



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

Civil Case 418 of 2004

**KWALITY CANDIES & SWEETS LTD
PLAINTIFF**

VERSUS

INDUSTRIAL DEVELOPMENT BANK LTD.....DEFENDANT

R U L I N G

This is an application by the plaintiff, for an injunction pending an appeal against the ruling which the Hon. Ransley J. gave on 20th April 2006.

The injunction sought is intended to stop the Receiver Managers, Messrs P.V.R. RAO and K.V.S. KAMASASTRY from gaining access to or in any way entering the plaintiff's factory and offices. The injunction order is also intended to stop the Receiver Managers from interfering with the plaintiff's business, chattels, Bank Accounts, Machinery, Equipment, assets and the day to day running of the plaintiff's affairs.

This application was brought after the court had dismissed the plaintiff's application dated 9th March 2006, through which the applicant had sought an injunction to restrain the Receiver Managers pending the hearing and determination of the suit. Following the dismissal of that application, the plaintiff has filed a Notice of Appeal.

When canvassing the application herein, the plaintiff pointed out that on 4th May 2005, the Hon. Emukule J. had granted to them, a three months injunction. The plaintiff also said that, by way of an application dated 8th July 2005, they sought a three months extension of the injunction.

After giving due consideration to that application, the Hon. Njagi J. gave to the plaintiff the extension they had sought, but on condition that the plaintiff paid KShs. 2.8 million within 7 days. The order by the Hon. Njagi J was made on 25th November 2005.

Following that order, the parties entered into negotiations, not only on the issue of the sum of KShs. 2.8 million, but also in relation to the whole debt owed by the plaintiff to the defendant. It is common ground that the negotiations between the parties resulted in an Agreement pursuant to which the plaintiff was to pay KShs. 38 million, in full and final settlement of the debt.

In order to raise funds with which to pay off the debt, the plaintiff sought and obtained the defendant's consent to sell-off the charged property L.R. No. 214/468 MUTHAIGA, NAIROBI. The said property will hereinafter be cited as "**the Muthaiga Property.**"

In order to give effect to the plaintiff's intended sale of the Muthaiga Property, Mr. Satish Gautama S.C. gave his professional undertaking to remit the proceeds of sale to the defendant.

Meanwhile, the plaintiff also sought consent of the defendant, to sell-off its equipment and machinery, from its Industrial Area premises. The said machinery and equipment was to be sold to Patco Industries. The defendant consented to the said sale. However, the defendant made it a condition of its consent, that the proceeds of the sale of the machinery and equipment be received by 6th March 2006.

It is the plaintiff's contention that Patco Industries were keen to purchase the equipment and machinery, but that they found the deadline to be impractical. The time-frame allowed for the transaction is described, by the plaintiff, as being oppressive.

Following the failure by the purchaser, Patco Industries, to remit payment of the purchase price, amounting to KShs. 20 million, the defendant appointed the Receiver Managers on 7th March 2006. The attempt by the plaintiffs to restrain the Receiver Managers from accessing the plaintiff's assets, is what was thrown out the Hon. Ransley J.

The plaintiff feels that the decision to reject their injunction application was not sound, hence their Notice of Appeal. In the meantime, they now ask that this court should give them an injunction pending the hearing and determination of the appeal. It was submitted that unless the injunction was issued, the Receiver Managers would take over the assets, and by so doing frustrate the contract of sale with Patco Industries. If that were to happen, the plaintiff feels that they will suffer substantial loss, as they would be unable to raise the agreed settlement sum of KShs. 38 million.

At the conclusion of his submissions, Mr. Simiyu, advocate for the plaintiff, did inform the court that an injunction for three (3) months would suffice, for purposes of Patco Industries remitting payment to the defendant, and also for the purchaser of the Muthaiga Property too.

The plaintiff also said that the circumstances in this case were special as the defendant held both a debenture as well as a legal charge over the plaintiff's property. For that reason, the court was asked to dispense with the requirement for security pursuant to Order 41 rule 4 of the Civil Procedure Rules.

In any event, the provision of security, as a pre-condition for an injunction pending appeal was said to be discretionary, as opposed to mandatory. Therefore, the plaintiff asked the court not to order them to provide security.

In answer to the application, the defendant described the same as being an abuse of the process of the court. It was pointed out that since the order of the Hon. Njagi J, on 25th November 2005, the plaintiff had not remitted any payment.

It will be recalled that the Hon. Njagi J. did grant an injunction in favour of the plaintiff, but on condition that the plaintiff paid KShs. 2.8 within seven days of his order.

To my mind, the failure by the plaintiff to remit payment, so as to secure the injunction is very telling indeed. I say so because if only the plaintiff had remitted payment, they would be enjoying an injunction right now. However, they did not remit payment. Therefore, the order which was in their favour did not take effect.

Instead, the plaintiff made yet another application for an injunction. And, whilst it is true that the application dated 9th March 2006 was brought after the parties had held negotiations subsequent to the order made by the Hon. Njagi J. on 25th November 2005, it is instructive to note that the said order of 25th

November 2005 has never been varied or challenged in any manner. To my mind, that results in the question as to whether a party who had failed to meet the terms of an injunction order, ought to be allowed to bring another application for an injunction. It certainly appears that if the courts were not careful, parties could try to circumvent orders which they had failed to comply with, through new applications.

Whilst I do not say that there should be an absolute bar to new applications in circumstances such as these, I nonetheless believe that the court ought to be very cautious when handling such new applications, so as to ensure that the process of the court was not abused.

The defendant submitted that since there was no injunction order in force, an injunction pending appeal would not arise. That submission was premised on the defendant's interpretation of the decision in **RUSSEL CO. LTD V COMMERCIAL BANK OF AFRICA LTD & ANOTHER [1986] KLR 633**. However, with all respect due to counsel for the defendant, I believe that his interpretation is not borne out by a scrutiny of that decision.

The Court of Appeal did actually overturn the decision by the Hon. Todd J., who had refused to grant an injunction pending an appeal, which was against the court's rejection of an injunction application. In a unanimous decision, the Court of Appeal commended the views of Megarry J. in **Erinford Properties Ltd V Chesire County [1974] 2 All E.R. 448**.

And what did the Hon. Megarry J say in that case?

At page 454 of that law report, the learned judge said:

“A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would preserve the status quo pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with a holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes functus officio quod granting an injunction at all.”

Therefore, in principle, there is no bar to my granting an injunction pending appeal. However, the question must be whether or not it is merited.

If the injunction is granted, the Receiver Managers would stay away from the plaintiff's business premises and assets. But if the injunction is not granted, the Receiver Managers would take possession of the assets, including the offices.

In the event that the Receiver Managers take charge of the plaintiff's assets, the plaintiff fears that Patco Industries may not proceed with their intended purchase of the machinery and equipment. Frankly, I do not appreciate how the fact that the Receiver Managers took possession of the plaintiff's assets would frustrate the intended purchase by Patco Industries.

But, perhaps, the message from the plaintiff did not get across to me as it should have. May be, that if the Receiver Managers took charge of the plaintiff's assets, the sale to Patco Industries would falter. If that were to happen, the plaintiff would be frustrated in their efforts to pay off the debt, through the sale of some agreed assets. In view of the possibility that I might not have fully appreciated the impact of the Receiver Managers taking charge of the plaintiff's assets, I am prepared to grant to the plaintiff one last chance, to sell-off the necessary assets, so that they can thereafter pay off the defendant. For that reason alone, I do allow the plaintiff a period of ninety (90) days from today to pay-off the defendant's debt. However, the period of 90 days will only commence to run if the plaintiff pays to defendant the sum of KShs. 3.0 million within the next SEVEN (7) DAYS.

For the avoidance of doubt, there shall issue an injunction to restrain the defendant whether by itself or by its appointed Receiver Managers from taking over the plaintiff's assets, as set out in prayer 2 of the application dated 3rd May 2006. However, the said injunction order will only take effect if the plaintiff shall, within the next 7 days, have paid KShs. 3.0 million, to the defendant. And, in the event that the plaintiff makes the requisite payment of KShs. 3.0 million, within the stipulated period of 7 days, the injunction shall be in force for 90 days, calculated with effect from today.

Meanwhile, the costs of the application dated 3rd May 2006 shall be met by the plaintiff in any event.

Dated and Delivered at Nairobi this 13th day of July 2006.

FRED A. OCHIENG

JUDGE