



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

Civil Case 957 of 1997

NATIONAL BANK OF KENYA.....PLAINTIFF

VERSUS

JOAB HENRY ONYANGO OMINO.....DEFENDANT

R U L I N G

By a Notice of Motion dated 20th June 2005, the Plaintiff has sought the following orders:

- “1. That the Honourable Court be pleased to discharge, vary or set aside the Order made on the 12th day of May 2003, and allow the Plaintiff/Applicant to sell the suit property.**
- 2. That the Honourable Court do make other or further orders as it may consider just in the circumstances.**
- 3. That costs of the application be provided for.”**

It was the plaintiff’s case that the defendant had obtained an order restraining the sale of the suit property, on the condition that he had to remit KShs. 5.0 million, to the Applicant within 45 days of the order.

When the defendant failed to remit the said payment within the stipulated period, he sought and was granted an extension of time within which to effect payment. When granting the said extension of time, the Hon. Mwera J is said to have ordered that there would be no further enlargement of time.

Notwithstanding the said orders, it is said that the defendant had failed to remit the sum of Kshs. 5.0 million. It is also said that the defendant had failed to service the loan, resulting in the balance growing to the sum of KShs. 123 million.

It is because of the defendant’s said failure to remit the sum of KShs. 5.0 million, or to service the loan, that the plaintiff now feels that there was a need for this court to discharge the injunction orders.

Whilst prosecuting the application, the Plaintiff also pointed out that the court had required the said plaintiff to show that it had separated the accounts of the defendant from that of Archer's Cabs Limited. On its part, the plaintiff emphasizes that it had made available to the Defendant his own statement of account, which was distinct from that of Archer's Cabs Limited. Having thus complied with the condition imposed on it, the plaintiff feels that the defendant should also be ordered to pay the sums which the plaintiff was now claiming.

It was pointed out that the Hon. Mwera J. had held that the defendant still owed money to the plaintiff. Therefore, as the plaintiff was now holding a non-performing debt, following the defendant's failure to service the loan, the injunction order ought to be vacated. The plaintiff felt strongly about the issue because the injunction had remained in place, for three years, yet the defendant had failed not only to make any payments, but also to offer any reasonable explanation for his said failure.

On his part, the defendant put up a strong opposition to the application. First, he pointed out that the ruling delivered by the Hon. Mwera J. was favourable to him. That, of course, is very true.

The defendant then submitted that the court clearly ordered that the injunction was to remain in force until the suit was heard and determined. That order, it was said, was not subject to any of the other orders or conditions. The injunction was said to be independent of the order that the defendant should pay KShs. 5.0 million, as the court did not say that upon a failure to make that payment, the injunction would lapse.

None of the four orders made by the Hon. Mwera J. were subject to any other. Each was independent; so that if the plaintiff failed to pay the auctioneer's charge, that would not cause the injunction to lapse, submitted the defendant.

Another line of argument that was taken up by the defendant was that the prayers in the application were not specific, and could thus not be allowed. The reason for so saying was that the plaintiff had failed to specify which of the four independent orders it wanted vacated.

The defendant also pointed out that on 26th October 2005, the Hon. Ransley J. ordered that this suit be heard on a priority basis. The case was then set down for hearing on 21st January 2006. However, when the trial was set to commence, the parties consented to having it taken out of the hearing list.

As at the date when the court was making the order dated 26th October 2005, this application was already on record. Therefore, the defendant contends that the plaintiff must be deemed to have implied that they did not intend to prosecute the application.

For all those reasons, the defendant asks the court to dismiss the application.

But the plaintiff submits that it cannot be deemed to have waived its right to prosecute the application, simply because it consented to the fixing of trial dates. It is the plaintiff's case that when they realised the mistake of fixing trial dates whilst the application was still pending, the trial dates, which had been fixed, were vacated by consent.

Having given due consideration to the competing contentions in this matter, I now need to resolve the application. First, I note that in his ruling dated 12th May 2003, the Hon. J. W. Mwera J. made an express finding as follows:

“..... the defendant has made out a prima facie case with probabilities of success on the following grounds: That while the defendant claims that the further charge of 15th November 1998, consolidated his indebtedness on account excluding the Archer's Cabs one, the plaintiff seems to be of a different view as per its amended plaint and submission here. That is a matter for trial.

The other ground is that if the defendant is right that the further charge set the terms of the transaction, the plaintiff seems to have acted outside them particularly as regards interest.

.....

So the interest issue too, falls to be determined by evidence because the defendant maintains that interest charged above the maximum of 15% p.a. without his consent is what boiled down to pushing the debt beyond what he can clear to redeem his property.”

Based on the foregoing findings, the court was persuaded to grant an injunction in favour of the defendant. But, at the same time, the court noted that the defendant had not cleared his debt to the plaintiff. In that regard, it was noted that the defendant had made out a cheque for KShs. 5.0 million which was payable to the plaintiff. That cheque was said to be the beginning of the defendant’s proposal to clear his debt.

Finally, the Hon. J.W. Mwera J. allowed the defendant’s application on the following basis:

“(i) The plaintiff not to sell off the defendant’s property until this suit is finally determined or further orders of the court.

(ii) Such orders of the court may for instance follow if and when the plaintiff segregates the defendant’s accounts or transactions based on 15% p.a. rate. Even as the suit pends to determine whether the plaintiff or the defendant is right on this account, the court would consider to direct the defendant to make any payment in the meantime so that the bank does not hold a wholly non-performing account and the defendant is spared the burden of paying the whole sum that the court may find due, if any.

(iii) The defendant to pay Shs. 5 million to the plaintiff as a sign of good faith in the light of the fact that he “attempted” to make such a payment on 15th February 1998 – but “failed.” And that is the only time when a move to pay was made and there is no evidence that the defendant had/has indeed cleared his original debt with the plaintiff. Payment in 45 days.

(iv) Now that the defendant has obtained the injunction the plaintiff will sort out the auctioneer’s expenses.”

From my understanding of the foregoing orders, they cannot be described as being independent of one another. For instance, the first order serves to restrain the plaintiff from selling the suit property. That order is closely inter-connected with the order numbered (iv), which directs the plaintiff to pay the auctioneer’s expenses, because the defendant had obtained an injunction.

Secondly, the order numbered (i) is definitely linked to the order numbered (ii). I say so because the first order states that the injunction was to remain in force until the suit was determined, or until further orders of the court. The next order actually commences with the phrase **“such orders of the court”**, by which I understand the learned judge to be making reference to the discretion which he left to the court to grant further orders, even before the suit was finally determined.

Thirdly, the orders numbered (ii) and (iii) are connected because the learned judge said that the court could order the defendant to make some payments, so that the bank would not hold a wholly non-performing loan. Of course, any such payments were pegged to the need to have the plaintiff first segregate the defendant’s accounts or transactions based on interest at 15% per annum.

As the defendant had previously issued a cheque for KShs. 5.0 million, towards the repayment of the loan owed to the plaintiff; the learned judge directed him to pay the sum of KShs. 5 million within 45 days.

Whereas the plaintiff says that he has now segregated the defendant’s account from that of Archer’s Cabs Limited, in accordance with the order numbered (ii), the defendant had not paid any money towards the settlement of his debt. That has rendered the defendant’s account to be non-performing; which is the very thing which the learned judge said should not have happened.

In the circumstances is the defendant right to say that the injunction was to remain in force until the suit was determined? I would say that the defendant was not wholly correct in that regard. That is because in the order numbered (i), the learned judge did not so say. He actually did expressly qualify the injunction by saying that the property was not to be sold **“until this suit is finally determined or further orders of the court.”**

In effect, the order stopping the sale of the defendant’s property could be vacated upon further orders of the court.

The learned judge then gave hints as to when the court might be inclined to give orders vacating the injunctions. He said that the whole intention was to protect the defendant’s property, whilst at the same time striving to ensure that the bank did not have a non-performing account.

To my mind, the defendant’s current contention that the sustenance of the temporary injunction order issued by the Hon. J. W. Mwera J. on 12th May 2003, was not subject to his paying KShs. 5 million within 45 days is no more than an afterthought. I say so because in the application dated 25th June 2003, the defendant sought an extension of time for the payment of the sum of KShs. 5 million. In prayer (c) of that application the defendant asked that

“the period of forty five (45) Days as per the Court’s Ruling delivered on 12.5.03 requiring the Defendant to pay the plaintiff KShs. 5 million and expiring on 26.6.03, be extended to expire on the 28th day of July 2003, and upon the Defendant depositing the full KShs. 5 million by 28.7.03, the injunction issued on 12.5.03 do remain in force until the hearing and final disposal of this suit.”

From the foregoing, it is manifestly clear that the defendant well appreciated that it was only if he did pay the sum of KShs. 5 million, within the time prescribed, subject to the extension thereof, that the injunction would remain in force until the suit was determined. If he did not think so, he would not have needed to seek an extension of time to pay the sum of KShs. 5 million.

But, by the same token, the plaintiff also appears to hold the view that the injunction order remains in force until and unless it was vacated. In that sense, the plaintiff seems to be in agreement with the defendant that the injunction order is still in force, even though the defendant did not pay the sum of KShs. 5 million, as was ordered.

Pursuant to the provisions of Order 39 rule 4 of the Civil Procedure Rules any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order. The plaintiff has invoked that rule, as it feels dissatisfied with the fact that the defendant’s account is non-performing. I am satisfied that the continued non-performance of the defendant’s account is prejudicial to the plaintiff. Therefore taking cue from the order numbered (i) in the ruling by the Hon. J. W Mwera J, I hereby make further orders, and to that extent vary the said orders made on 12th May 2003. The further orders that I deem necessary, so as to safeguard the interests of both the parties herein, are that the defendant shall pay to the plaintiff, the sum of KShs. 5 million within the next forty-five (45) days. If the said sum is paid within the prescribed period of time, the plaintiff shall be restrained from selling the suit property until 30th October 2006 when this suit is scheduled for hearing. However, if the defendant should fail to pay the sum of KShs. 5 million within the next forty-five days, the injunction order issued on 12th May 2003 shall stand vacated.

Meanwhile, the costs of the application dated 20th June 2005 shall be paid by the Defendant.

Dated and Delivered at Nairobi this 25th day of May 2006.

FRED A. OCHIENG

JUDGE