



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 530 of 2006

FRANCIS MUTHIKE NJUKI 1ST PLAINTIFF

SALESIUS NJERU KARURI2ND PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.DEFENDANT

RULING

I have before me an application by way of Chamber Summons for interlocutory injunctive relief by the plaintiffs against the defendant which is craved as follows;

“That a temporary injunction do issue restraining the defendant whether by itself or by its servant or agents, advocates, auctioneers, employees, successors or assigns or any other person acting for and/or on its behalf from selling, disposing, transferring, alienating interfering with or in any other manner howsoever dealing with land parcels known as Title Nos. Baragwe/Raimu/775, Gaturi/Nembure/ 8595 and Gaturi/ Nembure/4258 together with the building thereon pending the hearing and determination of this suit or further orders of this Honourable Court.”

The application is expressed to be brought under Order XXXIX Rules 1 (a), 2, 2A, 3 and 9 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law. The application which is supported by an affidavit of the 1st plaintiff sworn on 22.9.2006 is based on the following principal grounds:-

- 1). That the defendant is in material breach of its contract with the plaintiffs and is seeking to unjustly enrich itself from its malfeasance.
- 2). That the defendant is unlawfully using its power of sale under the legal charge over the suit premises to extort money not due under the contract between it and the plaintiffs.
- 3). That the plaintiffs stand to suffer grave and irreparable damage if the orders sought herein are not granted.
- 4). That the plaintiffs have a prima facie case with a probability of success.
- 5). That the defendant’s claim against the plaintiffs is for monies paid out by the defendant recklessly and negligently when the same were not due and when the plaintiff had issued strict instructions not to pay out the money.
- 6). That the monies paid out by the defendant were paid pursuant to a performance bond that

had expired by more than one year.

7). That the defendant therefore unjustifiably wants the plaintiff to pay for the defendant's reckless mistakes.

The application is opposed and there is a replying affidavit sworn by one Eliud Ogutu the defendants legal officer. In response to the replying affidavit the plaintiffs have filed a further affidavit sworn by the same 1st defendant on 3.10.2006.

The application was canvassed before me on 25.10.2006 by Mr. Mureithi learned counsel for the plaintiffs and Mr. Mungai learned counsel for the defendant.

I have considered the pleadings, the application, the affidavits, the annexures thereto, the submissions of counsel and the authorities cited. The background of this matter is as follows. The plaintiffs carry own business as building contractors in the name of Njururi Building and Civil Engineering Contractors. The defendant is a commercial bank carrying on banking business under the Banking Act Cap 488 of the Laws of Kenya. The plaintiffs were awarded a contract to construct a new 66/11KV substation at Embakasi 220/66KV substation by M/s Kenya Power and Lighting Company Ltd. at a contract price of Kshs13,332,005.00 inclusive of VAT. The said Kenya Power and Lighting Company Ltd. offered the said contract to construct the said substation to the plaintiffs on certain terms one of which was that the plaintiffs were to furnish a Performance Bond in the form of an "On Demand Bank Guarantee" from a reputable bank equivalent to 10% of the contract value. To satisfy that condition the plaintiffs turned to the defendant who agreed to issue the performance bond. In consideration, the plaintiffs created a charge over Baragwe/Raimu/775 in the name of the 1st plaintiff, Gaturi/Nembure/8595 in the name of one Christopher Ngugi Karuri and Gaturi/Nembure/4258 in the name of the 2nd plaintiff. It appears that subsequently the defendant was called upon by the M/s KPLC to pay the sum in the performance bond of Kshs.1,340,000.00. The plaintiff state that the defendant indeed made the payment but it did so in circumstances that disentitles it recover from the plaintiffs. The defendant nevertheless demanded payment from the plaintiffs and in default served a Statutory Notice to realize its security over the said titles thereby provoking this suit and application.

The first of the plaintiffs' complaint against the defendant is that the alleged Performance Bond or Performance Bank Guarantee issued by the defendant is unenforceable for the following reasons:-

- 1) It was not signed under the seal of the defendant by any authorized signatory of the defendant.**
- 2) It was not stamped with the appropriate Stamp Duty.**
- 3) It expired on 3.10.2003, 12 months after it was issued.**
- 4) It was paid contrary to the express instructions of the plaintiffs and 8 months after demand had been made by M/s Kenya Power and Lighting Co. Ltd.**

Besides those complaints against the Performance Bond, the plaintiffs further complain that the defendant has demanded from them sums in excess of sum in the bond by Kshs.559,250 which comprise illegal debits of which the defendant has not accounted. In the premises, the plaintiff contend that the defendant is not acting in good faith and should be restrained by an order of injunction otherwise the defendant will proceed to sell the plaintiffs' said properties which will occasion the plaintiffs irreparable harm and damage.

Should the interlocutory relief prayed for be issued to the Plaintiffs? It is settled that an interlocutory injunction is a great remedy which a court may issue to protect legal or equitable rights of one party which are threatened with or have actually been violated by unlawful facts by another party. The conditions for the grant of the remedy were laid down by Spry V.P. in the precedent settling case of **Giella -vs- Cassman Brown & Co. Ltd. [1973] EA 358.** The conditions are as follows;-

First, an applicant must show a prima facie case with a probability of success.

Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

I remind myself that at this stage I am not required to decide with finality the various positions urged before me by the parties both on Law and facts. The genesis of this dispute between the plaintiff and the defendant can in my view be traced to the letter dated 5.6.2002 written to the defendant by the 1st plaintiff as director of Njururi Building and Civil Engineering Contractors. A copy of the letter is exhibited as “FMN2” to the plaintiff’s Supporting Affidavit. By that letter the plaintiff applied for an overdraft of Kshs.3 million. The purpose of the facility it appears, was to enable the plaintiffs perform a contract for the construction of a New 66/11/KV substation at Embakasi 220/66KV substation for Kenya Power and Lighting Company Ltd. at the consideration of Kshs.13,322.005.00. The offer of the contract is annexed to the same affidavit as “FMN1” and was dated 23.7.2002. The contract price is given as Kshs.13,322.005.00. Paragraph 10 of the offer was as follows:-

“10. You shall furnish us with a performance Bond in the form of an On Demand Bank Guarantee from a reputable bank, acceptable to us (KPLC) equivalent to Ten Percent (10%) of the contract value within 7 days from the date hereof.”

The defendant approved banking facilities of Kshs.2 million to the plaintiffs as follows:-

- (1) Bank overdraft Kshs.667,799.50.**
- (2) Bank Gurantee Kshs.1,332,200.50**

The payment period was stated to be 12 months or the date of project completion whichever came earlier. A copy of the Performance Bank Guarantee is exhibited as “FMN3” by the plaintiffs. The defendant guaranteed inter alia as follows:-

“We hereby affirm that we are the Guarantor responsible to you on behalf of the contractor upto a total of Kshs.134 million. We undertake to pay you upon your first written demand and without cavil or argument any sums within the limits of Kshs.1.34 million aforesaid without your needing to prove or to show grounds or reasons for your demand for the sum specified therein

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.....

This guarantee shall be valid until the date of the certificate of completion.”

By its letter dated 11.8.2205 , the defendants informed the plaintiffs that it had settled the Performance Bond in favour of M/s KPLC in the sum of Kshs.1,340,000.00 and called upon the plaintiffs to “liquidate” the position immediately.

The plaintiffs position appears to be that the defendant ought not to have settled the Performance Bond as they had expressly informed it not to release payment to M/s KPLC. Further, the performance bond had expired besides being unenforceable for want of the defendant’s seal and appropriate stamping. The plaintiff further complain about the payment of the sum of Kshs.1.34 million instead of Kshs.1,332,200.50 which was the sum for which the defendants guarantee had been sought.

Having considered the Performance Bank Guarantee aforesaid, I am of the view that the defendants obligation to M/s KPLC was not subject to the approval or consent of the plaintiffs. The obligation was

not also limited to 12 months as contended by the plaintiffs. The Performance Bank Guarantee as already stated above was to be valid until the date of issue of the Certificate of Completion and the defendant was obliged to settle the Guarantee “upon written demand and without cavil or argument”. M/s KLPC were not obliged to prove or to show grounds or reasons for making the demand for payment of the sums in the Bond.

It is not disputed that M/s KPLC demanded settlement of the Performance Bond and it is further not disputed that the defendant complied with the demand and effected payment to M/s KPLC. The plaintiffs do not allege that they liquidated the position as demanded by the defendant. In those premises, the complaint made by the plaintiffs that the Performance Bank Guarantee was not signed under seal by an authorized signatory of the defendant and that the same was not stamped with appropriate Stamp Duty is coming rather late in the day. The plaintiffs have already taken benefit of the same Performance Bank Guarantee. It is the same document the plaintiffs used to satisfy the performance bond requirements demanded by M/s KPLC who had awarded the plaintiffs the contract to construct the said substation. Having benefited under the Performance Bank Guarantee in my view, it would not lie in the mouth of the plaintiffs to now challenge the same document in the manner stated. It must be remembered that an interlocutory injunction is an equitable remedy and the conduct of the applicant is always a relevant consideration before the grant of the same. I should add that in my view the validity of the Performance Bond being a contract between the defendant and KPLC may only be brought into question by either of them. The want of execution by an authorized officer would in my view be a complaint to be made by the defendant if it was to resist to settle the Bond. But it has affected payment which in my view suggests that the defendant did not consider the Bond to be wanting in any material particular. With regard to the want of Stamping, my view is that such omission would not be fatal to the Performance Bond as duty may be collected anytime and failure to pay duly cannot be used by the plaintiffs to invalidate the Bond.

With regard to the complaint that the defendant paid more than the sums guaranteed under the contract by about Kshs.8,000.00, I am afraid such a complaint would be a dispute over amount due which normally would not be a ground for the grant of an injunction.

The upshot is that I am not persuaded that the plaintiffs have made out a prima facie case with a probability of success at the trial. This finding alone would suffice for a dismissal of the plaintiffs’ application. However, even if the plaintiffs would have established such a case, I would still have found that their injury would adequately be compensated in damages if an injunction were not granted at this stage. As it has been said again and again that by charging the suit properties the plaintiffs themselves converted the same into commodities for sale. Such commodities if sold cannot be said to result in irreparable injury not compensatable by damages.

Lastly, as stated above, the conduct of the plaintiffs on the material availed to me is unworthy of the equitable relief of injunction. The plaintiffs benefited from facilities granted them by the defendant. Settlement of the facilities is not alleged. The plaintiffs have failed to do equity and would not be entitled to the equitable relief of injunction.

In the end, the plaintiff’s application is dismissed with costs to the defendant.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2006.

F. AZANGALALA

JUDGE

Read in the presence of Mureithi for the plaintiff/applicant and Ogonji holding brief for Mamicha for the defendant/respondent.

F. AZANGALALA

JUDGE

23.11.06