

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT NO 1023 OF 2002

PATRICK KIRONO MWAURA.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1ST DEFENDANT

JAMES KANGETHE 2ND DEFENDANT

JOSEPH NYUTU KAMAU T/A PHTUMA AGENCIES LTD.....3RD DEFENDANT

RULING

The Plaintiff filed this suit against the defendants seeking an order of nullification of sale which took place on 2nd August, 2002 involving the Plaintiff's land known as L R Muranga/Maragua Ridge/82 hereinafter referred to as, the suit land. He also sought among others an order to restrain the defendants, their servants and/or agents from transferring, alienating and/or interfering with the Plaintiff's ownership and possession as well as registration of the suit property. The basis of the Plaintiff's claim is that the suit land had been sold at a gross undervalue to the second defendant. He accused the three defendants of fraud, the particulars of which are set out at paragraph 12 (twelve) of the Plaintiff.

Filed together with the Plaintiff is an application by way of summons in chambers for the injunction to issue in the interim pending the determination of suit. When this application came for hearing the Plaintiff abandoned the 4th prayer in the application as it was agreed that no sale had taken place on 2nd August, 2002 as the highest bidder had not paid the required deposit or pursued the matter. The application was therefore heard as between the Plaintiff on one side, and the 1st and 3rd defendants on the other. What is left of this application is the prayer for an injunction against the 1st and 3rd defendants to restrain them from transferring, alienating and/or interfering with the Plaintiff's ownership and possession of the suit land. Since the Plaintiff abandoned the 4th prayer in the application, the 1st, 2nd and 3rd grounds upon which the application was brought, as is set out on the face of the application, do not apply to the remainder of the application. The only ground left is that the Plaintiff does not owe the 1st defendant any money. The application is supported by the annexed affidavit of the Plaintiff dated 14th August, 2002. There is also another affidavit filed by the Plaintiff on 28th March, 2003 and a third one filed on 30th January, 2003. The application is opposed and replying affidavits were filed by the 3rd defendant, Bertha Oduor, the officer in charge of Advances in the 1st defendant bank.

The principles governing the grant of injunctions are set out in the celebrated case of *Giella vs Cassmann Brown and Co Limited* 1973 EALR 358. The applicant must show a prima facie case with a probability of success and that if the injunction sought is not granted, he will suffer a loss not capable of compensation by an award of damages. If the court is in doubt, it would normally decide the application on a balance of convenience in favour of the party that will suffer the greater inconvenience.

The Plaintiff's case as I understand it from the Plaintiff is that the principal debtor is M/s Protein and Fruits Processors Limited. The 1st defendant granted the principal debtor a financial facility amounting to Kshs.500,000/= secured by a charge over the suit land which is the property of the Plaintiff. The principal debtor, for the reasons set out in the Plaintiff, was unable to service the loan and the 1st defendant in exercising its statutory powers of sale, instructed the 3rd defendant to sell the suit property. That is what led to the filing of this suit. The Plaintiff also complains of exorbitant interest rates and the introduction of

punitive penalties and charges by the 1st defendant. He seeks an order for accounts to be taken.

It is clear from the Plaintiff that the principal debtor defaulted for the reasons given in the Plaintiff. Annexures BOA 1 – 36 are copies of correspondence between the Plaintiff and the 1st defendant. Majority of these letters by the Plaintiff to the 1st defendant acknowledge the indebtedness and make proposals on how to pay the debt. Right from 1994 (the letter dated 10th November, 1994), that has been the position. The letter dated 27th February, 1995 clearly admitted that there were arrears to be paid and he made a promise to clear those arrears by the month of March, 1995. In his letter dated 26th October, 1995 the Plaintiff asked for 14 days to enable him organize for funds, and in the letter dated 15th January, 1997, he asked for a further three months. In all the letters written by the Plaintiff or by his advocates to the 1st defendant, the issue of accounts or interest rates never arose. Each time, all the Plaintiff wanted was more time to pay up. I have read the judgments which the Plaintiff provided, among them are **HCCC No 1601 of 1999 HFCK (K) Limited vs Gilbert Kibe Njuguna** (unreported) . I do not find it relevant to the present case. As for **HCCC No 606 of 1998 KCB (K) Ltd vs James Kuria Njine** , the Plaintiff sought an order for judgment against the defendant in that case. The application was dismissed because the court found that the defence raised one triable issue and that was, whether or not the defendant was indebted to the Plaintiff. In the present case, it is admitted in the Plaintiff that the principal debtor, due to problems, defaulted. I have read the other judgments submitted and find that they are of no assistance to the Plaintiff. There are numerous letters which are annexed to the replying affidavit, in which the Plaintiff admits indebtedness to the 1st defendant and in which he kept praying for time to arrange payment. In the circumstances, he cannot say that he has shown a prima facie case with a probability of success, to warrant the injunction. On whether damages are an adequate remedy, I would say that the value of the suit land is known or can be ascertained. It has not been suggested that the 1st defendant bank would not be financially able to compensate the Plaintiff in damages should he be successful at the end of the case. I therefore find that damages would be an adequate remedy.

If I were to decide this case on a balance of convenience, then I take note of the fact that since 1994, according to the letters annexed to the replying affidavit of Bertha Oduor, the Plaintiff has made numerous promises to pay up, none of which has borne fruit. In the meantime, due to interest, the loan continues to escalate. It is not known when this case will be heard and finalised by the court and it is not known how much money will be owing then. If the case takes long to determine, the amount owing could easily exceed the value of the security, due to interest and penalties, in which case the defendant will be unable to recover it by selling the security. In my view, it is the 1st defendant who will suffer the greater inconvenience if the injunction is granted, than the Plaintiff will suffer if it is not granted. The balance of convenience favours the 1st defendant. I decline to grant the injunction sought. The Plaintiff's application dated 14th August, 2002 is hereby dismissed with costs to the 1st and 3rd defendants.

Delivered at Nairobi this 9th day of May, 2003

S. C. ONDEYO

JUDGE

9.5.2003