



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Case 133 of 2004**

**PATRICIA ENNECE CHUMA .....1<sup>ST</sup> PLAINTIFF**

**ESTHER JEBOO CHESAMA ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....DEFENDANT**

**RULING**

The plaintiffs, Patricia Ennece Chumo and Esther Jeboo Chesama instituted this suit against the defendant m/s Kenya Commercial Bank in May, 2006. They sought for a singular order of;

*(a) An injunction to restrain the defendant its agents, servants, assigns and/or anyone acting on its behalf from selling, disposing of and/or dealing in any manner with LR. No. Miti Mingi/Mbaruk 3/1255 (Barut).*

As it has become customary in this suit simultaneously with the filing of the plaint, the plaintiff also filed a chamber summons application of 11<sup>th</sup> May, 2004 which is expressed to be brought under the provisions of **Order 39 rules 1, 2 and 3**. The plaintiffs sought for a temporary order of injunction to restrain the defendants from advertising or selling the suit premises. This application is grounded on the grounds stipulated on the body of the application and the supporting affidavit by the 1<sup>st</sup> plaintiff sworn on 10<sup>th</sup> May, 2004.

The applicants were given an interim order of injunction on the 15<sup>th</sup> May, 2004 and after several appearances, the parties recorded the following consent on 16<sup>th</sup> December, 2004.

**“By consent:**

- 1. A temporary injunction do issue to restrain the defendant, its servants and/or agent from advertising, selling, transferring and/or dealing in any manner with LR No. Miti Mingi/Mbaruk block 3/1266 (Barut) until further orders of this Honourable court.**
- 2. The parties do take accounts within 3 months From the date of filling this consent letters and in default of which, this suit be fixed for full hearing.**
- 3. Costs in the cause.”**

On 8<sup>th</sup> September, 2006 the defendant filed the notice of motion which is brought under **Order 16 rule 5 (d), Order 39 Rule 4** seeking for orders that the suit herein be dismissed alternatively, the consent order for injunction made on 16<sup>th</sup> December be discharged.

This is the application which was argued before me. Counsel for the defendant/applicant argued that the plaintiffs have failed to take any action to prosecute this matter since the order was recorded in December, 2004. He referred to the consent order in which the parties were to take accounts and in default the suit be fixed for hearing. The defendant has persistently written letters to counsel for the plaintiff requesting for documents in respect of deposit slips for the monies alleged to have been paid by the plaintiff on the loan account. The plaintiffs have not responded to these letters nor have they furnished the documents as agreed and therefore the defendant could not file a defence to this suit.

After due caution to the plaintiffs lawyers about the delaying tactics and the defendants intentions to be discharge the injunction order as no action was taken, the defendant filed the present application. In further arguments, counsel contended that the plaintiff is enjoying the interim orders and has failed to fulfill the condition of taking accounts or to fix this matter for hearing while the defendant's rights as the **chargor** have been prejudiced because they cannot realize the security.

The 1<sup>st</sup> plaintiff has obtained a receiving order dated 5<sup>th</sup> October, 2005 in which she has been declared bankrupt. However under the provisions of **Section 9 (2) of the Bankruptcy Act**, the appointment of a receiver cannot interfere with a secured creditor. In any event, the plaintiff has not applied for a stay of these proceedings. Secondly, the reasons given that the 2<sup>nd</sup> plaintiff be located to Molo is an indication that she has lost interest in the matter.

This application was opposed by counsel for the plaintiff, who relied on his own affidavit sworn on 11<sup>th</sup> January, 2007. His arguments are that the pleadings are not closed because a defence has not been filed, therefore the provisions of **Order 16 Rule 5** of the **Civil Procedure Rules** cannot be invoked. He also argued that a receiving order having been made against the 1<sup>st</sup> plaintiff, these proceedings cannot go any further without involving the official receiver.

On the part of the defendants, counsel submitted that documents were forwarded to the plaintiff and if this documents were not sufficient, that is a matter for defence and the injunction order should not be discharged.

The present application cannot be determined under the provisions of **Order 16 Rule 5** because the pleadings are not closed. Under **Order 39 Rule 4** the court is empowered to discharge or vary, or set aside on an application made by any dissatisfied party an order of injunction. That is what the applicant is seeking on the present application. It is obvious from the court record that the plaintiff has not taken any initiative to prosecute the application.

According to the consent order the parties were to take account within three months of the filing of the consent or fix the matter for hearing. The defendant confesses that due to the plaintiffs' inability to provide the paying slip, they have been unable to file a defence. The only prayer in the plaint is for an injunction. This is an equitable remedy and any party seeking the exercise of the courts discretion should always do so in utmost good faith.

In the case of **Malindi Air Services & Another -Vs- Halima Abdinoor Hassan Civil Appeal No. 202/1998 (unreported)**. The court of appeal held as follows:

***“Granting an interlocutory injunction is a matter of discretion of the court it is granted only when there is complete and utmost good faith and when there is no material untruthfulness on the part of the party seeking assistance of the court at an interlocutory stage when the court cannot perceive or judge what the final result of the case is going to be. A mandatory injunction at an interlocutory stage is rarely granted; only when the plaintiff's case is clear and incontrovertible”.***

The plaintiff had a duty to establish that she had made all the payments, and if she failed to do so, and failed to co-operate and provide the documents to show the source of her dispute or even to prosecute the matter are the plaintiffs entitled to continue enjoying the interlocutory order of injunction.

I am not satisfied that the conduct of the plaintiffs should be encouraged. It is a settled practice in matters of this nature that delay, acquiescence and unclean hands would disqualify an applicant from an equitable relief. In the present case, the applicant is right in invoking the provisions of **Order 39 (4)** and to seek for the discharge of the order of injunction because the applicant who is the beneficiary failed to comply with the condition of taking accounts.

The issue of the receiving order was raised by counsel for the plaintiffs. I agree with the submissions by counsel for the defendant that no application has been made to stay the present proceedings. In any event, these proceedings were instituted by the plaintiff, and under the provisions of the **Bankruptcy Act**, the court is empowered to stay proceedings on terms. That being the case, and there be no proceedings for stay, I allow the application and discharge the order of injunction.

The application is allowed with costs to the defendants.

**Ruling read and signed this 2<sup>nd</sup> day of March 2007.**

**MARTHA KOOME**

**JUDGE**