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

Civil Case 219 of 2007

ONGATA RONGAI TOTAL FILLING

STATION LIMITED…….. ……PLAINTIFF

VERSUS

INDUSTRIAL AND COMMERCIAL

DEVELOPMENT CORPORATION…….……..DEFENDANT

RULING

The Applicant, Ongata Rongai Total Filling Station Limited, has by chamber summons dated 18th April, 2007 and brought under Order XXXIX rule 1 of Civil Procedure Ruels sought orders as follows:

"a) That this Honourable Court do issue an Order of temporary injunction directed against the Respondent restraining it from selling, disposing off, alienating or dealing with the Applicant's properties L.R Nos. Ngong/Ngong/27547, 23793,23794,23795 and 23797 until the suit herein is heard and finally determined."

The grounds for the application are on the face of the application and are as follows:

i) That in 1995 the Applicant charged it's property L.R. No. Ngong/Ngong/7505 in favour of the Respondent to secure a loan of Kshs.5 million advanced to it by the Respondent.

ii) That later the Applicant sub-divided the said plot into many plots with the approval of the Respondent and some six derivative plots namely L.R.Nos.Ngong/Ngong/27547,23793,23794,23795,23796 and 23797 were charged in order to continue securing the loan.

iii) That by the end of 2004, the Applicant had paid Kshs.8.7 million, the sum of Kshs.3.7 million being interest.

iv) That even after paying the full loan plus the interest of Kshs.3.7 million, the Respondent insisted that there was an outstanding balance of kshs.6,287,472.15 as at 31st December 2004.

v) That the Applicant approached the Respondent with the proposal as to how to pay the

outstanding loand and on 27th July, 2005, the Respondent made an offer to the Applicant to pay a sum of Kshs.3 million as full and conclusive settlement of the outstanding loan which offer was accepted.

vi) That by 31st July, 2006 the Applicant had paid the sum of Kshs.3 million to the Respondent.

vii) That subsequently thereafter, the Applicant demanded it's titles and the discharges from the Respondent and instead of releasing the said titles and discharges, the Respondent threatened to sell the said properties.

viii) That it would be unfair and unjust to sell the Applicants properties when the loan has been repaid.

ix) That if sold, the Applicant would suffer irreparable damage.

The application is supported by the affidavit of Ruth Wanjiru Wakapa, A Director of the Plaintiff Company.

In brief the gist of the application is that the Applicant obtained a loan from the Respondent in the total sum of

Kshs.5 million which it secured with a parcel of Land LR No. Ngong/Ngong/7505. Eventually, with the approval of the Respondent, the Applicant sub-divided the plot into many plots and charged the six of these plots, hereinafter referred to as the suit plots, to the Respondent. There were negotiations entered into between the Applicant and Respondent concerning payment of the outstanding loan balance at the time the balance stood at Kshs.6,287,472.15. The Applicant contends that the Respondent agreed to receive kshs.3 million within six months in final settlement of the loan. The issue in dispute in the suit is whether the Respondent accepted the settlement and also the date from which the six months was to be computed. There is no dispute however that the Applicant paid the Kshs.3 million by 31st July, 2006.

The application was contested. The Respondent filed a replying affidavit dated 11th July, 2007. In it the deponent, Grace Magunga depones that the negotiation to pay the outstanding balance of Kshs.3 million, as communicated to the Applicant in the letters dated 28th February, 2006 and 30th March, 2006 were first and foremost on a 'without prejudice' basis and secondly the proposal was subject to approval by the management and the Board of the Respondent Company. Ms. Magunga depones further the corporation declined to accept the Applicants offer and that the information was communicated to the Applicant by the Respondents letter dated 13th December, 2006. Mr. Magunga also depones that the suit is premature as the Respondent had not initiated any recovery proceedings in respect of the outstanding loan account.

The application was argued by Mr. Chege for the Applicant and Mr. Mulwa for the Respondent. They pretty much repeated the facts as set out in this ruling. Mr. Chege's contention is that the Applicant met the conditions set by the Respondent in its letter dated 28th February, 2006 by paying the entire sum of Kshs.3 million, six months from the date of the said letter. Mr. Chege contends that after receiving the last payment by 31st July, 2006, the Respondent could not renege on the agreement.

Mr. Mulwa on the other hand contends that had the Applicant stuck within the repayment period of 60 months as agreed originally, the loan could have been cleared by 2000.

Counsel submitted that the letter of 28th February, 2006, relied upon by the Applicant was written on a "without prejudice" basis and should not be used as a basis of this application. Counsel submitted that the Applicant did not establish a *prima facie* case and the orders sought were not deserved by her.

The Applicant has to show that it has a *prima facie* case with a probability of success or that it will suffer irreparable loss or damage if the injunction sought is not granted or that on a balance of

convenience the scales tilt to its favour. These principles were set out in the case of GIELLE VS CASSMAN BROWN [1973] EA 358.

This suit has been brought by way of an originating summons in which the Applicant seeks an order of permanent injunction against the Respondent from selling the suit plots. At this stage, the court need not go into the merits of the originating summons. All this court must be satisfied of is whether there is a *prima facie* case with a probability of success.

The Applicants position is that it has cleared the loan it secured from the Respondent on the basis of an agreement entered into between them vide the Respondent's letter dated 28th February, 2006. That letter is contested by the Respondent on the grounds that it was written on 'without prejudice' basis and further that the letter was merely an offer that was subject to the approval of the Respondents management which had since declined to follow through with it.

The submissions by the Counsels are considered. The issue seems to be the nature of the letter dated 28th February, 2006 and whether it was an agreement between the parties and secondly whether it could be admitted in evidence. If the said letter will be found to be an agreement binding on the parties, then according to it the terms of the loan repayment were varied to the extent the Respondent accepted to receive Kshs.3 million in six months, in full and final payment of the loan. By the date of the letter only kshs.2,500,000/= of the Kshs.3 million was outstanding. The letter provides as follows:

"28th February, 2006

Ruth Wakapa,

P. o. Box 15592

MBAGATHI.

Dear Madam,

'Without prejudice'

RE: LOAN REPAYMENT –ONGATA RONGAI FILLING STATION

We have received your letter of 16th February, 2005.

Please note that the Corporation's offer of Kshs.3.0 million payable in six (6) months is still unchanged. Since the negotiations started in April, 2005 you have paid a total of Kshs.500,000/= to date. If the balance of Kshs.2,500,000/= is not cleared within the next six months from the date hereof, the offer will be considered lapsed and legal recovery measures will be instituted without further reference to you.

Your account reflected an outstanding amount of Kshs.6,792,193.50 as at 31st December, 2005.

Yours faithfully,

INDUSTRIAL & COMMCERCIAL

DEVELOPMENT CORPORATION

JOHN KAHINDI

FOR: EXECUTIVE DIRECTOR"

In compliance with the letter, the Applicant paid the sum in three installments reflected in the Statement of Account sent by the Respondent to the Applicant marked "RWW6" dated 19th December, 2006 as follows:

On 31st May, 2006 Kshs.500,000/=

On 30th June 2006 Kshs.500,000/=

On 31st July, 2006 kshs.1,500,000/=

That would mean that, if the letter of 28th February, 2006 was a valid binding agreement between the parties, then the Applicant complied with the terms of the agreement and cleared the re-negotiated balance as required.

The reverse of this scenario is that if the letter is found not be admissible in evidence for having been on a 'without prejudice' basis, then the Applicant will have nothing to go by to prove that it re-negotiated both the loan balance and the terms of payment, and also met those terms.

If the former position is accepted, then the Applicant has a *prima facie* case with a probability of success and should be granted the injunction sought. If the reverse position is the correct one, then the Applicant will have no *prima facie* case with a probability of success.

The Applicant has stated that it took a loan of Kshs.5 million in 1995 and that by 2004, it had paid a total of 8.7 million composed of Kshs.5 million loan repayment and Kshs.3.7 million interest on loan. The Applicant depones further that as of 31st December, 2004, the Respondent was demanding Kshs.6,687,472.15 as the outstanding balance. The Applicant depones further that it negotiated the loan balance downwards to Kshs.3 million which it paid as required. The Applicant's case is that it has cleared entire loan as agreed and that in the circumstances it would be unfair for the Respondent to be allowed to sell its properties over a debt already paid.

According to the Applicant's loan Statement "RWW6", the outstanding balance on the Applicants loan account as of 31st December, 2006 was kshs.5,070,471.81. The issue is, can the Respondents be allowed to renege on its agreement to accept the kshs.3 million as full and final payment after the Applicant has fully paid the entire sum as required? Second issue is if the loan was to be cleared by the payment of Kshs.3 million in six months, and since, before the Kshs.3 million was paid, the balance was Kshs.6 million, on what basis did the Respondent arrive at a balance of Kshs.5 million after the payments were made?

At this stage the court cannot make a final ruling on the issue whether the two letters in which the parties varied the original contract between them are admissible or not. That is for the trial court to decide. The issue between the parties is not merely that of accounts and sums due but of whether the terms of agreement were varied. The court will then have to arrive at a decision of whether or not any sums are due in this suit.

That being the case, I find that the Applicant should succeed in this application on the basis that it has a *prima facie* case with a probability of success and on the basis that it will suffer irreparable loss if the orders are not granted. If it will be found that the Applicant paid the loan in full and the property is sold then the applicant stands to loose its property which cannot adequately be compensated through monetary terms. On these basis I do allow the application and grant the prayer sought.

I order that a temporary injunction do issue against the Respondent restraining it from, disposing off, alienating or selling the suit properties until this suit is heard and finalized. The Respondent should pay for the costs of this application.

Dated at Nairobi this 30th day of November, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

Chege for Applicant

Mulwa for Respondent

LESIIT, J.

JUDGE