



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 145 OF 2018**

VINBEL INTERNATIONAL LIMITED.....1<sup>ST</sup> PLAINTIFF/APPLICANT

VINCENT AMENYA MARUBE.....2<sup>ND</sup> PLAINTIFF/APPLICANT

ISABELLA KERUBO ONGERA.....3<sup>RD</sup> PLAINTIFF/APPLICANT

**-VERSUS-**

**KEROKA TECHNICAL TRAINING**

**INSTITUTE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**CABINET SECRETARY-MINISTRY**

**OF EDUCATION.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**CHASE BANK**

**(under receivership).....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**NELSON WAWERU t/a**

**ANTIQUA AUCTIONEERS.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiffs have filed a Notice of Motion dated 18<sup>th</sup> June, 2018 supported by the grounds set out on the body thereof and the sworn affidavit of Vincent Amenia Marube. The plaintiffs are seeking the following orders:

*i) Spent.*

*ii) Spent.*

*iii) THAT pending the hearing and determination of the suit, a temporary injunction do issue restraining the 4<sup>th</sup> and 5<sup>th</sup> defendants, their employees, agents and/or servants from advertising for sale, auctioning, selling, transferring, disposing and/or dealing with the plaintiffs' quiet possession and enjoyment of the suit property.*

*iv) THAT this Honourable Court be pleased to issue a mandatory injunction and/or appropriate prerogative orders directed at the 1<sup>st</sup> and 2<sup>nd</sup> defendants to honour the irrevocable undertaking to pay and do pay to the 4<sup>th</sup> defendant all monies owed by themselves to reduce and/or liquidate the plaintiffs' charge loan with the 4<sup>th</sup> defendant.*

*v) THAT the costs of the application and interest thereon be provided for.*

*vi) Any other and further reliefs that this Honourable Court may deem fit and just to grant in the circumstances.*

2. Vincent Amenya Marube, the deponent in this instance and a director of the 1<sup>st</sup> plaintiff, averred that the 1<sup>st</sup> plaintiff took out a credit facility of Kshs.55,000,000/= from the 4<sup>th</sup> defendant while the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs acted as guarantors for the 1<sup>st</sup> plaintiff and charged their two (2) properties to the 4<sup>th</sup> defendant as security. That the 4<sup>th</sup> and 5<sup>th</sup> defendants have since advertised the suit properties in the local newspaper and scheduled a sale by way of public auction for 20<sup>th</sup> June, 2018.
3. The deponent also stated that the 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant entered into a written contract for certain works for the contract price of Kshs.65,512,000/= and that both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants undertook to pay the proceeds of the said works to the 4<sup>th</sup> defendant in a bid to liquidate the 1<sup>st</sup> plaintiff's credit facility. Vincent Amenya added that the proceeds of the contract can adequately liquidate the 1<sup>st</sup> plaintiff's liabilities and that these proceeds are inaccessible to the 1<sup>st</sup> plaintiff. That the 4<sup>th</sup> defendant has since failed, neglected and/or refused to accept the proceeds of the aforesaid contract and thus, the purported sale of the suit property will subject the plaintiffs to double jeopardy.
4. In opposition to the Motion, the 1<sup>st</sup> defendant filed a replying affidavit sworn by *Evans Bosire Omwenga*. Therein, the deponent confirmed that the 1<sup>st</sup> defendant had signed a contract with the 1<sup>st</sup> plaintiff but refuted that an arrangement had been made to have the monies paid by the 1<sup>st</sup> defendant to the 4<sup>th</sup> defendant. It was the deponent's statement that the 1<sup>st</sup> plaintiff had received all payments and acknowledged receipt thereof and hence, the 1<sup>st</sup> defendant was not obligated to pay any monies directly to the 4<sup>th</sup> defendant.
5. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed Grounds of Opposition to the Motion on 12<sup>th</sup> September, 2018 essentially arguing that they are not privy to the dealings between the plaintiffs and the other defendants, and hence the issues raised cannot be controverted by them; that the suit does not disclose a reasonable cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and that the Motion is incompetent, fatally defective and bad in law.
6. In his replying affidavit on behalf of the 4<sup>th</sup> and 5<sup>th</sup> defendants, *Kevin Kimani* deponed that the 1<sup>st</sup> plaintiff had taken out a loan facility with the 4<sup>th</sup> defendant while the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs executed a letter of Guarantee and Indemnity in that regard; that the 1<sup>st</sup> plaintiff defaulted in repaying the loan facility, prompting the 4<sup>th</sup> defendant to issue a demand notice. That despite the issuance of the demand notice, the 1<sup>st</sup> plaintiff has continued to be in default. The deponent also stated that a redemption notice and notification of sale were later issued and in the absence of a response or effort to make the necessary payments, the suit property was advertised for sale by way of a public auction.
7. It was the deponent's further averment that the plaintiffs previously filed a chamber summons application dated 17<sup>th</sup> August, 2017 seeking injunctive orders and which application was heard and dismissed by the late Honourable Justice J.L. Onguto on 2<sup>nd</sup> February 2018. That owing to the fact that the 1<sup>st</sup> plaintiff is in default, it would only be fair for the 4<sup>th</sup> defendant to be permitted to proceed with recovery. That in any case, the plaintiffs have not satisfied the necessary conditions for the granting of an interlocutory injunction.
8. The application was canvassed through written submissions. In citing among others, the *Giella v Cassman Brown* case, the plaintiffs submitted that they have a prima facie case with a probability of success in the sense that the 1<sup>st</sup> defendant has failed to pay the contractual sum to the 1<sup>st</sup> plaintiff whereas the 4<sup>th</sup> defendant has neglected to collect or otherwise accept the proceeds of the contract. As concerns irreparable harm, the plaintiffs contended that the 4<sup>th</sup> defendant intends to auction their parcels of land and thus causing them an inconvenience and that the suit will be rendered nugatory. It was also the plaintiffs' submission that it is the plaintiffs who stand to suffer greater harm should an injunction be denied. In turn, the plaintiffs argued that they have met the threshold for granting a mandatory injunction.
9. The 1<sup>st</sup> defendant's submissions reiterated their argument that there was no arrangement to make any payments to the 4<sup>th</sup> defendant and that the plaintiffs do not have an arguable case. A few authorities were cited in support thereof but which I find to be irrelevant here.
10. In their submissions, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants restated the contents of their Grounds of Opposition, adding that the plaintiffs have neither established a prima facie case against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, nor shown the irreparable damage they stand to suffer if the prayer for an interlocutory injunction is not granted. The aforementioned defendants maintained that the suit does not disclose any reasonable cause of action against them as they were not parties to either of the agreements mentioned in the matter. The defendants quoted *Order 29, Rule 2 (2) (d)* of the Civil Procedure Rules in indicating that the application goes contrary to the cited provision.
11. The 4<sup>th</sup> and 5<sup>th</sup> defendants in their submissions echoed the sentiments raised by their counterparts that the plaintiffs have not established a prima facie case or demonstrated what irreparable harm they will suffer, and that the balance of convenience tilts in favour of the 4<sup>th</sup> respondent.
12. I have considered the application and respective responses together with the rival submissions before me. This is largely a question of whether or not to grant an interlocutory injunction. That said, I must remind the parties that it is not my duty to delve into the merits of the suit at this point in time.
13. The principles surrounding interlocutory injunctions are encapsulated in the renowned *Giella v Cassman Brown (1973) EA 358* case. In the same wavelength, the case of *American Cynamide v Ethicon (1975) AC 396* has stipulated largely similar principles that have proved relevant in offering guidance, that is:

**a) Whether there is a prima facie case.**

**b) Whether damages would be an adequate remedy in the event that an injunction is not granted and if not, whether the applicant would be able to give an undertaking in damages to the defendant(s).**

c) *Where the balance of convenience tilts.*

14. For ease of reference, I shall draw from the *Giella v Cassman Brown case (supra)*. The first principle concerns whether a *prima facie case has been established*. In *Mrao Ltd v First American Bank of Kenya and 2 others [2003] eKLR* relied upon by the parties, the Court of Appeal sought to define the same as hereunder:

**“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a 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.”**

15. The Appeal Court went further to opine that:

**“...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’s case upon trial. That is clearly a standard which is higher than an arguable case.”**

16. From the above, it is evident that proof of a *prima facie* case is placed at a higher pedestal in comparison to an arguable case. It is not in dispute that the 4<sup>th</sup> defendant advanced a loan facility to the 1<sup>st</sup> plaintiff or that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs acted as its guarantors. It is also not in dispute that the loan is yet to be repaid and in relying on the documents availed to me, it would appear the 4<sup>th</sup> defendant has every legal right to realize its security since the necessary notices had been issued.

17. That said, there arises the question as to whether or not there was an arrangement to have the payments made to the 4<sup>th</sup> defendant through the 1<sup>st</sup> defendant. I have noted from the documents annexed to the Motion the letter dated 19<sup>th</sup> September, 2013 and marked “VAM 5.” It would appear the letter was drawn by the Ministry of Public Works and not the 1<sup>st</sup> defendant. Not only so; the said letter does not address the specifics of the purported payments to be made to the 4<sup>th</sup> defendant, neither is the 1<sup>st</sup> defendant mentioned therein. In other words, there is nothing to indicate that the 1<sup>st</sup> plaintiff and 1<sup>st</sup> defendant agreed to have the 1<sup>st</sup> defendant pay any amount to the 4<sup>th</sup> defendant. Drawing from the above, I take the considered view that the plaintiffs have failed to convince me of the existence of a *prima facie* case.

18. On the second principle relating to *irreparable damage*, the plaintiffs are apprehensive that unless an interlocutory injunction is granted, their parcels of land will be auctioned. The case of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR* was cited. The question really is whether the plaintiffs stand to suffer irreparable and substantial loss that cannot be compensated through damages. In *Paul Gitonga*, the court drew from the *Halsbury’s Laws of England* analysis that:

**“...Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”**

19. I have in turn considered the *Nguruman Limited v Jan Bonde Nielsen & 2 Others, CA NO. 77 OF 2012* case quoted by the Court of Appeal in *Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR* in this respect:

**“...If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage.”**

20. I am alive to the fact that the suit properties were legally charged to the 4<sup>th</sup> defendant and thus giving it every prerogative to exercise its statutory power of sale over the same in the event of a default. It has also been shown that the 1<sup>st</sup> plaintiff is in default and that the requisite notices have already been issued to the plaintiffs by the 4<sup>th</sup> defendant and that the same have not elicited any response from the plaintiffs. Under the circumstances, there is nothing barring the 4<sup>th</sup> defendant from realizing its securities.

21. In relation thereto, I am called to consider the arguments by the 4<sup>th</sup> and 5<sup>th</sup> defendants that the plaintiff has not come to court with clean hands. I reiterate that there is nothing to indicate that the plaintiffs have made efforts to service the loan or reply to the demand notices issued; in this sense, I am inclined to agree with the 4<sup>th</sup> and 5<sup>th</sup> respondents and find that the plaintiffs appear to be riding on tenuous arguments.

22. This brings me to the third principle on the *balance of convenience*. Having determined that the plaintiffs have not established a *prima facie* case, it is inevitable that the balance of convenience tilts in favour of the defendants and more so, the 4<sup>th</sup> defendant.

23. I am now left with the prayer relating to the granting of a mandatory injunctions. In consideration thereto, I take from the Court of Appeal’s analysis in *Lucy Wangui Gachara (supra)* that mandatory injunctions can only be granted in clear-cut cases and especially when sought at the interlocutory stage. The mandatory injunction is sought against the 1<sup>st</sup> and 2<sup>nd</sup> defendants and yet there is no proof of the existence of an arrangement for any payments. The letter of undertaking was evidently not issued by either of the said defendants.

Consequently, I would be hesitant to grant a mandatory injunction.

24. Before I pen off, I have observed that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants sought to have the application and suit against them struck out. I acknowledge that Order 29, Rule 2 (2) (d) of the Civil Procedure Rules prohibits injunctive orders against the government but there are several authorities to the contrary. Should the relevant parties be desirous of having the suit against them struck out, I would advise that they move the court appropriately.

25. The upshot is that the Motion lacks merit and the same is dismissed. The plaintiffs shall bear the costs of the application.

**Dated, signed and delivered at NAIROBI this 14<sup>th</sup> day of February, 2019.**

**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Plaintiffs/Applicants

..... for the 1<sup>st</sup> Defendant/Respondent

..... for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents

..... for the 4<sup>th</sup> and 5<sup>th</sup> Defendants/Respondents