REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Suit 247 of 2000

MAONEH INVESTMENTS LTD.....PLAINTIFF

versus

FIDELITY COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

On 28th August, 2000 the plaintiff filed the suit in this case against the defendant claiming various prayers at the same time filed an application under Order 39 Rules (1) and (2) asking for restraining orders to be issued against the defendant not to breach the agreement made on 17th February, 2000 pending the hearing of the suit.

The plaintiff further wants the defendant to be restrained from putting up for sale L.R. No 209/8125 by way of auction pending the hearing of the suit.

The grounds upon which the said application is based are that the defendant had breached an agreement dated 17th February, 2000 and has threatened to sell the property on 30th August, 2000 and if the sale goes through the plaintiff will suffer an irreparable loss.

Further that the defendant has distorted the agreement entered into between the plaintiff and the defendant on 17th February, 2000.

The said application is also supported by the sworn affidavit of Mohamed Yasmin Khan and the annextures thereto which I have taken into consideration.

The defendant has challenged both the suit and the application through the defence filed in court and a replying affidavit dated 11th September 2000 which to it is annexed various annextures which I have also taken into account.

It is not in dispute that the plaintiff was granted a loan by the defendant amounting to Kshs 3,000,000 and to secure the same the plaintiff offered parcel number 209/8125 to the defendant as security and the said parcel of land was charged to the defendant.

It is also not in dispute that the loan which was advanced to the plaintiff was not properly serviced and by 17th February, 2000 the same had risen to Kshs 5,124,518/45 and as a result of it the parties in this suit entered into an agreement in which the sum of Kshs 2,000,000 was treated as an overdraft and the sum of Kshs 3,000,000 was treated as a term loan repayable on certain terms.

Despite this agreement which has been styled variation of credit facilities the defendant has gone ahead

and caused the charged property to be advertised for sale by public auction.

It is against that advertised sale of property by public auction that the plaintiff has moved to this court to block the said sale.

In his submissions Mr Wasilwa who is appearing for the plaintiff has made his submission and said that when the charge was created in which the suit land was charged to the defendant among the terms implied on it was that the charge would be subject to the provisions of the Central Bank Act and the Banking Act especially section 39 and section 49 of the said Act.

The thrust of his submission on that point related to the interest rates charged as it is his contention that the increment of interest rates must be sanctioned by the Minister and those power have been delegated by the Minister to the Governor o the Central Bank of Kenya

asilwa has further submitted that when part of the overdraft was converted to a term loan, a period of 24 months was allowed to the plaintiff to clear the same. Further that the amount which remained as an overdraft was payable on demand but the term of the overdraft was a period of twelve months.

Further that there was a further intimation that showed the sum of Kshs 3,500,000 be paid by the plaintiff the charge would stand fully discharged.

He has also taken issue with what he called the defendant's subsistence wherein the defendant has taken different position as regards the varied terms.

His first submission rests on Rules 11B of the Auctioneers' Act in which he has contested that the property cannot be put up for auction unless the defendant shows that there has been a valuation on the property in question which has been carried out within the last twelve (12) months before the intended sale and that the property would be sold subject to the reserve price.

It is his submissions that the loss to be suffered by the plaintiff cannot be compensated by way of damages as the house built on the property has some sentimental value to the family of the deponent. Secondly that failure in life and the shame that goes with it no doubt is incomparable.

He has further argued that the loss of the right to pay Kshs 3,500,000 instead of Kshs 5,000,000 is a loss of a property right which cannot be compensated.

On his part Mr Kipkorir who is appearing for the plaintiff has relied on the provisions of Section 12, 13 and 15 of the Civil Procedure Act and raised an issue that this court do not have the jurisdiction to entertain the suit and the right's forum when the suit which have been filed should have been at the Commercial Court in Milimani at Nairobi as designated by the Chief Justice.

Secondly, it is his view that the order extracted on 29th August, 20000 is fatally defective and void in law as it does not comply with the provisions of Order 20 Rule 7(b).

Thirdly, that the affidavit filed in court was void for it offends the provisions of the Oaths and Statutory Declarations Act as it is neither dated nor commissioned and similarly the annextures to it are not exhibited and commissioned by a Commissioner of Oaths.

On this proposition he has relied in an extract in Halsburys Laws of England 4th Edition – paragraph 312 – 316.

Fourthly, that the core of the case is the contract made between the parties which was crystallized into a charge and that there has not been a variation of the charge and what was valid was a valuation of credit which terms the applicant has failed to comply with.

Mr Kipkorir has further submitted the charge is the document which regulates the interest rates and in it

the respondent is allowed to charge interest upto the rate of 48% and that in any event the interest rates have been liberalized.

Finally, it is Mr Kipkorir's submission that the question of valuation is not important and what is important is whether the defendant has a right to sell.

Also that there is nothing unique in parcels of land which can be offered for sale. To support that proposition he has relied on the decision in the case of Mavoloni Co Ltd vs Standard Chartered Ltd & Another Civil Appeal No 266 of 1997.

He has also relied on the case of J.M. Mwakio vs Kenya Commercial Bank Ltd Civil Appeal No 156 of 1997 where the court said that no matter how sympathetic the court can be, it cannot be blind to the legal requirements.

It is his view that the application cannot meet the criteria set in the Giella vs Cassman Brown case.

In their submissions both counsels have taken bold steps to assert certain legal issues which are very pertinent and would have been of a greater importance if they had been argued in a full hearing.

As this is an interlocutory application I will touch on them in so far as they may be relevant.

Mr Kipkorir has taken issue with this court not being vested with jurisdiction to handle the suit.

Section 60(1) of the Constitution of Kenya states:

"60(1) there shall be a High Court which shall be a superior court of record, and which shall have unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other law".

That section confers upon the High Court unlimited original jurisdiction in civil cases.

Similarly section 5 of the Civil Procedure Act states:

5. Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits which its cognizance is either expressly or impliedly barred.

I do not see anything in those two provisions which restricts the High Court in trying suits before it unless they are specifically or impliedly barred.

I am therefore not persuaded by Mr Kipkorir's submission that the court lacks jurisdiction to try the suit and by extension the application.

The exercise of the jurisdiction by the High Court is given in Section 3(1) of the Judicature Act which states:

3(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with:

(a) The Constitution

(b) Subject thereto, all written laws, including the Acts of Parliament of the United Kingdom cited in Part 1 of the schedule to this Act, modified in accordance with Part II of that schedule.

(c) ……

It is evident that the High Court exercises its jurisdiction in accordance with the written law and that

jurisdiction is original and unlimited.

That I think answers the first issue raised in this application on behalf of the respondent.

Mr Wasuna has also submitted that the increase of interest rates by the respondent violated the promises of the Banking Act.

Section 44 of the said Act provides as follows:-

44. "No institution shall increase its rate of banking or on the charges except with the proper approval of the Minister"

And by Section 45(1) it is provided as follows:

45(1) The Minister shall consult with the Central Bank in the exercise of his functions under this Act"

(2) Where the approval of the Minister is required under any provision of this Act, the application for such approval shall be submitted through the Central Bank.

The other legal provision which deal with interest rates in section 39 of the Central Bank of Kenya Act which states:-

39. "The Bank may, from time to time in consultation with the Minister, determine and publish the maximum and minimum rates of interest with specified banks or specified financial institutions on deposits and charge for loss or advances.

Provided that the Bank may in consultation with the Minister determine different rate of interest:

(i) for different types of deposits and loans; and

(ii) for different types of specified bank and financial institutions".

Though this argument put forward by Mr Wasilwa looks attractive and makes a lot of legal sense, the success of that argument depends upon a number of variables which are not present in this application and cannot be expected to be available as proof would be required to show whether the approval had been sought and obtained and whether the minimum or maximum rate of interest has been published by the bank in consultation with the Minister.

It will also be prudent to know whether the defendant herein is one of the specified banks or specified financial institutions.

A finding on this issue therefore will await its day in a full hearing which evidence would be had.

There is no dispute that the property in question has been advertised for sale on the ground that the applicant has failed to serve the loan or overdraft granted nor has he complied with the terms of variation of credit facilities.

Mr Wasilwa's submission is that there has been a breach of the auctioneer's rules in putting up the property for auction yet the valuation has not been carried out by the defendant.

Mr Kipkorir thinks that the valuation of the property before it is put up for sale is not important.

Rule 11(b) of the Auctioneers' Rules 1997 states:-

11(1) "A court warrant or letter of instructions shall include, in case of:-

(a) ……..

(b) Immovable property:

(i) …….

(x) the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale."

The terms of that sub-rule are couched in mandatory terms. The applicant in paragraph 30 of the supplementary affidavit has stated that:

30. "I know of my own knowledge that the defendant has not caused the charged property to be valued in the last twelve (12) months preceding the intended sale in the light of which I am advised the sale would be in breach the obligatory and mandatory requirements of Rule 11(b)(x) of the Auctioneers' Rules".

The defendant did not bother to respond to this point and is loudly quiet on it save the counsel's submissions that it is not important to value the property before it is offered for sale.

Those who drafted the rules saw the need to insert that requirement in the rules and where rules have been set this court will uphold those rules by keeping effect to them.

It was incumbent upon the defendant to see that the property had been valued and should have produced the valuation report on demand and canceling on this application.

Where there are breaches of the rules on the intended sale the plaintiff would be deprived of a right which he had had the property been valued and a reserve price set.

If the sale is therefore allowed to proceed in breach of the Rules, would be an illegal sale.

The applicant has therefore demonstrated that he has a prima-facie case with a probability of success as there has been a breach of the Auctioneers' Rules.

Mr Kipkorir has submitted that there is nothing unique in lands and in support of that contention has quoted the decision of the Court of Appeal in Civil Appeal No 266 of 1997 – Muhoroni Company Limited vs Standard Chartered Estate Management Limited where it was stated by that court that:

"Moreover, if the applicant succeeds in its intended appeal, it can be adequately compensated in damages since there is nothing unique about the farms".

It is quite evident that the wording therein related to the farms, whereas the property in question in this application is a residential property and in any event the plants rests his case on the breaches of the rules.

Likewise in the case of J.M. Mwakio vs Kenya Commercial Bank Limited Civil Appeal No 156 of 1997, the Court of Appeal said:

"The appellant no doubt, lost a substantial property. The loss arose out of operation of the Contract of Mortgage freely executed by him and the respondent bank. We should not be seen to lack sympathy for him. But, the consequences that flows out of enforcement of law can be said to cause injustice".

That is a statement of law which I quite agree with. The defendant however has chosen to ignore one fundamental step in its quest to get back its money. That step is the valuation of the property, an omission which the plaintiff has chosen to take advantage of it and I think rightly so.

There are other issues which were raised by both counsels relating to the affidavits.

I have seen the plaintiff's affidavit and annextures in the court file. The affidavit is duly sworn and the annextures are duly commissioned.

Likewise the defendant's affidavit is duly sworn and so nothing turns on the submissions made about them and it is my holding that the same are validly filed in the court file.

An issue was also taken by Mr Kipkorir about the orders that was extracted. He urged that the same violated the provisions of Order 20 Rule 7(b) and hence was defective and void in law.

I have seen the order extracted and in most respects meets the provisions of Order 20 Rule 7(b). Counsel for the defendant has not specifically pin-pointed what is lacking in it and does not advance must his objection.

As I have said the plaintiff has made out a prima facie case with a probability of success, an order is hereby issued against the defendants or any other persons through them restricting them from breaching the terms of the agreement made on 17th February, 2000 and barring them from selling by auction the plaintiff's property known as LR No 209/8125 pending the hearing of the suit.

The costs of this application are awarded to the plaintiff.

Dated and delivered this 1st day of November, 2000.

(P.K.K.A. Birech)

Commissioner of Assize, Kisumu

1/11/2000

Coram: P.K.K.A. Birech, Commissioner of Assize

Nyang'wara - C/Clerk

Odhiambo for Wachira for applicant

E Owino for Kipikorir's respondent