



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 31 OF 2003

1. GANSHYAM CHHOTABHAI PATEL.....1ST PLAINTIFF

2. MANIBEN GANSYAM PATEL.....2ND PLAINTIFF

-VERSUS-

1. MAKUPA CHEMISTS LIMITED..... 1ST DEFENDANT

2. PRIME BANK LIMITED..... 2ND DEFENDANT

R U L I N G

By an application dated 13th February 2003, the plaintiffs sought for an order of temporary injunction to restrain the 2nd Defendant from selling and or disposing of a parcel of land known as L.R. subdivision No. 1657 Section 1 M.N. Mombasa pending the hearing and determination of this suit. The plaintiffs invoked the provisions of order XXXIX rules 1,2 and 3 of the Civil Procedure Rules and Sections 3A of the Civil Procedure Act. The plaint was filed at the same time with this application.

It would appear from the plaint that the plaintiffs had guaranteed an overdraft facility to the 1st defendant by having their property known as L.R. Subdivision No. 1657 Section 1 M.N. Mombasa to be charged by the 2nd Defendant as security for a maximum principal sum of KSh.9,500,000/=. On 3rd September 1998 a charge was registered over the abovementioned title in which the 2nd Defendant offered to advance the 1st Defendant a sum of KSh.9,500,000/=. The plaintiffs complaints in the plaint are that the 2nd Defendant extended the legal date of redemption without consulting them and that this amounted to varying the terms of the charge. Secondly that the 2nd Defendant has failed to furnish the details of the account in respect of the 1st Defendant's loan account and thirdly that, the amount demanded by the bank exceed the maximum principal sum guaranteed. The plaintiffs aver that these are issues which should go to trial and that the status quo should be maintained by way of a temporary injunction pending the hearing of this suit. The plaintiffs in the plaint will also be seeking for an order of declaration that they are discharged from responsibility to the liabilities under the charge and finally for a declaration that they are only liable to pay KSh.9,500,000/= instead of a sum of KSh.12,959,822/50 as demanded.

The application sets out the grounds and the same is supported by the affidavit of Gansyam Chhotabhai Patel sworn on 13th February 2003. The grounds which came out from the pleadings and submissions of plaintiffs Counsel were first that the guaranteed maximum overdraft facility was upto a sum of KSh.9,500,000/= and no more and anything demanded beyond that amounted to a breach of the terms of the contract created by the charge executed on 3rd September 1998. Secondly, that the legal date of redemption was fixed by the charge to be on 4th October 1998 and it was not to exceed one year. The plaintiffs aver that the 2nd Defendant's delay to demand its debt after 4.10.98 amounted to a breach of the

terms of the charge and therefore the plaintiffs are entitled to be discharged from responsibility of the debt. Thirdly, that the 2nd Defendant continued to advance money to the 1st Defendant without the consent of the plaintiffs and this non-disclosure of the transactions between the 1st Defendant and 2nd Defendant frustrated the contract created by the charge. Fourthly, that the 2nd Defendant failed to disclose the status of the 1st Defendant's loan account despite being requested on several occasions by the plaintiffs. Fifthly, the plaintiffs also aver that they will suffer irreparable loss should the 2nd Defendant proceed with their intended sell of their charged property. Finally that the 2nd Defendant has issued a statutory notice to redeem hence the threat is real. The plaintiff's annexed the charge relevant to this suit as annexure marked 'G.C.P2' to the affidavit of the 1st plaintiff.

The 2nd Respondent strenuously opposed this application and averred that the legal date of redemption did not bar the bank from rescheduling the debt repayment even after the date fixed and that it was the duty of the chargers and the borrowers repay and redeem. The 2nd respondent also averred that the sum guaranteed was Ksh.9,500,000/= as the principal sum plus interest. That there was no material variation of the terms of contract and finally that the dispute over the amount payable was not a good ground for the grant of the orders of an injunction. The principles that guide the court in deciding whether or not to grant an interlocutory injunction are well settled in the case of **GIELLA =VS= CASSMAN BROWN & CO. LTD. [1993] E.A. 358** . That is:

- (i) An applicant must show a prima facie case with a probability of success;
- (ii) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages and
- (iii) That if the court is in doubt, it will decide the application on the balance of inconvenience.

The definition of the meaning of a 'prima facie case' was given by the court of Appeal in the case of **NAIROBI CIVIL APPEAL NO. 39 of 2002 (unreported) MRAO LTD. =VS= FIRST AMERICAN BANK (K) LTD. ABDUL ZAHIR SHEIKH ANDREW DOUGLAS GR EGOR Y** In which Justice Bosire J.A. had this to say:-

“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant, case upon trial. That is clearly the standard which is higher than an arguable case.”

Having established the meaning of a prima facie case it is important to relate to this case. It is imperative to note that the applicant raised various complaints which I highlighted earlier. The answers to the plaintiffs issues are settled when one peruses the annexure marked 'G.C.P.2' of the affidavit of Ganshyam Chhotabhai Patel is the charge.. This document was duly executed by the plaintiffs as the "Chargors", the 1st Defendant as the "borrower" and the 2nd defendant as the "bank". The applicants had complained that the 2nd Defendant had demanded a figure more than what they had agreed upon i.e. KSh.9,500,000/=. At page 2 of annexure 'G.C.P2' the maximum principal amount guaranteed was stated to be KSh.9,500,000/= and at page 3 the issue of interest, other costs, liabilities, taxes, charges and expenses are mentioned. It is therefore clear that the amount guaranteed is fixed as a sum of KSh.9,500,000/= plus interest and this matter is presumed to have been within the knowledge of the plaintiffs. At page 38 of annexure G.C.P. at the bottom the plaintiffs say:-

“We the above named (1) Ganshyam Chhotabhai Patel and(2) Naniben Chhotabhai Patel, the Chargors, have read and had explained to us the above sections and confirm that we understand the same.”

The plaintiffs here dispute the figure. It should be noted that disputes over accounts cannot be a basis of

granting an order of injunction to restrain a bank from realizing its security. It was stated by the Court of Appeal in Nairobi Civil Appeal No. 147 of 1989 (unreported. **HABIB BANK A.C. ZURICH =VS= POP (K) LTD. RAJNIKANT KHETSHI SHAH HASMUKH DEVCHAND SUMARIA RATILAL KHETSHI SHAH.**

“that disputes as to the exact amount owed under a mortgage is not a ground upon which a Mortgager, who served a valid statutory notice can be restrained from exercising its statutory power of sale.”

The other issue which the plaintiff raised concerns the delay to redeem by the bank. At page 25 of annexure ‘G.C.P2’ paragraph 19 says:-

“It is hereby agreed that (a) No failure or delay by the bank in exercising any right or remedy shall operate as a waiver thereof nor shall any single or partial exercise or waiver of any right or remedy preclude its further exercise or the exercise of any other right or remedy.”

Again it is clear that the complaint raised by the plaintiffs is clearly set out in their instrument of contract. There is nothing unusual for the bank to delay in redeeming. The bank acted within the provisions of the charge.

The plaintiffs complained of the 2nd Defendant continuing to advance overdraft facilities without consulting them. It should be noted that there was no single averment presented to court to establish that there was a variation on the terms of the charge. And even if there was such a variation the same was covered by the charge in page 31 at paragraph 20 which says:-

“The liability of the chargors he reunder shall not be impaired, discharged or otherwise affected by (a) any determination, variation or increase by the bank of any credit or facilities to the borrower.”

It is clear in my mind that the applicants concede that the 1st Defendant was advanced money by the 2nd Defendant and as a result a charge was registered against their property as security and that the 1st defendant has not repaid the money. That since the date they executed the charge dated 3rd September 1998, they have not made any payment to the 2nd Defendant and that with or without any demand they were required to repay the whole debt by 4th October 1998 which they admitted they have not done. The applicants therefore have not been candid, a court of equity cannot assist such a party who comes to court with unclean hands. The instances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in **HALSUBURY’S LAWS OF ENGLAND** VOL. 32 (4TH edition) paragraph 723

. “The mortgagee will not be restrained form exercising his power of sale because the amount due is in dispute, or because the Mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged.”

I have taken into consideration the material placed before me. I have also taken into account the submissions of both counsels and I have come to the conclusion that this application is without any sound foundation. The plaintiffs have not established any prima facie case to persuade me to exercise my discretion to restrain the 2nd Defendant as doing so will go against the laid down principles governing the grant of the remedy sought. I will not belabour to go into the other tests. From the foregoing this application is ordered dismissed in its entirety with costs to the 2nd Defendant.

Dated at Mombasa this 3rd day of April, 2003.

J.K. SERGON

J U D G E