



REPUBLIC OF KENYA

COURT OF APPEAL OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 387 OF 2004

EZEKIEL OSUGO ANGWENYI1ST PLAINTIFF

EZZYCON COMUPTER COLLEGE2ND PLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK LIMITEDDEFENDANT

RULING

The main orders sought in this application are three. These are:-

- (a) The Defendants/Respondents either by themselves or their servants and/or agents be restrained from attaching, advertising, alienating or in any other way dealing with the Applicants property known as L.R.No.2250/65 until the hearing and determination of this suit.
- (b) The Applicant be allowed to deposit Kshs 1,254,503.65 in Court pending the hearing and determination of this suit.
- (c) The Respondent be ordered to supply the Applicants with proper statements of accounts for agreement Numbers 42/012551/17 and 42/012552/17.

The application is brought by the Plaintiffs against the Defendant and is expressed to be brought under Order 39 Rules 1(a) 2, 3(1), Order XIX Rules 1 and 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of Law.

The reasons for the application are that:-

1. There is no consideration that passed between the 1st Plaintiff and the Defendant to warrant sale of his property.
2. The Defendant/Respondent has failed to provide proper statements of accounts to the 2nd Plaintiff.
3. The Defendant/Respondent has not given credit to the 2nd Plaintiff in the sum of Kshs 2.1 million.

The application is supported by an affidavit sworn by the 1st Plaintiff.

The application was canvassed before me on 19th October, 2004. Counsel for the Plaintiff/Applicants informed me that prayer 3(b) above had already been granted and the Applicants are now pursuing the prayer for the interlocutory injunction. The case of the Applicants is that the 1st Plaintiff offered the suit property to the Defendant as security for a loan he had sought from the Defendant. A charge was duly created over the suit property. However, the loan sums were not disbursed by the Defendant to the Plaintiffs at all. The Plaintiffs also had a Hire Purchase Agreement for the purchase of two motor vehicles. For the Hire Purchase Agreement, the motor vehicles were the securities and not the suit piece of land. Yet the Defendant served a Statutory Notice of Sale and has advertised the suit piece of land for sale in respect of the Hire Purchase account. The Statutory Notice of Sale demanded from the 1st Plaintiff payment of Kshs 1,254,503.65 plus interest. This sum has been deposited in Court not for payment to the Defendant but to show that Plaintiff's *bona fides*. The Plaintiff therefore prays for the temporary injunction. In conclusion it was submitted for the Plaintiffs that interlocutory judgment has already been entered against the Defendant. The issue of showing a *prima facie* does not therefore arise as liability has already been determined.

The Defendant filed a replying affidavit of one Reuben Nyangaga the Defendant's Assistant Manager. However when Counsel for the Defendant was alerted of the interlocutory judgment, he sought an adjournment for further instructions and when the application came up for further hearing on 8th November, 2004 he sought a further adjournment to enable the Defendant prosecute an application to set aside the interlocutory judgment. I declined to grant the adjournment for reasons recorded. Counsel for the Defendant made no response to the submissions of his counterpart. This application has therefore not been opposed.

The principles for the grant of an interlocutory injunction are now well settled. First, do the Plaintiffs have a *prima facie* case with a probability of success at the trial. The answer must be in the affirmative. A Statutory Power of Sale cannot be exercised where there is total failure of consideration. A Statutory Power of Sale cannot also be exercised to recover sums for which the charge was not created. In any event in this case the Plaintiffs have deposited the sums shown in the Statutory Notice of Sale. I hold that the Plaintiffs have shown a *prima facie* case with a probability of success at the trial.

It is settled Law that an injunction will not normally issue if the injury to be suffered in default thereof can be compensated by an award of damages. The rule however is not that an interlocutory injunction can never issue if damages would be an adequate remedy. The Rule is that it will not normally issue (underlining mine).

In this case the Defendant's conduct on the *prima facie* basis appears high handed. It is using a Statutory Power of sale to recover sums allegedly owed to it in a separate and distinct transaction. This conduct cannot escape the notice of the Court. In any event the amount demanded in the Statutory Notice of Sale has been deposited in Court.

The upshot of this matter is that I grant the application for injunction in terms of prayer (2) of the Chamber Summons dated 15th July, 2004.

The Plaintiff shall have the costs of this application in any event.

DATED AND DELIVERED AT NAIROBI THIS 30th DAY OF NOVEMBER, 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of:-