



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

Civil Suit 605 of 2005

ELIJAH KIPNG'ENO ARAP BII.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

The plaintiff has moved this court by an amended chamber summon dated 18th October 2005 seeking an injunction to restrain the defendant pending the hearing of this suit from selling the charged properties namely L.R. No. Nairobi/Block 99/122 New Runda and L.R. No. NAIROBI/BLOCK 32/448 HIGHWAY VIEW.

The plaintiff's contention is that the defendant violated the credit terms by variations of interest rate which were affected by meetings of non board members of the defendant and that those variations were illegal and unlawful. The gist of the plaintiff's argument can only be appreciated by reproduction of his affidavit sworn on 16th November 2005, paragraph 2 to 6, as follows:

2. The government appointee in the board of directors of the defendant under the leadership of the then permanent secretary treasury, Ms Margaret Chemengich, Mr E.C.A. Saina Mr P.C.J.O. Nyakiamo, Ms. S Wainaina, Mr L.R. Otundo and Dr. K Lang'at who purportedly made a decision to vary my credit terms with the defendant were not capable of making such a decision since they were not board members of the defendant.

3. That the presence of Mr E.C.A. Saina in the said meeting was an illegality because the government had no power to appoint the general manager of the defendant since such power was vested in the board of the defendant by its articles of association numbers 85 and 86.

4. That the appointment by the government on 20.3.98 of Mr P.C.J.O. Nyakiamo as the defendant's director/chairman was unlawful and invalid because it was in breach of the Companies Act [cap 486] Section 186 (5) that prohibits appointment of a person who has attained the age of seventy (70) years except only by shareholders in a general meeting.

5. That Ms S.Wainaina, Mr L.R. Otundo and D.r K. Langat had not lawful capacity to participate in the formulation and the making of the resolution that varied my credit contract in the said purported board meeting as director vie their appointment by the government on 20.3.98 because

their said appointment contravened and violated the defendant's article of association No. 101 since the said article vested with the defendant's directors and/or shareholders the power of appointing the defendant's directors other than director/chairman who was to be appointed by the government.

6. That the said appointments were also illegal because there were no director vacancies to be filled because the incumbent directors that include Joash Wa Mang'oli and whom they were to replace had neither retired nor had he been removed from office in accordance with the defendant's article 102."

As a consequence of the aforesaid illegalities the plaintiff pleaded in his plaint that:

"...that the defendant should not exercise its statutory power of sale against his properties that he charged and deposited with it on the basis of its violation of his credit contract on the basis of invalid 3rd party decision that were made on 20th March 1998 and 23rd March 1998."

Plaintiff's counsel submitted as a consequence of those decisions the plaintiff's employment was terminated through the press coverage. That by that action of termination the plaintiff's rate of interest on the outstanding loan was varied and recalled. That as a consequence of that action the defendant now seeks to sell the plaintiff's properties. The plaintiff on this point stated that he seeks the court's declaration that the variation was illegal.

The other issue the basis of which the plaintiff sought an injunction is that there was no service of the statutory notice and the notification of sale.

In regard to the service of statutory notice the plaintiff denied receipt of the same, which was served by registered post. Defendant served the plaintiff with two notices one dated 20th November 2001 and the second dated 2nd April 2002 be posted both by ordinary post and by registered post.

By a supplementary affidavit the plaintiff sworn on 4th April 2006, the plaintiff sought to prove by letter from Posta Kenya written by the post master general that the registered letters all dated 20th November 2001 were returned to the sender on 2nd January 2002. There is however no evidence of return on the second demand dated 2nd April 2002.

The plaintiff's allegation of non receipt of the notification of sale is supported by the letter from Posta Kenya which indicated that the notification of sale was returned to the sender, that is the auctioneer, on 20th October 2005.

The auctioneer by certificate under Section 15 (c) of the Auctioneers Rules 1997 stated that he swerved by the plaintiff with the notification of sale by registered post on 15th August 2005. It is that notification of sale that was confirmed as having been sent back to the sender, that is the auctioneer.

The plaintiff's counsel argued that by the aforesaid the plaintiff had shown a prima facie case with a probability of success.

The application was opposed on the basis the issue of termination of the plaintiff's services from the defendant, the variation of interest rate, were the subject of a suit previously filed by the plaintiff in HCCC NO. 324 of 2000 which case is still pending before this court. Defence pointed out the paragraphs where the issue of variation of interest rate was mentioned in the previous suit and also the paragraphs in that previous suit which dealt with the issue of termination. The application for injunction in that previous suit was heard by the court on 28th June 2001 whereby the application was dismissed.

Just to prove that the issues raised in the present application were also raised in the previous suit the defence referred to the aforesaid ruling, in recording the arguments before him, Justice Ringera, as he

then was, stated:

“The said loans are said to have been fully performing and infact prepaid and were also fully secured for substantially more than the sum due. They agreed interest rate of 8% and 3% per annum pursuant to the staff rate. Upon his wrongful removal from office the bank claimed from him the total sums due on the said loan. It also unilaterally changed the interest rate from 8% and 3% to 40% and per annum which latter rates were wholly unconscionable and without basis in law, contract or commercial basis.”

Defence stated that on the High Court dismissing the injunction application the plaintiff filed an appeal and that again the court of appeal considered the termination of employment of plaintiff and the variation of interest rate and the court of appeal declined to order stay. Defence therefore stated that the present application is caught by res judicata.

On the issue of the statutory notice, which was returned to sender, and the notification of sale, which was also returned, defence argued that the Posta Kenya letters failed to state why the same failed to be received by the addressee. Defence suggested that the same could be due to the plaintiffs failure to receive the same. That in the absence of that explanation that was the inference that should be drawn.

That I believe does summarise the issues raised.

The court needs to consider whether the plaintiff is entitled to an order of injunction in view of the two broad issues raised. The first issue is whether indeed the alleged illegality of the meeting and the decisions of 20th March 1998 shows a prima facie case with a probability of success. The second issue is whether the alleged non service of statutory notice and notification of sale does also show a prima facie case.

On the first issue I am of the view that the plaintiff has no locus to alleged illegality for the meeting of 20th March 1998 by the board of the defendant. The plaintiff is a stranger and cannot be allowed to allege illegality of the defendant’s board meeting. Even if there was illegality in such meeting the pertinent issue is that the defendant company owned the board’s decision and proceeded to implement it.

The plaintiff in bringing the issues relating to the termination of his employment and the variation of interest is itself an abuse of the process of the court and indeed is caught by the doctrine of res judicata. Those issues are directly related to the issues raised in the previous suit and which were the subject of the ruling of 28th June 2000. The court’s finding therefore is that on this issue, the plaintiff has failed to prove an prima facie case.

On the issue of service, firstly of the statutory notice, the plaintiff was obligated to have annexed the charge documents to show what the agreement was on effecting service of statutory notice. The plaintiff did not annex that instruments.

The plaintiff in annexing the letter of posta Kenya failed to shift the burden of proof, for, if indeed, the charge instrument provided that service shall be effected to the plaintiff by his address, the plaintiff can be deemed to have been served. It would not be unusual for the plaintiff to deliberately refuse to collect his letter sent by registered mail in attempt to lay an allegation of non service. The plaintiff was in any case served by the letter dated 2nd April 2002, that is the defendant’s statutory notice.

On the notification of sale it is essential for one to consider that the Auctioneers Rules are subsidiary legislation and the intention of parliament could not have been that the rules would hamper the exercise of the statutory power of sale provided for in a statute. That as it may be, the plaintiff’s wife was served with the notification of sale. The plaintiff was not competent to swear an affidavit on such a matter of service, his wife, who it is alleged was served ought to have sworn her affidavit on that issue. In any case the sale date has not passed and if the plaintiff desires to set another date for sale will have to serve afresh such notification for sale, therefore, it would not be correct to issue an injunction on non service of

previous notification of sale when such sale is now past.

The plaintiff in his arguments was not heard to say that he was not indebted to the defendant. Even if the plaintiff's allegation on variation of interest rate is correct, the plaintiff was at the time of the alleged variation indebted to the defendant and did not prove payment of his debt.

In view of the court's findings hereof the court will decline to grant the injunction sought.

The plaintiff application amended on 18th October 2005 is hereby dismissed with costs to the defendant.

MARY KASANGO

JUDGE

Dated and delivered this 20th June 2006.

MARY KASANGO

JUDGE