



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 182 of 2007

JAMES RATEMO MOSETI.....APPLICANT/
PLAINTIFF

VERSUS

INDUSTRIAL COMMERCIAL DEVELOPMENT
CORPORATION.....RESPONDENT/DEFENDANT

R U L I N G

By his amended plaint filed on 23.4.2007, the plaintiff prayed for a permanent injunction restraining the defendant from selling, alienating, disposing or in anyway interfering with the plaintiff's property L. R. No.Nairobi/Block 82/1811 Tena Estate Nairobi (hereinafter called "*the suit property*"). The plaintiff also prayed for a declaration that the plaintiff is entitled to be given credit on his loan account with the defendant equivalent to his terminal benefits of KShs.1,739,785.90, discount on house loan of 35% amounting to KShs.1,147,764.00 and 5 months salary amounting to KShs.400,000.00 leaving a balance outstanding on the loan account a credit of KShs.8,225.40.

The foundation of the plaintiff's claim can briefly be stated. The plaintiff was formerly an employee of the defendant rising upto the level of a Branch Manager when he went on early retirement. In 1997 during his employment with the defendant, the plaintiff obtained from the defendant a loan on the security of the suit property. As at the time of retirement the loan outstanding was KShs.3,279,324.50. The plaintiff pleaded that his retirement benefits were KShs.1,739,785.90. Besides he was entitled to a discount of 35% on his loan which discount amounted to KShs.1,147,764. Taking into account the benefits and the discount, the plaintiff contended that the balance on the loan account stood at KShs.391,774.60 which sum was less than his claim for unpaid salary for 5 months amounting to KShs.400,000.00. In the premises according to the plaintiff, the defendant was not entitled to advertise the suit property for sale as it had done.

Simultaneously with the filing of the original plaint the plaintiff took out a Chamber Summons under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the Law seeking the following principal order:-

“That this Honourable Court be pleased to grant the plaintiff/applicant a temporary injunction restraining the defendant by itself, its agents and/or servants from selling, alienating, transferring and/or interfering with the plaintiff's premises known as L.R. No.NAIROBI/BLOCK 82/1811 pending the hearing and determination of this suit.”

The application was premised upon the following main grounds:-

- (1) That the amount due is disputed.
- (2) That the plaintiff is a former employee of the defendant and as at the time the plaintiff left the defendant's employment the balance outstanding on his loan was KShs.3,279,324.50 and his terminal benefits stood at KShs.2,887,549.90.
- (3) That the defendant has neglected and/or failed to either release the plaintiff's terminal benefits to him or give credit for the amount on the loan account. And if the defendant were to give the plaintiff credit for the terminal benefits on the outstanding loan account, the balance on the loan would be only KShs.391,774.60 which the plaintiff is ready and willing to pay.
- (4) That the intended sale is in bad faith and out of malice.

In support of the Chamber Summons, the plaintiff swore an affidavit which elaborates the above grounds. The plaintiff appeared ex parte before Hon. Okwengu J who on being satisfied with the prima facie merits of the application granted a conditional temporary injunction and fixed the application for hearing inter partes on 19.4.2007. On the later date, parties agreed to exchange affidavits and the application was fixed for hearing on 28.5.2007. On that date, a further order was made for the parties to exchange further affidavits and argue the application on 9.7.2007. The record shows that the plaintiff has filed 3 affidavits.

The application is opposed and the defendant has filed a replying affidavit sworn on 17.4.2007 by one Grace Mudola Magunga the defendant's Acting Corporation Secretary. She also swore a further replying affidavit on 30.4.2007. Both affidavits have annexed to them numerous exhibits. The defendant has in addition entered appearance and filed a defence. In a nutshell, the defendant's position with regard to the plaintiff's case is that in addition to the loan advanced to the plaintiff as admitted in the plaint, the plaintiff was a guarantor to one Fidelis Okindo Ondieki in respect of a commercial loan advanced to the said Ondieki by the defendant. It further contends that the plaintiff availed himself of an early retirement scheme offered by the defendant under which the plaintiff's retirement benefits were used up in paying the plaintiff's liability to the defendant on the guarantee and no retirement benefits remained to pay off the plaintiff's loan with the defendant secured by the suit property. In the premises, according to the defendant there are no monies due from it to the plaintiff. In its view, the plaintiff is heavily indebted to it. It has served the requisite notices and its statutory power of sale has arisen.

I have considered the pleadings, the application, all the affidavits filed together with their annexures. I have also given due consideration to the submissions of counsel. Having done so, I take the following view of the matter. The original position taken by the plaintiff was that had the defendant given him credit for his terminal benefits, the loan account would only reflect an outstanding sum of KShs.391,774.60 which he was ready and willing to pay. When the defendant responded to the claims as laid in its replying affidavit and further replying affidavit aforesaid, the plaintiff appeared to change tune. He now alleged that, he was blackmailed into accepting certain terms regarding settlement of his liability to the defendant under the guarantee. He further alleged that a discharge in favour of the defendant with regard to his terminal benefits was not signed voluntarily as that would be illegal and inequitable.

It is illustrative that in both the original plaint and the amended version, there is no allegation of blackmail coercion or undue influence against the defendant. The defendant on the other hand maintained a consistent position in its documents. Of significance is annexure "GM 16" exhibited by the defendant in Grace Mudola Magunga's replying affidavit aforesaid. The annexure is a discharge voucher signed on 15.4.2002 by the plaintiff. By that discharge voucher, the plaintiff acknowledged receipt of KShs.1,166,438.45 from the defendant and discharged the defendant from claims arising out of the early Retirement Scheme.

Besides a mere allegation that, he did not sign the discharge voucher voluntarily, the plaintiff did not disclose the facts or circumstances that form the basis of his allegation. The mere fact that there was a separate security which had not been realized could not in my view negate voluntary signing of the discharge voucher. It is noteworthy that the security is in the name of the plaintiff. The ultimate

beneficiary of the settlement was the plaintiff. In any event in his own letter dated 9.7.2002, exhibited as “GMM 15” by the defendant in the replying affidavit, the plaintiff acknowledged that the defendant had made several attempts to auction the said security without success. To put the issue beyond controversy, let me set out the plaintiff’s own words:-

“With full knowledge that it is my property which is at stake, I tried to come up with various proposals on how the matter could be resolved. The latest of such proposals was that I requested the corporation to be allowed to participate in the early retirement program to enable me as a guarantor of the said loan which I agree is now expired to pay the guaranteed sum subject to an amicable agreement or arrangements.

However, considering that I only acted as an honest guarantor to the client who took advantage of my extended generosity and refused to pay the loans. The corporation agreed to my request to participate in the retrenchment program under extremely harsh, hostile and selective terms and conditions to say the least at this stage ...”

With regard to the contention that the plaintiff was entitled to a discount of 35% on his staff/house loan under the early retirement programme, both parties relied on the Executive Director’s Internal Memorandum dated 4.1.2002. I have perused the said document. Under the item, “**Current Staff Loans**”, discounts were granted in respect of outstanding balances of existing staff loans if staff opted to redeem them at the time of severance and if not redeemed at that time, the loans would revert to staff rates for two years after which house loans would revert to an interest rate of 8%.

From the material availed to the court, it is obvious that the plaintiff knew how his retirement benefits had been applied and still claimed that the defendant had failed and/or refused to either release his terminal benefits or give him credit for the same. The plaintiff further knew that he did not redeem his house loan at the time he opted for early retirement. Yet he still claimed that he was entitled to a 35% discount under the early retirement scheme.

In view of the above findings, it would appear on a prima facie basis that the plaintiff’s claims are predicated on quick sand. The plaintiff has not established the first condition for the grant of a temporary injunction set out in the rule setting case of **Giella – vs – Cassman Brown & Co. Limited [1973] E.A. 358**. The material availed to the court reveals prima facie that the plaintiff is indebted to the defendant. The defendant served a valid statutory notice of sale. There was default and therefore the defendant’s statutory power of sale has arisen and is exercisable.

I have also found that the conduct of the plaintiff must be frowned upon by a court of equity. He executed a discharge voucher in favour of the defendant with respect to his retirement benefits but failed to disclose the same and without batting an eyelid claims the same. He wrote to the defendant about the harsh severance conditions and specifically acknowledged that his retirement benefits had been credited to his liability under the guarantee. Yet he breathed no word about the same and when confronted with the same in the defendant’s response changed the story to allege that he did not sign the acknowledgements and discharge voluntarily. In my view, the plaintiff has not done equity and is not entitled to the equitable remedy of injunction.

In the end the plaintiff’s application dated 10.4.2007 and filed on 11.4.2007 has no merit and is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Mulwa for Kinyanjui for the defendant/respondent.

F. AZANGALALA

JUDGE

25/9/07