



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 537 OF 2006

PETER ABUGA T/A SENTA VIEW STUDIOS..... PLAINTIFF

VERSUS

IMAGING SOLUTIONS LIMITED.....DEFENDANT

RULING

In the Plaint filed herein on the 27th September 2006 the plaintiff describes himself as being involved in business of photographing and photochromatic Equipment/Instruments amongst others. He said that he had a business relationship with Kodak Kenya Ltd prior to November 2005. During that Business relationship Kodak Kenya Ltd guaranteed the plaintiff for a sum of kshs 6, 500, 66/- in respect of a facility by Barclays Bank (K) Ltd. In consideration of that guarantee the plaintiff executed a Chattels mortgage in favour of Kodak Kenya Ltd. The Chattels mortgage was over the plaintiff's equipment and instruments. The plaintiff then stated in the plaint that in the year 2005, the defendant informed him that it had taken over the operations and Business of Kodak Kenya Ltd. The Defendant therefore requested that the plaintiff would deal with it henceforth. The plaintiff admitted having acquired from the defendant materials, chemical papers and other assorted materials which were payable either in cash or credit arrangements. The plaintiff further averred that in November 2005 being in need of a bridging loan, approached the defendant for a loan of kshs 3, 239,519.10/-. The defendant agreed to lend the plaintiff that amount on condition that the plaintiff would execute a charge on the parcel of land No. Ngong Township Block 1/3. The plaintiff averred that after executing the charge over that property, the defendant refused or failed to advance the bridging loan. Subsequently the defendant it is alleged unlawfully caused to be transferred to the plaintiffs loan account with Barclays Bank Kenya the amount of kshs 3, 239, 519. 10/-. The plaintiff pleaded in the plaint that that action was unilateral, illegal and fraudulent. The plaintiff therefore in this action is seeking that the defendant be restrained from taking possession of custody of the equipment the subject of the Chattels mortgage. The plaintiff is also seeking a declaration that the defendant is not entitled to benefit from the contract between the Plaintiff and Kodak Kenya Ltd. The plaintiff by an interlocutory application brought by Chamber Summons dated 26th September 2006 seeks the following orders:

(a) That there do issue an order of temporary injunction restraining the defendant from possessing, taking into custody or in any other way alienating, or removing from the Plaintiff's custody the following equipment and instruments namely: -

(1) Noritsu QSS 1201V 10540885,

- (2) Noritsu QSF 450V 02906686
- (3) Noritsu QSS 1202vs 13542469
- (4) Noritsu QSF 41002 – 110450455
- (5) Noritsu QSS 1202 VZ 13640004
- (6) Noritsu QSF 4100l – 3107001022
- (7) Noritsi QSS 1201 V 0293993
- (8) Noritsu QSF 450L -20203453
- (9) Noritsu QSS 1202VS 13640489
- (10) NORITSU QSF 4100L – 1

The application is supported by the plaintiff affidavit. In that affidavit he repeated the averments in the plaintiff relating to his Business relationship with Kodak Kenya Ltd. He also mentioned the guarantee issued to Barclays Bank of Kenya Ltd by Kodak Kenya Ltd. The plaintiff further deponed that the Chattels mortgage mentioned hereinbefore had not been registered as required by the Law. It can however be said that after evidence was presented before court by defence counsel which showed conclusively that the charged document was registered, the plaintiff advocate did seem to accept that fact. The plaintiff said that the loan issued to him which was the subject of the guarantee by Kodak Kenya Ltd was through Barclays Bank of Kenya Ltd and that he did service that loan on a monthly basis. That he had a standing order in favour of the Bank which ensured that that loan was repaid on a monthly basis. The plaintiff thereafter deponed to matters relating to his request for a bridging loan and he deponed to the fact that he executed a charge in favour of the defendant over his property. He stated that on executing that charge the defendant did not advance him the loan as agreed. That however subsequently the defendant wrongly caused to be debited from his account at Barclays Bank of Kenya Ltd the amount of kshs 3, 239, 519.10/-. The plaintiff deponed that that action caused him hardship because it distorted the repayments arrangement introducing a charge of interest to the loan not anticipated. The plaintiff said that that debiting in his account was fraudulent since it was done without consideration. The plaintiff stated that the defendant has demanded from him the sum of kshs 2, 249, 414/-. That the defendant has stated if the plaintiff does not make payment of that sum, it would proceed to take possession of the plaintiff's Equipment and Chattels. The plaintiff therefore stated that if the Court does not restrain the defendant as prayed in his application, the defendant will take away his Chattels and that the consequence of that will be to disable the plaintiff business completely. He was therefore of the view that such attachment would cause him irreparable loss and damage. The plaintiff finally stated that he runs businesses in Kisii, Migori and Kisumu City.

The application was opposed and in opposition a Replying Affidavit was sworn by the defendant's Credit Controller. He began by correcting the deposition of the plaintiff by saying that the Chattels mortgage was duly stamped and registered. He annexed to the affidavit a copy of the registered Chattels mortgage. He stated that prior to the year 2005, the plaintiff in his business transaction was dealing with Kodak Kenya Ltd. That thereafter the share holding in Kodak Kenya Ltd was acquired by Imaging Solutions Kenya Ltd. Subsequently and after a resolution, the trading name of Kodak Kenya Ltd was changed to Imaging Solutions Kenya Ltd. Imaging Solutions Kenya Ltd later transferred its assets and liabilities to Imaging Solutions Ltd. The deponent therefore stated that the defendant both in Law and in fact is the proper assignee of the Chattels mortgage. In that case the deponent said that the defendant was properly enforcing its rights under that mortgage. The deponent further stated that the plaintiff's trade debt with the defendant had accrued to the sum of ksh 5, 488, 933. 10/-. That on 13th of September 2004 it was agreed between the plaintiff and the defendant that the plaintiff would reduce the said trade debt by having his loan account with Barclays Bank Kenya Ltd debited with a sum of kshs 3, 239, 519. 10/- which sum was paid to the defendant and that brought the plaintiff's debt with Barclays Bank Ltd to kshs

7.5 million. The deponent said that it was agreed between the plaintiff and the defendant that in respect of the enhanced liability to the Bank as guarantor the plaintiff was to give an additional security to the defendant by way of a mortgage over Title No. Ngong/Ngong Block 1/3. The deponent stated that mortgage had not been perfected. He said that the plaintiff defaulted in his repayments towards the loan of Barclays Kenya Ltd and as a consequence of that default the defendant was called upon as the guarantor to pay the amount guaranteed. The deponent said that the plaintiff trading account with the defendant is still in debit for the sum of kshs 2.2 million. That the plaintiff had acknowledged the debts owed and had accordingly issued post-dated cheques in respect of the said debts. The deponent ended by saying that the plaintiff's injunction application is misconceived and without basis.

In oral submissions, the plaintiffs advocate stressed the issue of the alleged wrongful debiting of the plaintiff's account as stated both in the plaint and in the plaintiff's supporting affidavit. The plaintiffs advocate submitted that no consideration was given for the said debiting of the plaintiff's account. In so stating the plaintiff's advocate failed to explain a letter that was written by the defendant which was in the following terms: -

Monday 11 September 2006

Mr Peter Okao

Senata View Studios

P O Box 2688

Kisii

RE GUARANTEED LOAN ACCOUNT 08/1221472

As per our meeting this morning, on your loan at Barclays Bank of Kenya, the bank has accepted your proposal to pay shs. 80, 000 per week towards the loan beginning this week. As such, please let us have your post-dated cheques for one year ahead as agreed.

We wish to advise that the bank shall recall the loan immediately if any of the cheques is not honoured for payment as this will amount to default of payment. Having made several other payment plans with the bank that have not succeeded, we request that you ensure this arrangement is implemented as it is the last chance that the bank has offered.

Kindly sign below as an acceptance to this terms and return a copy with the post-dated cheques.

Yours faithfully

Imaging Solutions Limited.

Pierre Viljoen

Managed Director

Accepted: Peter Okao – Sentaview Studios.

The plaintiffs advocate also failed to explain the 14 post-dated cheques that were signed by the plaintiff in favour of the defendant. It ought to be noted that the dates of those 14 cheques were dates after the alleged wrongly loading into the plaintiff's Account of the amount of kshs 3, 239,519.10/- the question that arises from that is if indeed there was unlawful loading of the plaintiff's account why did the plaintiff issue post-dated cheques. The plaintiff's advocate also finally failed to explain the letter written by the plaintiff to the defendant dated 27th of September 2006. That letter is in the following terms: -

SentaView Studios

P O Box 2088

Kisii

27th September 2006.

Imaging Solutions Ltd

P O Box 18210

Nairobi

Dear Sir

RE CHEQUES

Please do not present the remaining cheques to the bank until after one month or so. I thought I will be paid by the person who is buying Kisumu Studio before the end of the month, but it has been delayed a bit. Hold the cheques and I will notify you soon when to bank them.

Many regards.

Yours faithfully

Peter A. Okao

The plaintiff's counsel further argued that the chattels mortgage has a limit of kshs 6.5 million. He was therefore of the view that the debit being demanded against the plaintiff for kshs 7.5 million was beyond the amount allowed by the Chattels mortgagee and that accordingly the defendant was not entitled to exercise the rights under that Chattels mortgage. In response to that argument, I would state that the plaintiff is correct in saying that the Chattels mortgage is limited to kshs 6.5 million but that on its own is not a basis for granting a prayer that the plaintiff seeks. The plaintiff has not shown that he has paid the amount due on the Chattels mortgage in order to get an order to restrain the defendant from attaching for much more than that amount. The plaintiff advocate further argued that the Chattels mortgage was in favour of Kodak Kenya Ltd and since there was no proper assignment of that mortgage the defendant could not attach the plaintiff's goods. In making that argument the plaintiff's counsel did not state what constitutes a proper assignment.

The defendant's advocate in oral submission stated that the defendant had purchased the assets of Kodak Kenya Ltd. Having so purchased he said by virtue of Section 45 of the Chattels Transfer Act, the rights of the Chattels mortgage of the plaintiff accrued to the defendant. Section 45 of the Chattels Transfer Act provides as follows: -

“Except in so far as the contrary intention appears, all covenants, conditions, provisos, agreements and powers expressed in any instrument, or implied therein by this Act, shall bind the executors, administrators and assigns of the person, or the successors and assigns of a company or corporation, upon whom the covenants, conditions, provisos, agreements and powers impose an obligation, and shall operate for the benefit of the executors, administrators and assigns of the person, or the successors and assigns of the Company or corporation for whose benefit they enure”.

Further the defendant advocate emphasized the fact that the plaintiff had accepted to deal with the defendant in place of Kodak Kenya Ltd. The defence counsel referred the Court to paragraph 7 of the plaint where he said that the plaintiff had accepted having received from the defendant materials, chemicals and paper amongst others. He further drew the Court's attention to Paragraph 9 of the plaintiff

supporting affidavit where the plaintiff deponed to his request for an advance from the defendant to enable him to purchase goods and material. He brought out these two paragraphs with a view to proving that the plaintiff was granted by the defendant the advance of kshs 3, 239.519.10/. Defence counsel therefore argued that the defendant is entitled to attach the goods the subject of the Chattels Mortgage and to sell the same as per the provisions of Section 42 of the Chattels Transfer Act. That section provides as follows:

“There shall be implied in every instrument the covenants, provisos, agreements and powers set out in the Third Schedule or such of them as are applicable; and those implied covenants, provisos, agreements and powers shall, subject to any modifications thereof expressed in the instrument, have the same effect as if they were respectively set out therein at length”.

As it is clear that section provides that there are certain covenants which are implied in every instrument of Chattels mortgage. The defence counsel in reliance to this section referred to rule 7 of the Third Schedule of the Act which in essence provides that one of the covenants that are implied to the Chattels mortgage is that once there is default of either interest or principal money lent, the guarantor is entitled to attach and sell the property, the subject of the Chattels mortgage. In that regard, defence counsel said that the defendant is not ‘*tied*’ to any particular advances in exercising its rights under the mortgage. The defendant further argued that the plaintiff’s affidavit in support of the present application is faulty because it fails to state the information that is relied upon either on information or from facts. The defence counsel argued that this made the plaintiff’s affidavit to be fatal.

I have considered all the arguments and the affidavits of the parties. In the first instance the plaintiff’s argument that there was wrongful loading or debiting of the plaintiff’s account at Barclays Bank of Kenya Ltd must fail for the plaintiff has failed to join the Bank in this action. The court cannot consider that argument without the Bank being present in the action because essentially there cannot be any debiting of the plaintiff’s account without the consent of the Bank. One fails to understand how the defendant can access the plaintiff’s account with the Bank to be able to wrongfully debit the same. That argument does not take the plaintiff’s application any further. The plaintiff claims that there was no proper assignment of the Chattels mortgage to the defendant also fails for the defendant in the replying affidavit annexed documents which proved that there was an assignment from Kodak Kenya Ltd to the defendant. With that and considering the provisions of Section 45 of the Chattels Transfer Property the plaintiff’s argument is defeated. The court finds that nothing really turns on the plaintiff’s argument that the Chattels mortgage was limited to an amount of kshs 6.5 million yet the debt owed by the plaintiff was kshs 7.5 million. The court finds that it is in agreement with the defendant in finding fault with the plaintiff’s affidavit in support of its application which affidavit failed to state what facts the plaintiff was relying on that either from information or from a position of knowledge. This is contrary to Order XVIII Rule 3 [1] of the Civil Procedure Rules. That rule requires that all affidavits be confined to such facts as the deponent is able from his knowledge to prove. Where the deponent’s knowledge is from information at interlocutory application the court will allow such deposition on condition that the deponent will state the source of that information. The plaintiff having failed to state whether the information in his supporting affidavit is from knowledge or information is fatal to the affidavit. For indeed there is therein facts which are from information and the plaintiff ought to have identified them and stated their source. But perhaps much more fatal to the plaintiff application is the prayer as presented by the Chamber Summons dated the 26th of September 2006. That prayer seeks an injunction which seems to be a permanent injunction because the plaintiff has not stated that it is pending in any event. In other words the plaintiff has failed to say that the injunction will be pending the final determination of this suit. In totality, having in mind the submissions in the affidavit and the findings of this court, this court finds that the plaintiff has failed to show a prima facie case with probability of success. The plaintiff therefore has failed the first test of granting an injunction. The plaintiff in seeking to injunct the defendant from attaching items of property, it will be assumed that those items of property have a value and accordingly, if at the conclusion of this suit it is found that any attachment by the defendant was wrongful the plaintiff can be compensated accordingly. All in all the plaintiff’s application by way of Chamber Summons dated 26th September 2006 does fail and is hereby dismissed with costs to the defendant.

Dated and delivered this 20th Day of February 2007

MARY KASANGO

JUDGE