



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 108 of 2005
JOSEPH W. WACHIRA T/A TAMU TAMU WINES & SPIRITS.....PLAINTIFF

VERSUS
BARCLAYS BANK OF KENYA LTD.....DEFENDANT

RULING

The applicant filed on application under **Order XXXIX Rules 1, 2, 3 and 9** of the Civil Procedure Rules praying for an interlocutory injunction to restrain the respondent from demanding from him the sum of **Kshs.5,443,397.35** or any other amount of money at all or making phone calls or threats to him pending the hearing and determination of the suit which he had filed against the defendant/respondent.

In his affidavit in support of the said application, the applicant stated that he had for several years maintained a current account number 1247249 with the respondent at its Nakuru East Branch and he had severally applied for overdraft and loan facilities to run his business known as **TAMU TAMU WINES & SPIRITS DISTRIBUTORS**. The said facilities, whenever they were granted, were secured by legal charges over to the applicant's properties known as L.R. No. 464/20 and 464/21

Nakuru Municipality, fire policy, burglary policy and fixed deposits. All the said securities were still held by the respondent and had declined to return them, the applicant stated, despite his contention that he did not owe the respondent any money at all as he had fully repaid all the money that had been advanced to him.

The applicant further averred that sometimes in the year 2004 the respondent demanded from him a sum of Kshs.5,443,397.35 without any justification and immediately thereafter he went to the respondent's offices and informed them that he did not owe any money and the respondent kept quiet for a while but soon thereafter they started making the demands again. The respondent thereafter authorised its debt collection agents, Collection Africa Limited, to demand and collect the aforesaid amount from the applicant, he deposed. He stated that the respondent had refused, declined and/or failed to give him proof of his indebtedness to it but had now resorted to making telephone calls to him asking him to go to their offices and admit the said debt and undertake to pay the same in instalments failing which they would realise the various securities. He said that he was an old man with chronic ailments and the respondents were stressing him unnecessarily and his blood pressure was going up whenever the respondent

called him as he feared that they may sell his properties unlawfully. He therefore urged the court to restrain the respondent from making the said demands to him as he owed it no money at all.

The respondent filed a replying affidavit sworn by one Ahmed Abush, a Recoveries Officer based at Nairobi. He deposed that the applicant had, on application, been availed by the respondent various financial facilities and he annexed to his affidavit several documents evidencing the said facilities. He stated that the applicant had breached the repayment terms of the agreements in respect of the said facilities and consequently there was a debt that was due and owing to the bank by the applicant. He annexed to his affidavit a statement for the period March 25th 2004 to September 21st 2005 which showed a debit balance of Kshs.11,281,568.24. He further denied that the respondent had been harassing the applicant as alleged or at all and said that the respondent had merely demanded payment of money that was due to it through its duly appointed agent, Collection Africa Ltd.

Mr. Omolo, the respondent's counsel, submitted that the applicant's application was fatally defective and incompetent and did not satisfy the requirements for grant of an injunction. He said that in his plaint, the plaintiff asked for a declaration, general damages and costs but there was no prayer for an injunction as contemplated by Rule 2 of Order XXXIX which states as follows:-

“2. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.”

He buttressed his above submission by citing the decision of Ringera J. (as he then was) in **PAUL MUHORO KIHARA VS BARCLAYS BANK (K) LTD** Milimani Commercial Courts, Civil Suit No. 33 of 2002 (unreported).

I am in agreement with the above submission by the respondent's counsel. Turning to Order XXXIX Rule 1, the same applies only where it is proved by an affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or where the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit. That is not the case in this matter. Rule 3 is not relevant and Rule 9 is simply procedural. The application is therefore incompetent as submitted by the respondent's counsel.

Does the application meet the conditions for grant of an interlocutory injunction as set out in the celebrated case of **GIELLA VS CASSMAN BROWN & CO. LTD** [1973] E.A. 358? The first test is whether the applicant has established a prima facie case

with a likelihood of success. The applicant stated that he had been granted by the applicant various bank facilities but had repaid all of them and there was nothing owing by him to the bank. However, he did not make any effort to show, albeit *prima facie*, that indeed he had repaid all the money which he had been advanced by the respondent from time to time. I would, for example have expected to see loan account or overdraft statements showing progressive repayments of the said facilities upto completion annexed to the applicant's affidavit or letters calling for release to him of his various securities upon full repayment. He who alleges must prove and when a person admits that he borrowed some money from a bank and alleges that he has fully repaid, surely there must be some documentary evidence to prove that and I cannot think of a better way of proving the same than production of bank statements or loan account statements. The applicant did not exhibit even a single one.

Secondly, the applicant did not show that he stood to suffer such loss as cannot be compensated by an award of damages in the event that the orders he was seeking were not granted. In any event, the applicant is not urging the court to restrain the respondent from selling his properties which have been charged to it to secure repayment of the bank facilities, he is urging the court to restrain the bank from demanding from him Kshs.5,443,397.35 or any other amount at all. In the absence of *prima facie* evidence that the applicant has repaid all the amounts advanced to him by the respondent as shown in the documents annexed to the respondent's advocate, the applicant's claim is non justiciable.

All in all, I find the applicant's application to be incompetent and lacking in merits and I dismiss the same with costs to the respondent.

DATED, SIGNED AND DELIVERED at Nakuru this 1st day of November, 2005.

D. MUSINGA

JUDGE

1/11/2005

Ruling delivered in open court in the presence of Mr. Kisila holding brief for Mr. Omolo for the respondent and N/A for the applicant.

D. MUSINGA

JUDGE

1/11/2005