REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 224 of 2003

ALLOYS KAYIHURA KAVEN T/A ALLOYS KAVEN & CO. BAKERY……..PLAINTIFF
VERSUS
KENYA COMMERCIAL BANK LIMITED…….....
….DEFENDANT

R U L I N G

The plaintiff has brought this application in the hope that he would persuade the court to grant an interim injunction pending the hearing and determination of both this suit as well as of Civil Appeal No. NAI 12 of 2005.

It is the plaintiff's case that the defendant had acted fraudulently. For instance, when the plaintiff was given a loan of KShs.250,000/=, the defendant is said to have registered a charge for KShs. 650,000/=. And when the plaintiff was given a further loan of KShs. 400,000/=, he says that the defendant registered a charge for KShs. 900,000/=.

In any event, the plaintiff says that he did repay the loans in full. Therefore, the balances now reflected in the bank statements were attributable, in the plaintiff's mind, to illegal charges such as commissions, standing orders, miscellaneous debits and numerous mobilisation charges, which were unjustified.

The plaintiff says that he learned of those illegal charges in 1996 and 1997, whereupon he met with the bank's officials to discuss the issues. He says that although the said bank officials agreed to reverse the debits, the defendant failed to do so.

Indeed, the defendant is said to have offered to lend to the plaintiff a further sum of KShs. 1.5 million, which would be repayable over 36 months. In that regard, the plaintiff provided extra security. However, when he learnt that the defendant had advertised the suit property for sale, the plaintiff opted out that further facility. Therefore, the extra loan was not disbursed.

That notwithstanding, the plaintiff says that the defendant was seeking to recover the loan of Kshs. 1.5 million, which was never disbursed. That action on the part of the defendant, is described by the plaintiff as fraudulent.

The plaintiff then filed "**an application for accounts**". The said application was granted by the court, which directed the defendant to provide the plaintiff with accounts within two weeks. The court also ordered the defendant to return the security documents to the plaintiff.

However, the defendant then filed an application before the Court of Appeal, seeking a stay of the orders which had been given by the High Court on 29th January 2004, and on 22nd November 2004. After hearing that application, the Court of Appeal granted an order staying the orders of the High Court.

The Court of Appeal also directed that the title documents be returned to the advocates for the defendant. And, those orders are to remain in force until the hearing and determination of the Civil Appeal No NAI 12 of 2005.

Meanwhile, the defendant instructed messrs Watts Enterprises, who are licensed auctioneers, to have the suit property, L.R. No. 14431 – NGONG TOWNSHIP, sold by public auction. The auctioneers had scheduled the sale for 15th June 2006.

It was the action, on the part of the defendant which prompted this application for an injunction.

As far as the plaintiff was concerned, it was sufficient for him to demonstrate that his case had raised serious issues for determination. In support of that proposition, the plaintiff relied on the decisions in the two cases of **AMERICAN CYANAMID CO. V ETHICON LTD [1975] 1 ALL. E.R. 504,** and **FELLOWES & ANOTHER V FISCHER [1975] 2 ALL. E.R. 828.**

The plaintiff also asserted that damages would not be an adequate remedy. For those reasons, the plaintiff urged the court to grant an injunction, so as to safeguard the suit property pending the hearing and determination of this suit and of the pending appeal.

On its part, the defendant opposed the application. The first ground for opposition was that the application for an injunction was res judicata. The basis for that contention is that a previous application for an injunction had been heard substantively, and then dismissed by the High Court.

I have perused the Ruling which was delivered by the HON. GITHINJI J. (as he then was), in the case of **ALLOYS KAYIHURA KAVEN T/A ALLOYS KAVEN & CO. BAKERY Vs KENYA COMMERCIAL BANK LIMITED, HCCC No. 215 of 2003.** The said Ruling was delivered on 3rd April 2003.

It is significant that in his said ruling, the learned judge noted that the plaintiff had claimed that he had repaid the two loans which he had been given by the defendant. He then observed as follows:-

"**He did not annex a single document from the bank (defendant) to show that, indeed, the original loan had been repaid. Secondly, the plaintiff does not dispute that he has not honoured the terms and conditions of the letter dated 6.4.99 and terms and conditions of the second further charge dated 30.4.99." High Court**

Even now, the plaintiff has still not exhibited any document to show that he repaid the loans in issue, or that he has honoured the terms and conditions of the contracts between himself and the defendant.

The HON. GITHINJI J. also held as follows:-

"**That contract is binding on the parties and the court cannot re-write it. By that contract, the plaintiff agreed that it owed the defendant the sum of KShs. 1,121,970/10 and executed a second further charge to secure that sum. Plaintiff has not shown why he should be relieved from the terms of the contract."**

As the plaintiff never challenged that finding of fact, by an appeal, it is not open to him to raise issues which tend to contradict the said finding. Furthermore, as the said sum of KShs. 1,121,970/10 was the debt which the plaintiff had admitted owing as at April 1999, I find that there is nothing unlikely about the said debt having risen to KShs.2,639,251/90 as at 7th April 2006 when the auctioneer issued the notification of sale.

Another significant holding in HCCC No. 215 of 2003, was a follows:-

"**Lastly, it is apparent that this suit was filed merely to temporarily assist the plaintiff to stop the intended sale of the charged property. Plaintiff had filed a previous suit HCCC No. 1371/2000 and**

a pervious application in that suit for an order to stop the sale of the same property. The suit was withdrawn on 13.8.2002. The plaint in this suit is an exact copy of the Plaint in HCCC No. 1371/2000.

The fact that the previous suit was withdrawn shows that the purpose of filing the previous suit and this suit was merely to get an injunction to stop the sale and not to have the issue raised in both Plaints determined. Prima facie, this suit and application is an abuse of the process of the court."

Those words are deemed to be significant because subsequent to the ruling by the HON. GITHINJI J., the plaintiff also withdrew HCCC No. 215 of 2003. To my mind, therefore, the words of that learned judge are worth repeating. The process of seeking an injunction in this suit is an abuse of the process of the court. I say so, because as the plaintiff herein said in his submissions, the alleged illegal charges which were debited to his account had come to his knowledge in 1996 and 1997. Therefore, by the time he was filing HCCC No. 1371/2000, as well as HCCC No. 215 of 2003, the plaintiff was well aware of the said charges. He could therefore have raised those issues in the previous suits. Indeed, the issue of the alleged illegal Daily Mobilisation Fees was dealt with both by the HON. GITHINJI J in HCCC No. 215 of 2003, as well as by the Court of Appeal in Civil Application No. NAI 296 of 2004. Therefore, it is not open to the plaintiff to re-agitate the same issue, which has already been determined by the High Court.

Of course, the plaintiff contends that this suit is wider than the previous suits. I am afraid that that is not good enough to give to the plaintiff a right to canvass this application, unless he could demonstrate that there were new developments. In this case, the suit has only been widened by raising issues about charges which the plaintiff already knew about in 1996 and 1997. Those are not new developments at all.

In the case of **UHURU HIGHWAY DEVELOPMENT LIMITED V CENTRAL BANK OF KENYA & 2 OTHERS, CIVIL APPEAL No. 36 of 1996**, the Court of Appeal held as follows:-

"**There is not one case cited to show that an application in a suit once decided by courts of competent jurisdictions can be filed once again for rehearing. This shows only one intention on the part of the legislation in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation."**

In the light of the foregoing, my considered view is that what was decided by the HON. GITHINJI J. bars me from hearing an application which is similar to the one he had dismissed in the previous suit. Even if the plaintiff had omitted from the earlier application, certain issues, this application would still be res judicata as all parties are required to bring all points, that they could take, in one suit or application. Any points not taken then cannot be taken in a fresh application, as that would amount to an abuse of the process of the court.

For that reason alone, this application should fail.

But even on merit, the application does not fair any better. First, because the requirements set out in the two authorities cited by the plaintiff are not applicable in Kenya.

In the **AMERICAN CYANAMID** case, the House of Lords held that in order to grant an injunction, "**all that was necessary was that the court should be satisfied that the claim was not frivolous or vexatious, i.e that there was a serious question to be tried."**

And in the case of **FELLOWES V FISCHER** (supra) it was held that:-

"**A plaintiff claiming an interlocutory injunction need not establish that he had a prima facie case but merely that there was a serious question to be tried."**

Insofar as those two decisions are at variance with the requirements laid down in the celebrated case of **GIELA V CASSMAN BROWN & CO LTD [1973] E.A. 358,** they do not reflect the correct legal position on the issue of applications for temporary injunctions. As far as I am aware, the most fundamental requirement in an application for a temporary injunction remains the need for the applicant to demonstrate to the satisfaction of the court that he has a prima facie case with a probability of success.

And, in this case, I find that the plaintiff has not demonstrated any prima case with a probability of success.

By complaining that the defendant has not provided him with accounts, as per the orders dated 29th January 2004 is not good enough. I say so, because the plaintiff himself acknowledges the fact that the Court of Appeal did order that there be a stay of those orders.

Consequently, whilst the parties await the hearing and determination of the suit, the plaintiff cannot ignore the findings of the HON. GITHINJI J. in HCCC No. 215 of 2003. The court did make an express finding that the plaintiff owed money to the defendant, and that he had admitted that fact. Therefore, the least that the plaintiff ought to do, whilst awaiting the hearing and determination of this suit, and also of the pending appeal, is to repay the loan.

As the plaintiff has not provided any proof that he was making payments towards paying-off the sums which were already held to be due, he is not entitled to the equitable relief of an interlocutory injunction. Accordingly, the application dated 5th May 2006 is hereby dismissed, with costs to the defendant.

Dated Delivered at Nairobi this 26th day of July 2006.

FRED A. OCHIENG

JUDGE