REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 385 OF 2002

EPHRAIM WAMBU MIANO ……..…….. PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD ……..…… DEFENDANT

RULING

This is an application for an injunction to restrain the defendant from advertising for sale by public auction or otherwise disposing or alienating the Plaintiff's L R No's Kajiado/Kaputiei North/4302, 4303 and Nairobi/Block 129/46 Komarock Estate Phase II until the hearing and determination of this suit. The application is dated 27th March, 2002 and is made under Section 3A of the Civil Procedure Act Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules and all other enabling provisions of the law. The application was filed together with a plaint of even date. In the plaint a restraining order is sought among other prayers. An interim injunction was granted on 2nd April, 2002.

After several adjournments submissions for and against the grant of the said orders commenced on 20th January, 2004 and concluded on the same date. Mr Gachoka Advocate argued the application for the Plaintiff/applicant and Mr Bundotich represented the Respondent.

Mr Gachoka based his submissions on Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules and relied on the grounds set out in the body of the Chamber Summons aforesaid and on the affidavit in support thereof sworn on 27th March, 2002. In a nutshell Mr Gachoka complained that the Plaintiff maintained four accounts with the Defendant only 2 of which were secured. This notwithstanding the defendant now purports to exercise its power of sale in respect of all the accounts secured or not. According to Mr Gachoka, this action of the defendant is oppressive.

Secondly, Mr Gachoka submitted that the defendant is guilty of cross debiting. Sums intended for a specific account are debited or credited on different accounts. The debits are therefore irregular. The issue of cross debiting was brought to the attention of the defendant but has not been resolved to date. The effect is that the sum allegedly owed is inflated and the inflated amount attracts interest and other penalties.

Thirdly Mr Gachoka submitted that no statutory notice was served in respect of Nairobi/Block 129/46 Komarock. In his view the defendant has not explained how the statutory notice in respect of this title was served upon the Plaintiff.

Fourthly, Mr Gachoka submitted that the defendant sold the Plaintiff's 5000 shares without his authority and at a throw away price even though the shares were not securities.

Fifthly the defendant misrepresented to the Plaintiff the status of an auction in respect of his securities when indeed there was no auction. This misrepresentation according to Mr Gachoka was oppressive.

In the circumstances, Mr Gachoka submitted the Plaintiff's case is strong and has high chances of success. The prerequisites set in the rule setting case of Giella vs Cassman Brown have been satisfied and an injunction should issue. He relied on the following cases to buttress his case:-

1. NAIROBI (MILIMANI) HCCC NO 1604 OF 2000

SAMUEL N KIHARA & ANOR VS H F C K & ANOR

2. NAIROBI (MILIMANI) HCCC NO 606 OF 1998

K C B LTD VD JAMES KARUA NJINE

3. NAIROBI HCCC NO 21 OF 2001

TRACKSPA LTD VS I C D C

4. HALSBURY'S LAWS OF ENGLAND

4TH EDITION Page 268 Paragraphs 585 .

Mr Bundotich in reply opposed the application for injunction. He relied on the affidavit of Ngetich sworn on 27th April, 2002. In his oral submission before me Mr Bundotich stated that the Plaintiffs case is one on accounts. In the security documents the defendant had the right to combine or consolidate any of the Plaintiff's accounts. The right has also been set out in the various letters of offer made to the Plaintiff. Indeed even the Plaintiff himself gave express instructions to consolidate the accounts. Mr Bundotich argued that as the Plaintiff had not disclosed that the security documents conferred on the defendant the said right and as the Plaintiff himself had given express instructions to consolidate or combine the accounts the Plaintiff had accordingly not established a prima facie case against the defendant.

Mr Bundotich's submissions on the validity of the statutory notices was this:-

> ***That the Plaintiff himself had admitted receipt of the notices. Service of the same was therefore not i n issue. In correspondence with the defendant regarding his indebtedness with the defendant the Plaintiff admitted the same and proposed a settlement mode. He did not challenge the statutory notices.***

In Mr Bundotich's submission, in the absence of a challenge to the statutory notices and the acknowledgement of the same the Plaintiff had not made out a prima facie case.

On the allegation of cross debits by the defendant, Mr Bundotich submitted that these were none. The Plaintiff in any event when requested to show the alleged cross debits did not. There was therefore no evidence of the same. Accordingly no prima facie had been made out by the plaintiff.

Regarding sale of the Plaintiff's 5000 shares Mr Bundotich submitted that the same were pledged as securities for loans granted to the plaintiff by the defendant. The said shares were sold for their real market value at the time and the Plaintiff had been advised accordingly. In any event the plaintiff had not shown the alleged actual value of the shares and even if there was such proof of sale below the market value the Plaintiff's remedy lies in damages and not an injunction.

On the allegations of misrepresentation, Mr Bundotich submitted that there was none. The alleged offending letter of 24th April, 2001 has been misinterpreted by the Plaintiff. In his view the letter did not say that the Plaintiff's property had been sold but simply that the auction proceeded on the said dated i.e. 24th April, 2001. In any event whether or not a sale took place was not material.

According to Mr Bundotich all this grounds relied upon by the Plaintiff have not been established. Accordingly a prima facie case had not been made out and an injunction cannot therefore issue.

Lastly Mr Bundotich submitted that the Plaintiff is guilty of non-disclosure of material facts. He did not disclose that he had made many offers of settlement of the loan but he had not honoured the same. The attempt by the Plaintiff to disclaim his own correspondence is evidence of bad faith on the Plaintiff's part. He is therefore not entitled to the equitable remedy of injunction.

To justify his submission, Mr Bundotich cited the following texts and cases:-

> ***1. Halsbury's Laws of England 3 rd Edition pages 301 paragraphs 366. This text say s dispute on amount is not a ground for an injunction.***
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> ***2. NAIROBI HCCC NO 3125 OF 1991 (Unreported) JOHN P O MUTERE & ANOR VS KCB LTD. In this case the High Court held that once the power of sale has arisen or accrued, a mortgagee has the right to exercis e it and the court cannot interfere with the exercise of that power unless the power is being exercised oppressively. Mr Justice Bosire J as he then was quoted with approval.***
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> ***3. Geoffrey Ngumo Nyaga vs H F C K, Civil Appeal No 134 of 1987 (Unreported) wh ere it was held that a party seeking an www.kenyalawreports.or.ke 6 injunction must show that the statutory power of sale is being exercised oppressively.***
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> ***4. NAIROBI C A NO 95 OF 1999 (Unreported) NATIONAL BANK OF KENYA LTD VS PIPE PLASTIC SAMKOLIT (K) LTD & PROF. SAMSON K ONGARI***
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> ***It was held in this case that unless coercion fraud or undue influence are pleaded and proved an injunction will not be granted as parties are bound by their terms of contract.***
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> ***5. NAIROBI HCCC NO 302 OF 2002 JALJIT S THATHY VS MIDDLE EAST BANK LTD & ANOR***
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> ***In this case the conduct of the Plaintiff was considered. He had made several unfulfilled promises. He made no offer of payment in the documents filed. His conduct disentitled him to the equity of injunction.***
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> ***6. NAIROBI HCCC NO 1129 OF 2002 LAWRENCE MUTHIANI MAITHYA VS HOUSING FINANCE & ANOR***
>
> ***In this case, penalty rates, default charges although high are not a basis for the issue of an injunction.***

In Mr Bundotich's submission the Plaintiff has not established a prima facie case with a probability of success and his application should be dismissed with costs.

In reply Mr Gachoka submitted that the court is not bound by the decisions of either Judge Mwera or Mr Nyamu. He reiterated that where the statutory power of sale is being exercised oppressively courts intervene. He further submitted that the Plaintiff is not guilty of non-disclosure. In the result his client has satisfied the prerequisites set out in the Rule setting case of ***GIELLA VS CASSMAN BROWN & CO LTD*** already referred to above.

The precedent setting case of ***GIELLA VS CASSMAN BROWN & CO LTD (1973) E A 358*** set the following conditions for the grant of a temporary injunction:

> ***"First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction wil l 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."

In my view the requirement for a prima facie case with a probability of success is paramount. This hurdle must be crossed first before considering the second condition. Has the Plaintiff in this case established or shown a prima facie case with a probability of success?

I will first deal with the question of the validity of the statutory notices issued by the defendant to the Plaintiff. Once a chargee's or mortgages statutory power of sale crystallizes on the default of the chargor or mortgagor the law requires that a statutory notice calling upon him or her to pay the loan be served before the exercise of the statutory power of sale. Under the Registered Land Act (Cap 300 Laws of Kenya) Section 74 (1) the chargees statutory power of sale arises three (3) months after receipt of the statutory notice by the chargor. The defendant must therefore show that it complied with Section 74 (1) of Cap 300 before the exercise of the statutory power of sale as all the securities in this case are registered under the Registered Land Act (Cap 300 Laws of Kenya).

The three statutory notices are dated 18th September, 2000. On the face of the notices they appear to have complied with Section 74 (1) of the Registered Land Act, Cap 300 Laws of Kenya. The Plaintiff admits that he was served with statutory notices of sale in respect of L R No's KAJIADO/KAPUTIEI – NORTH 4302 and 4303. He however says at paragraph 11 of his affidavit in support of his chamber summons sworn on 27th March, 2002 that he received the notices in April 2001. He did not exhibit the same. The differences in the dates not withstanding, there is no serious challenge against the statutory notices of sale in respect of L R No KAJIADO/KAPUTIEI – NORTH 4302 and 4303. I hold therefore that valid statutory notices were served in respect of these titles.

The Plaintiff has however challenged the statutory notice of sale in respect of NAIROBI/BLOCK 129/46. He denied receipt of the same in ground 1 in the body of the Chamber Summons dated 27th March, 2002. At paragraph 11 of his supporting affidavit sworn on 27th March, 2002 the Plaintiff admitted being served with statutory notices of sale in respect of L R No's KAJIADO/KAPUTIEI-NORTH 4302 and 4303 but denies receipt of the same in respect of L R No NAIROBI/BLOCK 129/46.

In response to the Plaintiff's denial of receipt of the statutory notice of sale in respect of L R No NAIROBI/BLOCK 129/46, the defendant in the Replying Affidavit of S K NGETICH sworn on 22nd April, 2002 says at paragraph 12 that:-

> ***"It is not true that no statutory notice was served to the Plaintiff in respect of parcel number Nairobi/Block 129/46 and I state that the same was duly served on the same date with the statutory notices in respect of the other parcels and the plaintiff in fact acknowledged receipt of the same in his letters of 19 th February, 2001 annexed to the Plaintiff's affidavit "EWM 4". The said statutor y notices are annexed hereto as exhibits "SKN 6"."***

The Plaintiff only acknowledged receipt of 2 statutory notices. The acknowledgements are exhibited as EWM 7. There is no evidence of acknowledgement of a third statutory notice. In my view once receipt of a statutory notice is denied the Plaintiff must show that indeed the statutory notice was served. The Plaintiff has not shown how the statutory notice in respect of L R No NAIROBI/BLOCK 129/46 was served.

In KISUMU C A No 148 of 1995 NYANGILO OCHIENG & ANOR VS FANUEL B OCHIENG & OTHERS the Court of Appeal held that:-

> ***"It is for the chargee to make sure that there is compliance with the requirements of Section 74 (1) of the Registered Land Act. That burden is not in any manner on the chargor. Once th e chargor alleges non receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent."***

On the issue of the statutory notice alone I find that the applicant has shown a prima facie case with a probability of success in respect of the prayer sought in paragraph 4 of the Chamber Summons dated 27th March, 2002. I grant the same until the hearing and the determination of this suit.

As regards prayers sought in paragraphs 2 and 3 of the said Chamber Summons I have already found that the statutory notices were valid and were properly served. Section 74 (1) of the Registered Land Act Cap 300 was therefore complied with. A prima facie case with a probability of success cannot be founded on the basis of the validity or otherwise of these statutory notices of sale.

Mr Gachoka also complained about how the defendant operated or dealt with the Plaintiff's accounts. He submitted that only 2 accounts were secured. Yet the defendant combined or consolidated all the Plaintiff's accounts and demanded payment thereof. The Plaintiff further alleged that the defendant made cross debits. If correct debits had been made by the defendants the secured accounts would be fully repaid and the issue of their sale by public auction would not arise. Yet correspondence exchanged between the Plaintiff and the defendant clearly gave the defendant

> ***"the right to set off or combine all or any of the borrowers accounts.The right to consolidate all securities held on any account as security for all liab ilities is also held."***

The charges executed by the parties hereto also gave the defendant the same rights. The Plaintiff failed to disclose these contractual obligations. He is therefore guilty of non-disclosure and is not entitled to the equitable remedy of injunction. In any event a dispute over accounts per se does not entitle an applicant to the equitable remedy of injunction. The relationship between the Plaintiff and the defendant is a contractual one. The two have agreed to be governed by a set of conditions or covenants. The court will not lightly interfere with the terms of such a contract. I accordingly hold that the Plaintiff has not shown a prima facie case with a probability of success in respect of prayers 2 and 3.

The Plaintiff made other complaints against the defendant which in his view entitles him to the equitable remedy of injunction. He complained that the defendant had misrepresented to him the status of the auction purportedly carried on 24th April, 2001. This misrepresentation is allegedly made in a letter dated 27th April, 2001 from the defendant's advocates to him. The letter says:-

> ***"The public auctions of the 2 properties proceeded on 24 th April, 2001 as scheduled and we cannot be of much assistance at this juncture."***

This letter gave the impression that the Plaintiff's properties had been auctioned. Yet indeed they had not been. This is a possible interpretation of the defendant's said letter but it is not the only one. The defendant contends that the letter did not state that the securities had been sold. In my view however, this is raising a storm in a tea cup. Whatever impression that the letter may have created in the mind of the Plaintiff, it does not amount to a misrepresentation which can amount conduct to entitle the Plaintiff seek the equitable remedy of injunction. Indeed the Plaintiff had a second bite of the cake as indeed no sale took place and that is why the present application was made.

The Plaintiff also complains about the defendant's sale of his shares. He alleges that the sale was below the market value. In any event they were not securities. He has not however given his own valuation or even that of an expert. In any event unless the same could have settled the loan due, I hold that this complaint would not affect the defendant's right to exercise its statutory power of sale.

In the result I make the following orders:

1. The temporary injunction granted to the Plaintiff against the defendant and its agents, servants or otherwise howsoever restraining it from advertising for sale by public auction or otherwise disposing or alienating the Plaintiff's L R No's KAJIADO/KAPUTIEI-NORTH 4302 and 4303 be and is hereby set aside.

2. An interlocutory injunction be and is hereby issued restraining the defendant from advertising,

alienating, disposing for sale or selling by public auction or otherwise the Plaintiffs L R No NAIROBI/BLOCK 129/46 KOMAROCK ESTATE PHASE II NAIROBI until the hearing and determination of this suit.

3. The Plaintiff should file a written undertaking as to damages within the next 21 days.

4. Costs of this application shall be in the cause.

Dated at Nairobi this 13th day of February, 2004.

F. AZANGALALA

JUDGE

13.2.2004