



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL SUIT NO. 7 OF 2020

BUNGOMA ROYAL SUITES.....1 ST PLAINTIFF/APPLICANT

DAMIANUS PIUS MASINDE.....2ND PLAINTIFF/APPLICANT

VERSUS

TOURISM FINANCE CORPORATION.....DEFENDANT

R U L I N G

The plaintiff/applicant's application dated 21/8/2020, seeks the following main order;

- 1. The defendant/respondent be restrained by way of temporary injunction either by themselves, their agents and/or servants from taking possession, disposing off and or in any manner dealing with that parcel of land known as land reference no. BUNGOMA MUNICIPALITY/ 138 and 139 pending the hearing and determination of this application.**
- 2. The defendant/respondent be restrained by way of temporary injunction either by themselves, their agents and/or servants from taking possession, disposing off and or in any manner dealing with that parcel of land known as land reference no. BUNGOMA MUNICIPALITY/ 138 and 139 pending the hearing and determination of the main suit.**
- 3. Costs of the application.**

The application is supported by the 2nd applicant's affidavit. He depones that on 17/10/2017, they requested the respondent for a Kshs 69, 892, 996/= to complete a hotel project. The sums as agreed was for construction of the hotel upto Kshs 40, 720, 215/= and refinancing of a loan owed to Equity Bank up to the sum of Kshs 29, 172, 781/=.

He depones that vide letter dated 9/3/2018, Messrs. Morrison Consultants advised the respondent to advance the drawdown for the project in 2 stages subject to full utilization of the first tranche. By another letter of 5/9/2018, the said consultants informed the respondents that the applicants had exhausted the 1st drawdown and therefore eligible for the 2nd drawdown.

The applicant states that the respondent had failed in its part of the bargain by not honouring its obligations under the professional undertaking to Equity Bank causing his name to be submitted to the CRB and therefore being termed credit defaulter.

He depones that he has received letters from the respondent demanding payment of the outstanding loan and threatening to sell the charged property. He depones that the failure to repay the arrears owed has been caused by the respondents failure to honour the terms of their undertaking to equity bank and he cannot now access credit elsewhere.

The applicant depones that the respondent has also failed to release the 2nd drawdown for completion of the hotel and put it to operation and finally that he has received a letter from the respondent giving him a 40 day period to clear the sum of Kshs 61, 263, 622/= failure of which his property will be sold despite the adverse effects of covid-19.

The respondent by a Replying Affidavit dated 27th October, 2020 opposed the application deponing that the respondent agreed by way of an offer letter to make available to the applicants a term loan facility to the tune of Kshs 69, 892, 996/= on a number of conditions precedent and secured by the applicants' properties for purposes of constructing a hotel and refinancing an existing loan with Equity Bank (K) Ltd.

That Messrs. Morrison Consultants gave a stage report indicating the loan to be disbursed in 2 drawdowns of Kshs 27,757,268.46/= and Kshs 12,962,946.83/= respectively and the applicant was required to fully exhaust the 1st drawdown before qualifying for the 2nd disbursement. He denies ever receiving a letter from Messrs. Morrison Consultants dated 5/9/2018.

The respondent avers that the applicant was not entitled to receive the 2nd drawdown because as at the time the status report was submitted by Messrs. Morrison Consultants, there was evidence that the applicant had not fully utilized the 1st drawdown.

The deponent further avers that the respondent indeed paid Equity Bank the full sum of money owed by the applicant and even negotiated an outstanding arrears and settled on paying 50 percent of the interest owed.

He depones that the issuance of a demand notice was in order as several meetings had been held between the parties and that the 1st applicants account is in arrears despite proposals by the applicants to pay off the loan from proceeds of sale of other properties which have been fulfilled to date.

Further, he depones that the applicants have not made any repayment since January, 2019, way before Covid-19 was declared in this country. He blames the applicants for being insincere.

By orders of this court, the application was canvassed of by way of written submissions.

The applicant in urging the court to find that he has met the threshold for the grant of the orders sought relied on the authorities in ***Giella vs Cassman Brown and CO. Ltd (1973) E.A 358, Musa K Kibusia vs Richard Kiplawat Chemjor & another (2021) eKLR, Mrao Vs First American Bank of Kenya Ltd & 2 Others (2005)eKLR, Joshua Musau Mutiso Vs Cyrus Robert Sala Nzibu & Another (2019)eKLR and Charles Awiti & 19 others Vs China Road & Bridges Corporation Kenya Limited (2016)eKLR.***

Counsel submits that if the orders sought are not granted, the respondent may sell his properties pursuant to statutory notice dated 17/12/2019 and notice of intention to sell dated 30/4/2020.

He submits that they qualify for a 2nd drawdown yet the respondent has frustrated their efforts of realizing their investment. He further submits that there is need to preserve the properties from alienation so that as they litigate on whether there was default or not, the substratum of the suit is preserved.

On their part, the respondent submits that the applicants have established a prima facie case with a probability of success for the reason that the respondent duly performed its obligations under the letter of offer, that the respondent could not disburse the 2nd drawdown because the applicant had not satisfied a condition precedent to wit, exhaust the 1st drawdown and finally that the respondent duly honoured the professional undertaking with the bank for the redemption of the loan owed by the applicants. Counsel relies on the authority in ***Mrao Limited vs First American Bank of Kenya Ltd & 2 others (2003)eKLR, Robert Mugo wa Karanja Vs Ecobank (Kenya) Limited and another (2019)eKLR and Lucy Wangui Gachara Vs Minudi Okemba Lore (2015)eKLR.***

On whether the applicant has demonstrated an irreparable loss, counsel submits that if the applicants loose their property subject of the charge herein, damages will be adequate. The authority of ***Kitur Vs Standard Chartered Bank & 2 Others (2002)eKLR*** has been cited in support of this proposition.

On which party will suffer greater harm, counsel submits that if the orders sought are granted, the respondent will face greater hardship because the outstanding amount shall continue to accrue interest. He cites the case of ***Thathy Vs Middle East Bank (K) Ltd (2002) IKLR.***

Having perused the application, the reply thereto with all the accompanying annexures together with the parties rival submissions, the only issue in this application is whether the applicant has made out a case for the grant of the orders sought.

The grant of orders of a temporary injunction is anchored on the provisions of Order 40 Rule 1 of the Civil Procedure rules which provides;

1. Where in any suit it is proved by affidavit or otherwise—

a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or y g wrongfully sold in execution of a decree; or

b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

The principles guiding such grant were enunciated in the celebrated case of ***Giella Vs Cassman Brown & Co. Ltd (1973)E.A 358*** where the court gave the three broad principles that must be met by an applicant before the orders can be granted. The 3 conditions are, (i) an applicant must show a prima facie case with a probability of success; (ii) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, and; (iii) when the court is in doubt, it will decide the application on the balance of convenience;

Prima facie case with a probability of success

The dispute herein relates to a loan facility advanced to the applicant for purposes of putting up a hotel. The loan was to be paid in 2 tranches on condition that the initial tranche is depleted before the other is disbursed. The issue arose whether the applicant was entitled to the 2nd tranche which was allegedly held back by the defendant due to non-depletion of the initial tranche advanced.

There are allegations on the applicant's part that the quantity surveyors gave a positive report that the amount had been depleted and therefore eligible for the 2nd disbursement while the respondent counters this by another letter from the same quantity surveyors indicating the contrary.

What therefore remains is that this being an interlocutory hearing where the court is called upon to make a determination based on affidavit evidence, it is the opinion of this court that given the rival stands taken by the parties, it is clear that there is a serious question of fact and law to be tried by way of evidence.

A similar approach was taken by Nyakundi J. in *Royal Mabati Factory Limited V Imarisha Mabati Limited [2018] eKLR* where the learned Judge held:

My role at this stage is to ensure that I do not embark on a journey resulting that of in depth analysis meant to be of a trial of the suit. This is indeed so given the fact that at this stage I have been presented with a rival affidavit evidence. I consider resolution of any disputes in the affidavit evidence and any difficult queries of the law to be a preserve of the main action.

It is also a principle of law that in exercising discretion for grant of interlocutory injunction the court should take the approach that appears to carry what I can call a lower risk of injustice to either of the parties in the suit. I am therefore guided by the above principles in determining whether or not the applicant's Notice of Motion on interlocutory injunction should be granted pending the hearing and determination of the main suit.

The court is in agreement and therefore find on this limb that there is serious issue to be tried in the main suit and an injunction will suffice for purposes of protecting the substratum of the suit.

Whether there will be irreparable injury

It is not in doubt that the applicant offered 3 parcels of land as security against the loan and are now at risk of being auctioned to satisfy the debt.

The respondent's contention is that the properties are charged in its favour and if sold, damages would be foreseeable and adequate.

The court on this limb is required to balance the two conflicting rights with view of doing justice to both as the court's duty on interlocutory applications is purely discretionary.

I have analysed the material on record, in *Marple Brooks Projects Company Limited & another Vs I & M Bank Limited (2019) eKLR* the court held;

"The next issue to address is whether the injury visited upon the Applicant should the conservatory orders not be granted could be compensated by way of damages. The principle generally is that where damages would suffice and the Respondent would be in a position to pay them, the court ought not to grant conservatory orders at an interlocutory stage. However, the position taken by Ringera J.A in the case of Kanorero River Farm Ltd and 3 Others v National Bank of Kenya Ltd (2002) 2 KLR 207 was that "No party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."

In the circumstances of this case and taking into account that all the

requirements thereto ought to be taken and considered conjunctively and in the interest of justice with a view of protecting the suit property pending the hearing of main suit.

I allow an order of injunction to issue restraining the Respondent from disposing of or in any manner dealing with parcel of land known as **Bungoma Municipality/138 and 139** for 6 months from today's date within which time the main suit will be heard and finalized.

If the suit is not prosecuted, by plaintiff, heard and finalized within the said 6 (six) months, this order will lapse on 21st March, 2022.

DATED, DELIVERED and SIGNED at BUNGOMA this 21st day September, 2021.

S N RIECHI

JUDGE