REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 235 of 2006

PATRICK N. KANGETHE…….....…….1ST PLAINTIFF

MARGARET W. KANGETHE…….....……..2ND PLAINTIFF

VERSUS

EQUITY BANK LIMITED…….....……DEFENDANT

R U L I N G

The plaintiffs have brought this application by way of a Chamber Summons, which is expressed to have been made pursuant to Order 39 rules 1, 2 and 3 of the Civil Procedure Rules, as read together with Section 3A of the Civil Procedure Act.

Through this application, the plaintiffs pray for an interlocutory injunction to restrain the defendant from selling, disposing of or interfering with their property L.R. No. 209/2489/31, NAIROBI. The said property will hereinafter be cited as the "**suit property".**

Basically, the plaintiffs' contention is that they have made all the requisite payments which had fallen due, and that therefore it would be wrong of the defendant to sell the suit property, which had been given to them as security. Secondly, the plaintiffs protest about the failure by the bank to issue any statutory notice.

When prosecuting the application the plaintiffs stated that they had obtained a credit facility of KShs. 8,236,203/= from the defendant, on 31st August 2005. They go on to say that after obtaining the said credit facility, they had complied with all the terms and conditions of the letter through which the credit facility had been offered to them.

In that regard, the plaintiffs concede that the credit facility which they got in August 2005 was that of a re-scheduling of a loan. But, according to the plaintiffs, the parties to that facility were starting anew, so that they were not in any way subject to terms that might have governed their relationship prior to August 2005. It was submitted that clause 6 (e) of the loan facility letter made it clear that the parties were starting afresh.

The said clause, which falls under the heading "**Conditions Precedent"**, stipulated as follows;

"**As conditions precedent before the proposed facility will become available to the Borrower, the Lender requires the following from the Borrower, each in satisfactory form and substance:**

(e) Duly executed and perfected security documents of the items referred to in clause 5 above."

In my reading of the clause above-cited, I find no declaration that the parties were entering a new contract, which was completely separate and distinct from the contract that governed their relationship prior to August 2005. If anything, when one makes reference to the provisions of clause 5, it becomes clear that the Loan Facility Letter dated 31st August 2005 recognised the fact that the security for the said facility had already been charged to the bank. Clause 5 is headed "**security"**, and it stipulates that:

"**The proposed facility will be secured by L.R. No. 209/2489/31 currently charged to us."**

Secondly, it must be appreciated that the facility was being granted to the plaintiff solely for the purposes of re-scheduling the loan. That fact is made clear from clause 2 of the facility letter. It is also further clarified from the plaintiff's own letter dated 4th July 2005, through which the plaintiffs had expressly requested the defendant to reschedule the loan.

Having come to the conclusion that the facility amounted to no more than the re-scheduling of the loan, (as opposed to the grant of a new loan amount), I find that the plaintiffs have failed to demonstrate that there was a requirement for the defendant to issue a statutory notice after 31st August 2005.

Meanwhile, the plaintiffs also asserted that they had paid a lumpsum amount of KShs. 2,295,919/= in October 2005. That payment is alleged to have been sufficient to cover all the instalments which the plaintiffs were required to pay from September 2005 upto May 2006. In the circumstances, the plaintiffs insist that their repayments were up-to-date, and that therefore, the defendant had no legitimate reason to sell-off the suit property.

Another issue which the plaintiffs raised was in relation to "**suspended interest",** which the defendant had debited to their account. It was said that there was no provision in the contract between the parties herein, for suspended interest.

When responding to the plaintiffs' submissions, the defendant first raised the issue of what is perceived to be, the plaintiffs' "**unclean hands."** The dirt that is alleged to have caked the plaintiffs' hands is attributed to the assertion, by the plaintiffs, that they had paid KShs. 2,295,919/26, in October 2005.

Whilst the said figure is appearing in the statement of account, as an entry made in October 2005, the defendant explained that the said entry did not reflect a payment. Instead, the said sum is said to be the cumulative total of the payments which the plaintiff had made between April 2002 and October 2005.

In that regard, when the court inquired from the plaintiffs if they had any proof of payment, the answer was in the negative. Secondly, the said sum is clearly titled "**Closing Balance: Dec. 31 2005",** under the column of credits. Had the sum been a payment, the closing balance on the statement would have shown a reduction from KShs. 8,008,086.09, which was due as at 31st October 2005. Instead, the outstanding balance remains static as from October to December 2005. That implies that the explanation by the defendant is accurate. In other words, the plaintiffs did not remit payment of KShs. 2,295,919/26 in October 2005 as alleged by them.

Given the fact that the 1st defendant has sworn an affidavit which contains a falsehood, he must be deemed to have deliberately set out to mislead the court, with a view to procuring an advantage thereby.

In **JOHN MURITU KIGWE & ANOTHER V AGIP (KENYA) LIMITED, MILIMANI HCCC No. 2382/99,** the HON. P.J.S. HEWETT J., emphasized the well settled legal principle, that:

"**If the party applying for a special injunction, abstains from stating facts which the court thinks are most material to enable it to form its judgement, he disentitles himself to that relief which he asks the court to grant. I think, therefore, that the injunction must fall to the ground."**

Those words were derived from the decision of LORD COZENS-HARRY M.R. in **REX V KENSINGTON INCOME TAX COMMISSIONERS, PRINCESS EDMOND DE POLIGNAC [1917] 1 K.B. 486 at page 505.**

In that same case, at page 509, WARRINGTON L.J. said;

"**It is perfectly well settled that a person who makes an exparte application to the Court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."**

I am convinced that the aforegoing pronouncements of the law are accurate, and therefore I do wholly adopt the same.

Accordingly, although the court did decline to grant an exparte injunction, the fact is that the plaintiffs did attempt to obtain the same. They relied on a falsehood to try and gain advantage. In other words, they had come to court with unclean hands, and are thus not worthy of favourable consideration through the eyes of equity.

That alone would be sufficient to bring the plaintiffs' application to a crushing defeat. The court need not have delved into the merits thereof.

In any event, the plaintiffs did exhibit a statement of account dating back to January 2002. It is the said statement which the plaintiffs were using to try and show that they had made a substantial payment in October 2005. That said statement of account is a further confirmation that, even by the plaintiffs' own understanding, there was continuity in the relationship between the parties herein from as early as January 2002.

And even more interestingly, the plaintiffs' own documents show that as from 31st August 2005, the debit balance was Kshs.8,236,203/09. That balance is acknowledged in the loan facility letter. Thereafter, the only credit reflected in the statement of account was KShs.300,000/=. That would imply that the plaintiffs had only paid one single instalment between September 2005 and May 2006.

The reason why I have called the payment of KShs. 300,000/= as one instalment is because pursuant to clause 3 of the Loan Facility Letter, the monthly instalments were to have been KShs. 297,759/=.,

Having only made one payment in eight months, the plaintiffs were most definitely in substantial arrears. Therefore, the defendant would have been fully justified to take steps to realise the security.

In conclusion the application is without any merit. It is therefore dismissed, with costs to the defendant.

Dated and Delivered at Nairobi, this 3rd day of October 2006.

FRED A. OCHIENG

JUDGE