



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 734 of 2002**

WAB HOTEL LIMITED..... 1ST PLAINTIFF

JOSEPH WAMBUA MULUSYA2ND PLAINTIFF

VERSUS

INDUSTRIAL DEVELOPMENT BANK LTD.....1ST DEFENDANT

LAWRENCE ODORI NABWANA 2ND DEFENDANT

RULING

The application dated 12.8.2005 is seeking several orders as are indicated in the Chamber Summons on numerous grounds set out in the body of the Chamber Summons. There is an affidavit in support of the application sworn by one Pasqualine Mulusya a Co-director of the 1st plaintiff. Annexed to the affidavit are numerous exhibits. There is also a supplementary affidavit sworn by one Joseph Wambua Mulusya another director of the 1st plaintiff with two annexures.

The application is opposed and there is a replying affidavit sworn by one Rebecca Kinyanjui the 1st defendant's Chief Legal Officer/Company Secretary. There is also a further replying affidavit sworn by one Ronangipalli Venkata Ramana Rao the 3rd defendant and Joint Receiver and Manager of the 1st defendant.

The application was canvassed before me at length on 10.11.2005, 17.2.2006 and 24.2.2006. Counsel relied on the affidavits of their respective clients. Counsel for the plaintiffs highlighted the following complaints:-

- 1) *That the 1st defendant had given different amounts as owing to it by the 1st plaintiff at various times.***
- 2) *Irregularities in the Statutory Notices of Sale.***
- 3) *Deliberate devaluation of the 1st plaintiff and its assets.***
- 4) *Failure of Receivers and Managers to account for the period of receivership.***
- 5) *Defective and irregular Auctioneers Notices.***

Counsel for the defendants on his part was of a different view. With regard to discrepancies in the amounts given as owing at different times, it was counsel's view that the differences were not substantial

and in any event a dispute as to amounts owing would not entitle the plaintiffs to the orders sought. With regard to the Statutory Notice of Sale, Counsel submitted that no irregularities had been identified. Counsel also submitted that there was no deliberate devaluation of the 1st Plaintiff and its assets as alleged. With respect to the receivership period it was submitted that the same had been accounted for satisfactorily. As to auctioneers notices, counsel submitted that no irregularity had been identified and if any irregularity had been identified the same is of no consequence now.

I have considered the application, the affidavits filed, the annexures, the submissions of counsel and the authorities cited. Having done so I take the following view of the matter. I remind myself that these are interlocutory proceedings and I should not make any definitive findings at this stage. I am however alive to the fact that the reliefs sought by the plaintiffs are equitable reliefs which a court may give to protect legal or equitable rights that are violated or which are threatened with violation. The necessary conditions for the grant of an interlocutory injunction were laid down in the case of *Giella –vs- Cassman Brown & Company Limited [1973] EA 358*. They are that first an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.

In the application at hand the prayer for injunction reads:-

3) That in the interim, the Honourable Court does grant orders restraining the 1st defendant, by itself, its servants and or agents from selling, transferring, illegally disposing, advertising for sale by auction or private treaty the asset belonging to the 1st plaintiff, that is Wab Hotels together with furniture fittings and machinery pending the hearing and determination of this application, and subsequently confirm the same orders pending the hearing and determination of this suit or such further orders of the Court.

The facts that are in my view not in controversy are that the 1st defendant advanced the 1st plaintiff KShs.25 million. There was default and on 5/2/2002 the 1st defendant appointed a Receiver/Manager for the 1st plaintiff when the 1st plaintiff had repaid KShs.7,718,242/= of the mortgage debt. On the plaintiffs' application Mwera J on 25.7.2002 suspended the receivership for 6 months. The directors of the 1st plaintiff in the year 2003 attempted to sell the Hotel but without success. On 10.2.2004 the Hotel was handed back to receivers. The 2nd defendant was the receiver then.

Before Mwera J the plaintiffs sought injunctive orders that the 1st defendant should not appoint the 2nd defendant as a receiver and in the alternative the receiving order be lifted to enable the plaintiffs to procure offshore funding to run the operations of the 1st plaintiff as well as pay off what was due to the 1st defendant. When the application was canvassed before Mwera J the 1st plaintiff admitted owing the 1st defendant a sum of KShs.38 million. Mwera found that the 1st plaintiff was in default. The Learned Judge also found that the plaintiffs had not made out a prima facie case against the 1st defendant but had asked for indulgence. He also found that the position of the 1st plaintiff was uncertain and precarious and when the Learned Judge lifted the receivership for 6 months it was to allow the plaintiffs **“to put in place the finances required”**.

What happened for the period of 6 months? There is no evidence of any payment having been made during the said period yet Mwera J had ordered the parties to agree in two weeks of his order on the rate at which the 1st plaintiff was to continue repaying the Loan.

On 19.2.2003 on the 1st defendant's application the receivership was reinstated. Two days before that date the plaintiffs had lodged another application for the following primary orders:-

(a) That the Court does disqualify the 2nd defendant from acting as a receiver and/or

manager of the 1st plaintiff.

(b) That consequently the court does order the 1st defendant to appoint a professional Hotelier as receiver to run the Hotel for the purposes of immediate disposal of the premises as a going concern, failure whereof the court does appoint a professional hotelier as receiver to run the Hotel for the purposes of immediate disposal of the Hotel as a going concern and the court does fix the remuneration of either receiver to be paid out of the proceeds of sale including fixing the time within which such sale should be completed.

(c) That in the alternative, the court does order the 1st defendant to immediately close down the hotel to prevent damages wastage and pilferage of the hotel's assets pending immediate disposal and an inventory taken prior to such closure.

(d) That the court does determine the forced sale value of the said hotel with guidance from the valuation reports of Mbindah & Company and Centenary Valuers.

(e) That the court does order the 1st defendant to make available to the plaintiffs proper statements of accounts from the period of issuance of the loan to-date.

(f) That the Court does order the 2nd defendant to provide a tabulated documented and detailed account of his income and expenditure during the period of receivership.

That application was heard and determined by Onyango Otieno J as he then was. The Learned Judge dismissed the application in its entirety. In dismissing the application the Learned Judge was not satisfied that the 2nd defendant had failed to carry out his work within the standard required. Indeed the Learned Judge found that the plaintiffs had not been candid with the court. The Learned Judge further found that the plaintiffs were in contempt of court. In the Learned Judge's view it was clear that the 1st respondent held a valid statutory power of sale and could not be ordered to exercise that power of sale. That ruling is dated 6.11.2003.

It is clear from the above record and from submissions made to me that there is no dispute that the 1st plaintiff is indebted to the 1st defendant. There appears however to be a dispute as to the amount owed. The 1st defendant has not been consistent as to what sum is owed to it by the 1st plaintiff. On 26.5.04 it made a demand for KShs.76,404,634/=. On 7.1.2005 another demand for KShs.47,416,073/13 was made. The account exhibited by Rebecca Kinyanjui in her replying affidavit aforesaid at page 112 gave a debit balance of KShs.43,201,061.11 as at 27.5.2004. The 1st plaintiff on its part by its letter dated 1st February 2003 exhibited as RK 7 in the said replying affidavit admitted owing KShs.41,538,301/= and in the supporting affidavit of Mrs. Mulusya aforesaid a sum of KShs.44,175,425.33 is admitted as owing by the 1st plaintiff to the 1st defendant as at 30.9.2004. Taking the figure given by the 1st defendant as at 7.1.2005 of KShs.47,416,073/13 and the one given by the plaintiffs as at 30.9.2004 of KShs.44,175,425.33, the difference is KShs.3,240,647.80. In view of the fact that the plaintiffs' figure is based on calculations made by a third party and was for the period upto 30.9.2004, I am inclined to accept the 1st defendant's computation which is based on actual figures. In my view therefore there is no doubt that the 1st plaintiff owes the 1st defendant upwards of KShs.47,000,000/=. In any event it is trite that a mortgagor cannot be restrained by injunction from exercising a statutory power of sale which has arisen merely because the amount due is in dispute. It is also trite that a dispute over accounts perse cannot entitle a mortgagor to the equitable relief of injunction.

With regard to the challenge made against the Statutory Notice of Sale, counsel for the plaintiffs' did not advance any argument on this challenge. I will therefore say no more about the same. Heavy weather however, was made of service of auctioneers notification of sale. The plaintiffs contended that the said service was contrary to Rule 15(c) of the Auctioneers Rules. The 1st defendant in the replying affidavit sworn by Rebecca Kinyanjui aforesaid deponed that a Notification of Sale was served upon the plaintiffs through "the debtors worker." This service is challenged by the plaintiffs. However Ms Kinyanjui also

deponed that another Notification of Sale was served by registered mail on 27.6.2005. A certificate under Section 15(c) of the Auctioneers Rules 1997 is annexed to the said affidavit as “**RK 10**”. A certificate of postage is also annexed. The Notification of Sale gave the plaintiff notice that the property would be sold on 31.8.2005 in exercise of the 1st defendant’s statutory power of sale. The plaintiffs have not challenged this service of the Notification of Sale in the further affidavit. On 12.8.2005 the auctioneers advertised in the Daily Nation that the plaintiff’s property would be sold on 31.8.2005.

In my view the 1st defendant complied with the Auctioneer’s Rules. In any, the sale was stopped and the challenge made against service of the Notification of Sale under the Auctioneer’s Rules is academic as compliance will still be demanded in the event of the plaintiff’s property being sold.

With respect to the plaintiffs’ complaints regarding valuation of the 1st plaintiff’s Hotel and its assets I have found as follows. There are differences in the values given by different valuers. M/s Kinyua Koech Limited valued the property at KShs.120,000,000/= as the open market value and KShs.85,000,000/= as the forced sale value. This was as at 28.7.2004. M/s Centenary Valuers and Property Consultants valued the property at KShs.177,000,000/=. Their report is dated 10.9.2001. The valuation was on the instructions of a third party called Liberty Assurance company Limited who wanted to be advised on the property’s open market value for mortgage purposes. No forced sale value was given. M/s Mbindah & Company Valuers and Estate Agents valued the same property on 19.1.2002 at KShs.196,913,574 (Land and developments thereon). This valuation was done on the instructions of the 1st plaintiff for mortgage purposes. No forced sale value is also given.

What the above valuation reports suggest is that there can be as many valuation reports as are valuers. The report made by M/s Kinyua Koech Limited valuers may have given a valuation which does not please the plaintiffs. However, there is no suggestion that M/s Kinyua Koech Limited are not competent valuers. The valuation was made within 12 months of the advertised sale as required by the Auctioneers Rules. I am not satisfied on a prima facie basis that the defendants have deliberately devalued the plaintiff’s property. In any event the advertised sale was stopped and it is now 12 months since any of the valuation reports was made. In the event of a subsequent sale a fresh valuation will have to be carried out under the Auctioneers Rules.

With regard to the complaint made by the plaintiffs regarding failure of the receivers managers to account for the period of receivership, I have found this to be a red herring. The plaintiffs’ allegations are in my view speculative and without foundation. The appointment of the 2nd defendant as Receiver and Manager of the 1st plaintiff on 5.6.2002 was a consequence of default by the 1st plaintiff to pay its indebtedness to the 1st defendant. The 2nd defendant’s appointment as Receiver and Manager of the 1st plaintiff was suspended by the Order of Mwera J aforesaid on 25.7.2002. While suspending the receivership, Mwera J had found the 1st plaintiff’s position as uncertain and precarious. The receivership was suspended for 6 months during which time the plaintiffs made no payment towards their indebtedness to the 1st defendant. When the 6 months elapsed the 2nd plaintiff and his wife as directors of the 1st plaintiff refused to vacate the 1st plaintiff until so ordered by the court on 19.3.2004. For the entire period from 27.7.2002 to 19.3.2004, the plaintiffs made no single payment towards their indebtedness to the 1st defendant. Instead the 1st plaintiff’s directors advertised the suit property for sale at the time when receivership was in place and when an order had been made reinstating the Receiver/Managers. Indeed this fact is expressly admitted by Mrs. Mulusya in her supporting affidavit at paragraph 11(b). Other allegations of misappropriation and theft made by Mrs. Mulusya are not supported by documentary evidence. In my view the conduct of the plaintiffs does not meet the approval of a Court of Equity. The plaintiffs have not done equity.

The 1st defendant on the other hand has annexed to the replying affidavit of Rebecca Kinyanjui a print out of the receivership statement of account and filed returns. The 2nd plaintiff in his supplementary affidavit aforesaid merely dismisses the account and returns as not being proper without saying why they are not proper. I am not therefore satisfied that the plaintiffs have shown on a prima facie basis that the defendants have failed to account for the period of receivership.

Having found against the plaintiffs on their primary complaints, I am in the premises not satisfied that the plaintiffs have established a prima facie case with a probability of success. I am also of the view that the plaintiffs' conduct in relation to the subject matter of this suit renders them unworthy of equitable relief. These findings would suffice for dismissal of the plaintiffs' application. However, even if the plaintiffs had established a prima facie case, I would have been obliged to consider whether they have satisfied the second condition for the grant of interlocutory injunction: whether the plaintiffs' injury could adequately be compensated in damages if an injunction were not granted at this stage. I think damages would be an adequate remedy. As already stated above, when the plaintiffs were before Onyango Otieno J as he then was they inter alia sought an order that the 1st defendant appoints a professional hotelier as receiver to run the hotel for the purposes of immediate disposal of the premises as a going concern failure whereof the court was to appoint a professional hotelier as receiver to run the hotel for the purpose of immediate disposal of the hotel as a going concern and the court was to fix the remuneration of the receiver to be paid out of the proceeds of the sale including fixing the time within which such sale was to be completed.

In the application at hand all the primary prayers sought suggest that any injury the plaintiffs may suffer if the injunction is refused can adequately be compensated in damages and the 1st defendant being a bank is capable of meeting any award of damages. For the above reasons, the plaintiffs application dated 12.8.2005 is without merit and is dismissed with costs to the defendants.

DATED AND DELIVERED AT NAIROBI THIS 4th DAY OF APRIL, 2006.

F. AZANGALALA

JUDGE

4/4/2006

Read in the presence of:- Mutua for the Plaintiffs and Maweu for the defendants.

F. AZANGALALA

JUDGE

4/4/2006