



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 107 of 2006

RAKAI CLEARING & FORWARDING Ltd.PLAINTIFF

VERSUS

PRIME BANK LIMITEDDEFENDANT

R U L I N G

Rakai Clearing & Forwarding Ltd., the plaintiff herein, filed a plaint in which it prayed for the following orders against Prime Bank Ltd, the defendant herein:

- (a) *A proper taking of accounts to determine the exact amount due and payable to the Defendant on the overdraft account applying the correct and agreed interest rates of 15% per annum.*
- (b) *An injunction to restrain the Defendant from interfering or taking away the plaintiff's Motor vehicle registration Nos. KAL 400W, KAL 400N, KAK 144P and KAM 150S.*
- (c) *Costs of the suit*

When served with the summons and the plaint, the defendant filed a defence and a counterclaim to resist the claim.

The subject matter of this ruling is the summons dated 23rd May 2006 in which the plaintiff sought for an order of injunction restraining the defendant from disposing of, selling alienating or in any other way from repossessing the plaintiff's motor vehicles registration Nos. KAL 400W, KAL 400N, KAK 144P and KAM 150S or any other of the plaintiff's assets pending the hearing and disposal of the suit. Patrick Kiyemba swore an affidavit in support of the summons. As expected, the defendant strenuously opposed the application by filing the replying affidavit of Hasu Silveira sworn on 17.6.2006.

It is the argument of the plaintiff that it has a prima facie case in that it will at the hearing of the substantive suit show that the defendant charged unconscionable, punitive and unreasonable rates of interest which were not disclosed to the plaintiff. It is also the argument of the plaintiff that the defendant varied the rate of interest without seeking prior permission and approval from the Minister under the provisions of Section 44 of the Banking Act (Cap 488 Laws of Kenya

has been claimed by the plaintiff that the rate of interest kept on changing without the knowledge of the plaintiff hence the necessity of the taking of accounts.

The defendant on its part contested the plaintiff's averments by relying on the averments contained in the replying affidavit of Hasu Silveira, its Mombasa Branch Manager. It is the contention of the defendant that the plaintiff has not shown the interest it has over motor vehicles registration Nos. KAL 400N, KAK 144P and KAM 150S which are registered in the names of Patrick Kiyemba. On this account the defendant is of the view that the plaintiff has no *locus standi* to agitate for any orders over the repossession of the aforesaid motor vehicles. It is the submission of Mrs. Kibe advocate for the defendant that the plaintiff can be compensated by way of damages and that this court has no jurisdiction to interfere with the contractual relationship between the plaintiff and the defendant.

Mrs. Kibe however, did not address this court over the issue as to whether or not the defendant sought the permission of the Minister for Finance to vary the rate of interest. She only pointed out that the rate of interest was contained in the letter of offer and that the provisions of Section 44 of the Banking Act were not breached.

The principles of granting injunctions are well settled (see **Giella =vs= Cassman Brown & Co. Ltd. [1973] E.A. 358**). A preliminary issue was raised by Mrs. Kibe which is to the effect that the plaintiff has no *locus standi* in that three of the motor vehicles i.e. KAL 400N, KAK 144P and KAM 150S save for KAL 400W are registered in the name Patrick Kiyemba. What is not disputed is that these motor vehicles were pledged by the plaintiff as securities to secure financial facilities from the defendant. It should be noted that Patrick Kiyemba is the Plaintiff's Managing Director. A simple consideration of this argument is attractive. The defendant relied on the logbook in its possession to claim that the motor vehicles are legally owned by Patrick Kiyemba. At the back of my mind I know the main case is yet to be heard when this point will be determined. At the moment I do not think I am in a position to rule with a finality that the plaintiff has no proprietary interest over the aforesaid motor vehicles. In support of my holding is the position taken by the court of appeal in the case of **Osumo Apima Nyaundi =vs= Charles Isaboke Onyantha Kibondori & 3 others C.A. No. 46 of 1996** in which the court of Appeal said:

"The Traffic Act is an Act of Parliament to consolidate the law relating to traffic on roads. It is not an Act which decides the defacto or dejure ownership of vehicles. Ownership of a vehicle passes by sale and delivery. The registration book of the vehicle is only evidence of title. Section 8 of the said Act reads:

"8. A person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."

This section signifies that a registered owner will be deemed *prima facie*, the owner. It is open for the real owner (should he be not the registered owner) to prove to the contrary."

In view of the above decision the objection is overruled.

Having disposed of the Preliminary point, the remaining issue is whether or not the defendant breached the terms of Section 44 of the Banking Act. It has been alleged that the defendant varied the interest rates without seeking the approval of the Minister. The defendant does not deny this fact but relies on the fact that the interest rates were changed in accordance with the terms of the letter of offer dated 22nd December 2003. The operations of the defendant is obviously governed by the Banking Act (Cap 488 Laws of Kenya). It was incumbent upon the defendant to provide evidence by affidavit that it complied with the provisions of section 44 of the Banking Act. At this stage I will take it to mean that there was none hence the plaintiff's contention proves that it has a prima facie case with a probability of success.

The other issue which arose is whether or not the interest which were charged was unreasonable, unconscionable or punitive. The court of Appeal came to the conclusion that such a ground is a sound ground to conclude that an applicant has a prima facie case. Such an issue can only be determined by evidence tendered in a substantive hearing. In the case of **Daima Bank Ltd. & 2 others =vs= K.H. Osmond C.A. No. 82 of 1998**. The court of appeal said:

"The learned Judge had before him, first, an allegation that the mortgages, the very foundation upon which the suits and the counterclaim, rested were invalid and of no effect. That allegation, could not, as

pointed out by the learned judge, be rebutted by the affidavit evidence. Secondly, that the interest charged on the principle sum was not only unreasonable but also unconscionable and manifestly excessive.

We are satisfied that the learned judge considered these aspects of the matter and correctly exercised his discretion in favour of them as these allegations had not been tried nor a decision made on them.”

The facts deponed on affidavits clearly shows that the defendant has exhausted some amount in a fixed account to settle part of the debt. Upon obtaining such sum, the outstanding debt still remained unsettled. That is why the defendant attempted to realize the securities in form of the aforesaid motor vehicles. The resulting effect is to obviously destroy the plaintiff’s source of income before accounts are taken.

I agree with the submissions of Mrs. Kibe that the plaintiff can easily be compensated by way of damages. But in my humble view this is one the those exceptional cases where I will exercise my discretion to grant an injunction on the principle of convenience. A refusal to grant a temporary order of injunction will greatly inconvenience the plaintiff in that its source of livelihood will grind to halt and that the entire business empire will collapse even before the substantive suit is heard and determined. Whatever the plaintiff will suffer is bound to be substantial and in excess of the loss or inconvenience the defendant would suffer.

In the end allow the summons in terms of the oral amendment made in court by Mr. Ouma advocate for the plaintiff with the approval of Mrs Kibe for the defendant that is to the effect that the defendant, its servants or its assignees and or agents particularly Thaara Auctioneers are restrained from disposing of in any manner Motor Vehicles Registration numbers KAL 400W, KAL 400N, KAK 144P and KAM 150S until this suit is heard and finally determined.

It is upon the defendant and its agents to keep the aforesaid Motor Vehicles in a safe place pending the outcome of this suit which hearing should be expedited. Costs of the application is given to the plaintiff.

Dated and delivered at Mombasa this 13th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Ouma for the applicant.

N/A for the defendant.