



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 625 OF 2003**

COFTEA MACHINERY SERVICES LIMITED.....PLAINTIFF

VERSUS

AKIBA BANK LIMITED.....1ST DEFENDANT

VIPUL SHAH.....2ND DEFENDANT

KAMAL SHAH.....3RD DEFENDANT

RULING

The Plaintiff Company, Coftea Machinery Services Limited, filed this application dated 3rd October, 2003 by way of Chamber Summons under Inter alia, Order 39, Rules 1, 2, 3 and 9 of the Civil Procedure Rules. The Application sought the following Orders:-

(1) That for reason to be recorded, service of this application be dispersed with and that this application be heard ex parte, in the first instance in respect of prayer 2 of the application herein.

((2) That the 2nd and 3rd Defendants be restrained from acting and/or purporting to act as Receivers and/or Managers of the Plaintiff and from interfering in any manner with the Plaintiff's quiet possession and enjoyment of all its land, bank accounts, properties and machinery equipment, assets and general day to day running of the Plaintiffs affairs and the running/management of the Plaintiff's Bank accounts do revert to the Plaintiff pending the hearing and determination of this application inter-partes.

(3) That the Defendants whether by themselves/servants or agents or Advocates or auctioneers or any of them or otherwise be restrained by a temporary order for Injunction from doing the following acts or any of them that is to say from interfering with the Plaintiff's rights of possession, advertising for sale, disposing of, selling by public auction or otherwise howsoever at any other time or by completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting otherwise howsoever interfering with the ownership of title to and/or interest in ALL THAT piece of land known as L.R. No. 209/4129, NAIROBI pending the hearing and determination of this application inter partes.

4. That Defendants whether by themselves, servants or agents or Advocates or auctioneers or any of them or otherwise be restrained by a temporary order for Injunction from doing the following acts or any of them, that is to say from interfering with the Plaintiff's rights of possession, advertising for sale, disposing of, selling by public action or otherwise howsoever at any other time or by completing by conveyance or transfer of any sale concluded by auction or private treaty leasing, letting otherwise howsoever interfering with the ownership of title to and/or interest in ALL THAT

piece of land known as L.R. No. 209/4129, NAIROBI pending the hearing and determination of this suit.

(5) That the 2nd and 3rd Defendants be restrained by themselves, their agents or servants or otherwise howsoever from acting and/or purporting to act as Receivers and/or Managers of the 1st plaintiff and from interfering in any manner with the Plaintiff's quiet possession and enjoyment of all its land, bank accounts, properties, machinery equipment, assets and general day to day running of the Plaintiff's affairs and running/Management of the Plaintiff bank account do revert to the Plaintiff pending the hearing and determination of this suit.

(6) That an order be made under Section 52 of the Indian Transfer of Properties Act (Amendment) Act 1956 that during the Pendency of this suit **THAT ALL FURTHER REGISTRATION** or change of registration in the ownership, leasing, sub-leasing, allotment, user, occupation or possession or in any kind or right, title or interest in **ALL THAT** parcel of land known as L.R. No. 209/4129, with any Land Registry, Government Department, and all other registering authorities be and is hereby prohibited.

(7) That the Plaintiff be at liberty to apply for such further or other orders and/or directions as this Honourable court may deem fit and just to grant.

(8) That costs of and occasioned by this application be taxed and paid by 1st Defendant to the Plaintiff.

The 1st Defendant, Akiba Bank Limited is a commercial Bank while the 2nd and 3rd Defendants are Receivers and Managers appointed by the Bank under Powers it claims was conferred on to it as Debenture-holder by Debenture dated 24th October, 1997.

Before the said application was heard the Defendants herein made an application dated 17th October 2003. for the consolidation of this suit

HCCC No. 625 of 2003 with HCCC No. 619 of 2003. In HCCC No. 625 of 2003 (Milimani) the parties are:-

Coftea Machinery Services Limited.

-VAkiba

Bank Limited

Vipul Shah

Kamal Shah

While in HCC No. 619 of 2003 the parties are:-

Intermart Manufacturers Limited

-VAkiba

Bank Limited

Vipul Shah

Kamal Shah

The Plaintiff in the 2nd suits are two separate and distinct companies but it is common ground that

both companies share the same directors. The Defendants in both suits are the same and are sued in the same capacities. The 1st Defendant is a Bank while the 2nd and 3rd Defendants are Joint

Receivers/Managers, appointed by the Defendant but under different Debentures. After hearing the application for consolidation, I held:-

“..... I, therefore disallow the application for the 2 suits to be consolidated into one suit. However, purely to save the expenses which will be will be incurred in 2 attendances, I hereby direct and order t hat the hearing of HCCC No. 625 of 2003 shall follow the hearing of HCCC NO. 619 of 2003 and consequently the same shall be listed and heard on the same day and before the same Judge.....”

As a result, the present application for injunction in this application was heard after the hearing of a similar application in HCCC No. 619 of 2003 by me. During and after the arguments and submissions in the present application both Counsels referred to and wholly adopted their respective arguments and submissions in respect of the Application in HCCC No. 619 of 2003. The purpose of this was to save judicial time and I am grateful to Counsel for this wise decision.

As a result, considering the similarities of facts and law, I do hereby adopt herein my findings, and holdings in respect of the Application in HCCC. No. 619 of 2004. In the present application, Mr. Sekou Owino their-house Legal Officer of the Defendant Bank also swore the Replying Affidavit in opposition. He did this on 13th October, 2003. The format used is exactly the same as the one he swore in HCCC No. 619 of 2003.

While perusing the Plaintiff's application, and the record. I did not see any **Notice to Strike out an Affidavit** filed by the Plaintiff similar to that in HCCC No. 619 of 2003. During the arguments and submissions, I had been made to believe that there was a similar Notice to strike out the Affidavit of Sekou Owino.

Be that as it may, the court was placed on the inquiry since the 2 applications were heard one after the other and the court found that the affidavit herein was exactly similar to that in HCCC No. 619 of 2003 in form.

Nowhere and I repeat nowhere in the body of the said affidavit does the deponent state that any of the statements of fact made by him are from his own knowledge. Again, nowhere in the deponents' affidavit does he expressly state that any of the statements of fact are based on information or belief and in such cases the sources of the information and grounds of belief respectively. The affidavit is wholly and totally silent in respect of the requirements of Order XVIII of the civil procedure Rules.

In the event the Plaintiff did file a Notice to strike out the said Affidavit, then I do hereby hold that my findings and decision in respect of the Affidavit in HCCC No. 619 of 2003 would equally apply here. However, if the Notice to strike was not filed then can the court, at its own instance apply the law and strike out the said Affidavit? In my view, this is not necessary, however, the court must apply the law with regard to admissibility, hearing and the provisions of the Evidence Act. The court appreciated that our system is an adversarial one but it will not ignore or disregard violations of the law merely because one party did not take it up.

I do hereby hold that Mr. Sekou Owino's affidavit herein is not in law an affidavit and is a mere sheet of paper and is worthless in evidentiary value. I do hereby adopt and reiterate my findings and reasons thereof as given in HCCC No. 619 in respect of Mr. Sekou Owino's affidavit. I hold that Mr. Sekou Owino's affidavit is defective in form and substance and thus incompetent.

However, I will not strike it out in this case, but will **wholly** and **totally** disregard it and its contents. The document is not an affidavit and is of no use to the court for the purposes of this application. As a result the only document I will consider on the Defendant's side is the Grounds of opposition and to some extent the Defence. This also means that the statements on oath in the Plaintiff's affidavit sworn on 3rd

October, 2003 and that sworn on 9th January 2004 remain uncontroverted and unrebutted by the Defendants.

I do hereby wholly adopt my decision and reasoning in HCCC No. 619 of 2003 in respect of the injunction application and in particular the application of the principles in **GIELLA –V- CASSMAN BROWN LIMITED** (1973) E.A. 358.

In conclusion the Plaintiff's application is successful and I do hereby grant prayers 4, 5, and 6 of the Chamber Summons dated 3rd October, 2003. The Defendants shall pay the Plaintiff's costs of the Application.

I do hereby direct and order and having adopted the findings in HCCC 619 of 2003 and ratio decidendi herein, the Ruling in the said suit HCCC No. 619 of 2003 dated 25.11.2004 shall form part and parcel of this Ruling and shall accordingly be read together for all purposes and for all proceedings.

Orders accordingly.

Dated and delivered at Nairobi this 25th day of November, 2004.

MOHAMMED K. IBRAHIM

JUDGE

Order by Consent:-

This matter shall be mentioned at the High Court, at Milimani

Commercial Courts on 29th November 2004 at 9 a.m. for further directions/Orders.

MOHAMMED K. IBRAHIM

JUDGE