REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 756 of 2003

SEED GROUP LIMITED……..……1ST PLAINTIFF

SWANYA LIMITED……....…….2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED …..……DEFENDANT

R U L I N G

This is an application for one principal order that the order made on 28.10.04 be discharged, varied or set aside. The application has been brought under Order XXXIX Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The main grounds for the application are that

(a) The defendant is dissatisfied with the said order.

(b) The plaintiffs have since the issue of the order waived their rights under the said order.

(c) The said order was given on the account of want of service of the requisite notices.

(d) Valid statutory notices have since been issued to the plaintiffs.

(e) The plaintiffs are not servicing the loan.

(f) The loan stood at KShs.335,384,114.60 as at 15.3.05 and continues to accumulate interest at 21% p.a..

(g) The accumulated loan may far exceed the value of the securities in which event, the defendant stands to suffer great loss.

(h) The applicant/defendant remains in a position to pay and compensate the plaintiffs in the unlikely event the court upon full trial were to find merit and award any of the prayers sought in the plaint.

(i) In the circumstances of this case equity will frown upon the further enjoyment of the injunction by the plaintiffs.

The application is supported by an affidavit sworn by one Zipporah Mogaka a manager of the defendant

in charge of Legal Services sworn on 20.7.2005. In opposition to the application the plaintiffs have filed two affidavits; one by Victor Ogeto the 1st plaintiff's Managing Director and director of the 2nd plaintiff and the second one by one Janet Nyanduko Ogeto a director of the 2nd plaintiff.

I heard arguments on the application on the 26.9.2006. I have considered those arguments including the authorities cited. I have read the affidavit sworn in support of the application and those sworn in reply. Having done so I take the following view of the matter.

Order XXXIX Rule 4 reads as follows:-

"**4. Any order for an injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with such order."**

The court is given a very wide discretion by that rule to discharge, vary or set aside an order of injunction. However, like all judicial discretions the discretion given by the rule should be exercised judicially and not arbitrarily, whimsically or idiosyncratically. In fact in exercising the discretion given by the rule the court should act cautiously lest it be accused of sitting on appeal against its own decision or that of a judge of concurrent jurisdiction. It should also be remembered that the rules provide for review under Order XLIV of the Civil Procedure Rules and Section 80 of the Civil Procedure Act and Order XXXIX Rule 4 should not be interpreted as giving a competing right to a review.

In the matter at hand my Learned Brother, Emukule J after extensive submissions made to him by both counsels for the plaintiffs and the defendant concluded that the defendant was in breach of statutory provisions which vitiated its right to exercise its statutory power of sale. The Learned Judge then allowed the plaintiff's application for injunctive reliefs. The Learned Judge in his wisdom did not grant the injunctive reliefs on any terms or conditions. It is that order the defendant applies by its present application to discharge, vary or set aside on principal grounds set out above. The defendant's principal argument is this: The Learned judge found that the charge documents are valid, legal and proper. He further found that the plaintiffs are indebted to the defendant and that the interest charged was contractual and proper. The Learned Judge further acknowledged the principle that a dispute on account is no ground for grant of an injunction and also found that there was no evidence that fraud had been perpetuated by the defendant. According to the defendant the only basis for the grant of the injunctive orders was want of service of the requisite notices. The requirement for service of a Statutory Notice had now been met by the issuance of a fresh statutory notice and notices under the Auctioneers Rules would be given once the injunction order is discharged, varied or set aside. That argument is quite attractive in view of the findings made by the Learned Judge. However, those findings were made on an interlocutory application and not at a trial. The Learned Judge was not hearing the entire case and did not and could infact not make definitive findings of fact or Law. The Learned Judge was alive to this fact and specifically stated at page 28 of his ruling as follows:-

"**Allegations of fraud and malice are matters which must wait final orders after necessary evidence has been adduced and considered by the trial Judge. For the purposes of this Ruling …."**

That statement makes it clear beyond peradventure that the Learned Judge's findings were for the purpose of his ruling on the plaintiff's interlocutory application. The findings were not conclusive with regard to the several complaints made by the plaintiffs in their pleadings.

The order that the Learned Judge finally gave was as follows: "**For these reasons I grant the plaintiffs' application of 30.9.2002."**

In that application the injunctive reliefs were sought "**pending the hearing and determination of this suit."** The order of the Learned Judge is crystal clear and cannot be clouded by the process the Learned Judge adopted in arriving at his decision.

In **Trust Bank Limited –vs- Karan Ramji Kotedia: CA No.61 of 2000,** the Court of Appeal made the following observations at page 15 of its judgment:-

"**In granting the injunction, the Learned Judge however, made certain conclusive and definitive findings on an interlocutory application, which findings may be somewhat embarrassing to the Judge who will eventually hear the substantive suit. All we can say on this point is that such findings are unnecessary and uncalled for in an application for an interlocutory injunction and they cannot in any case be taken as binding even of the Judge himself if he had the misfortune to hear the main suit."**

From the above observations, it is clear to me that the findings made by my Learned Brother on the interlocutory application for injunctive reliefs cannot be taken to have definitively and conclusively settled the plaintiffs' complaints. In my view therefore, if the defendant was dissatisfied with the Learned Judge's order on the interlocutory application it had the option to lodge an appeal against the order or apply for review of the same. Rule 4 of Order XXXIX of the Civil Procedure Rules is in my view of very limited application where for instance an injunction has been obtained ex-parte or an applicant has obtained such an order on the basis of material non-disclosure of facts. There may be other circumstances upon which a court may exercise it discretion under the rule. Those circumstances are absent in this case.

The upshot of the above is that the defendant's application has no merit and is dismissed. Costs shall be in the cause.

Orders accordingly.

DATED at **NAIROBI** this **18th** day of **DECEMBER, 2006.**

F. AZANGALALA

JUDGE

18/12/06

MARY KASANGO

JUDGE

18/12/06