts which he is now taking about, but in the holding by the learned judge, that he had admitted the said indebtedness.

I have noted that on the face of the application the plaintiff seeks an order for stay of execution. However, in his submissions, he only insisted that the status quo be maintained.

As regards the plea that there be a stay of execution, I hold the view that if the defendant were to instruct a valuer, with a view to having the suit property valued, that exercise could not be construed to be the execution of an order issued by this court. Instead, such an exercise would be an endeavour to comply with the Auctioneers Rules.

The plaintiff has not persuaded me that there is any good reason for asking me to order the 1st defendant to withold such action as would enable them to comply with the law. Therefore, insofar as the plaintiff sought stay of execution of the orders dated 2nd October 2006, the same is denied.

Meanwhile, should the status quo be maintained?

First, I understand the status quo currently prevailing to be the scenario in which the plaintiff is supposed to paying Kshs.50,000/= every month, towards the servicing of the loan account.

To my mind, the 1st defendant would not be prejudiced unduly, if the plaintiff should continue to remit monthly repayments until his intended appeal was heard and determined. I say that because apart from the monthly repayments, the 1st defendant would continue to hold onto the security.

On the other hand, I do recognize the plaintiff's inalienable right to challenge the ruling dated 2nd October 2006, by appealing against it. If, whilst the said intended appeal was still outstanding, the suit property were to be disposed of, the said intended appeal would perhaps be rendered nugatory. Therefore, in order to safeguard the subject matter of the suit, whilst at the same time weighing the interests of both parties, on the scales of justice, I hold that provided the plaintiff pays Kshs.50,000/- monthly, the 1st defendant should not take any steps towards realising the security herein until the plaintiff's intended appeal was heard and determined. The said payments are to be remitted on or before the 15th day of each month.

In arriving at this decision, I have taken into consideration the plaintiff's contention that he does not owe any money to the 1st defendant. Even though there might be a possibility that the plaintiff could prove his assertion, during the trial of the suit, I believe that the payments he would have made in the interim, would not be lost. He could always be refunded.

On the other hand, if it had been ordered that the status quo be maintained unconditionally, the 1st defendants books would continue to reflect a growing debt, which might quickly outstrip the value of the suit property. If that were to happen, and then the plaintiff lost the suit, both parties would have become prejudiced. The suit property would then be disposed of and the 1st defendant would have to bring further proceedings in relation to the balance of the debt that might still be outstanding.

It is because of those considerations that the scales of justice persuaded me that it would be best to stay the realisation of the security, provided that the plaintiff continued to make monthly repayments, as already ordered.

Finally, as it cannot be predicted, with any degree of certainty, how soon the plaintiff's intended appeal would be determined by the Court of Appeal, I can only suggest to the 1st defendant to withold the valuation of the suit property. That it is because, if subsequently the suit property had to be put up for public auction, there might be need for a new valuation, so as to comply with the Auctioneer's Rules, which require that the valuation which forms the basis of the reserve price should be not more than one year old, as at the date of the auction.

And as I conclude this Ruling, I would also ask the plaintiff to recall that there is an incomplete application for an injunction.

Meanwhile, the costs of the application shall be in the cause.

Dated and Delivered at Nairobi this 18th day of January 2007.

FRED A. OCHIENG

JUDGE