REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.90 OF 2002

SHELTER CREDIT LIMITED……………………………….. PLAINTIFF

VERSUS

THE KENYA NATIONAL ASSURANCE CO. LTD…… DEFENDA

RULING

In an application dated 12th March and filed in this Court on 13th March 2002 and amended on 2nd May 2002 the applicant sought an order of this court to restrain the respondent by itself, its agents and/or servants from attaching and/or selling the goods set out in the proclamation by UJUZI TRADERS dated 14th November 2001 and also costs thereof.

The grounds given on the body of the application for seeking the order is that the goods attached belong to the plaintiff.

The supporting affidavit deponed to by one George Njenga Ngugi, the operations Director of the applicant and filed in court together with the said application refers to a Hire Purchase agreement dated 7th January 2001 by which the plaintiff hired to Wheatland Holdings Limited some office furniture and equipment which were the subject of distress by the respondent in refund due to it not by the appellant by the said Wheatland Holdings Limited.

The appellant immediately objected to the distress and obtained orders preventing the respondent from attaching the said goods as they belong to the appellant and not the respondent, and that if the respondent was.

That is the respondent was permitted to attach and sell the subject goods then the appeal would be rendered nugatory.

The replying affidavit filed in Court on the original application on 20th March 2002 the respondent averred that the appellant had no proprietory interest in the property otherwise clause 5 of the Hire Purchase agreement provided a remedy to it in the event of distress.

That there were some items attached or proclaimed to which the appellant has non claim and that these proceedings were instituted at instigation of Wheatland Holdings Ltd. And so forth.

The application was heard in this Court on 23rd September 2002 when counsel for both parties appeared to submit either in favour or against the application.

Each of them supported this averments either in the support the supporting or replying affidavit.

Counsel for the respondent repeated that the goods intended for attachment belong to the appellant and not Wheatland Holdings Limited and that the issue or rent is not between the appellant and the respondent. He pleaded that the applicati9on be allowed with costs.

Counsel for the respondent also supported the averments in the respondent's replying affidavit that if the appellants have an interest in the proclaimed goods, hire purchase agreement has a provision for their remedy.

That the application was mischievous as it was intended to stop the respondent from exercising his rights as Landlord. And that the appellants did not establish a prima facie case and prayed that the application be dismissed with costs.

I was under the impression, and I think correctly so, that when an applicant makes an application for an injunction under order XLI Rule 5 of the Civil Procedure Rules, then it believes him/her to establish the conditions necessary for such an order to be granted as is enunciated in the case of ***Giella v. Cassman Brown and Co. Ltd [1973] E.A. 358*** and re-enforced by the case of Abel Salim and others v. Okong'o and others [1976] KLR 42: that is to say:

1. The probability of success of the main suit in this case the appeal,

2. Irreparable injury which cannot otherwise be compensated by an award of damages; and

3. In case of doubt, on a balance of convenience.

Neither in the application and the supporting affidavit, nor in the submissions before this Court as the applicant made any reference to that, otherwise very important conditions.

In an application of this nature it is important for the applicant not only to state the conditions but to demonstrate in submissions that they have been satisfied.

While it is not necessary at this stage for condition one to be exhaustively discussed for fear of deciding the main appeal at the interlocutory stage but the applicant had to satisfy this Court as to the question of collusion between the appellant and Wheatland Holdings Limited and why the appellant has never utilized the default clause in the Hire Purchase Agreement since the first attempt to levy distress.

Without satisfactory submission on this condition the answer thereon goes begging.

As to the second condition irreparable injury which cannot be compensated by an award of damages, the proclamation from Ujuzi Traders shows that the amount involved s Ksh.429,668/= which is a quantifiable figure likely to be compensated by an award of damages.

That the amount is huge by any standards is snot sufficient to propose that the injury would be irreparable particularly when the applicant says nothing about it in its submissions or shows that the respondent would be unable to refund it if the appeal succeeds; or to satisfy the Court that the appeal would be rendered nugatory if this application is not granted.

This application for injunction is not sustainable.

I dismiss it with costs.

Delivered and dated this 27th day of September 2002.

D.K.S. AGANYANYA

JUDGE