



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 318 OF 2018

MENENGAI ROLLING MILLS LIMITED.....1ST PLAINTIFF

I & M BANK LIMITED.....2ND PLAINTIFF

VERSUS

BLUE NILE WIRE PRODUCTS LIMITED.....1ST DEFENDANT

IDEAL AUCTIONEERS.....2ND DEFENDANT

RULING

1. The Notice of Motion dated 8th August 2018 and filed the next day on 9th August 2018 seeks the following remaining prayer:-

THAT the Defendants by themselves, their servants and/or agents be restrained by way of a temporary injunction from trespassing alienating, attempting to remove and goods and/or interfering in any manner whatsoever with the goods and machinery domiciled within the premises known as L.R. No.12815, pending the hearing and determination of the suit.

2. The Motion is an interlocutory application in proceedings commenced by Menengai Rolling Mills Limited (the 1st Plaintiff) against Blue Nile Wire Products Limited (the 1st Defendant or Blue Nile) and Ideal Auctioneers (the 2nd Defendant or the auctioneers). On 13th August 2018, I & M Bank Limited (the 2nd Plaintiff or the Bank) was allowed into the proceedings as the 2nd Plaintiff.

3. The suit involves goods and machinery standing or found on all that parcel of land known as LR.No.12815 (Orig.No.4955/19/1)(the premises).These premises are registered in the name of the 1st Plaintiff. In brief, the 1st Plaintiff is aggrieved by the action of the 2nd Defendant acting on behalf of the 1st Defendant in respect to proclamation of certain goods and machinery in an alleged distress for rent. The 1st Plaintiff's case is that it is not a tenant of the 1st Defendant in the said premises.

4. The 1st Plaintiff explains that it finds itself on the premises because in the year 2017 it agreed with one Menengai Stores Limited(**Menengai Stores**) to store and operate its machinery thereon. It emphasizes that the placement of the machinery was not an act of sale or conveyance of ownership of its rights.

5. The 1st Plaintiff asserts that, although it was informed that the 1st Defendant was the owner of the premises, it is not a party to any terms of lease between the 1st Defendant and Menengai Stores. Further that it was not aware of any indebtedness by Menengai Stores to Blue Nile in respect to rent arrears.

6. The 1st Plaintiff states that it is therefore troubled by the said proclamation as it does not owe any rent or monies on any other account to the 1st Defendant. That, in any event, the act of proclaiming the goods infringes on the rights of the Bank which holds a debenture over the said machinery and goods.

7. The Bank on its part sets out events leading the creation of the aforesaid debenture. That by a letter of offer dated 22nd May, 2018 the 1st Plaintiff was advanced the sum of Kshs.167,359,611.14. The said facility was secured by an all asset debenture dated 2nd April, 2014 in which the 1st Plaintiff charged all its assets for the sum of USD 2 million in favour of the Bank.

8. The application is resisted by the 1st Defendant which gives a version of its story. That through a Memorandum of understanding dated 13th December 2015, it agreed with Menengai Stores to have the property transferred to the latter for a consideration of 130,000,000.00 but

subject to a formal agreement for sale being executed.

9. Following those negotiations parties entered into an agreement of sale dated 23rd March 2016 and which was varied on 29th March 2016. For purposes of the matter before court, the details that led to the variation are not necessary.

10. However, an important aspect of the variation of the agreement was that the intended purchaser was to take possession of the property pending the subsequent transfer of the property to itself. In consideration, the purchaser agreed to pay a monthly rental fee for occupying the property.

11. The intended sale fell through after the 1st Defendant rescinded the contract. Again, details as to the circumstances leading to the undoing of the intended sale are unnecessary for now.

12. The Recession notice issued by the 1st Defendant required Menengai Stores to vacate the property within 14 days from the date when Notice was to take effect. It is the 1st Defendant's case that the notice was served on 5th October 2107 and the purchaser was required to hand over vacant possession of the property by 18th November 2017. It is a complaint by the 1st Defendant that Menengai Stores refused or declined to vacate the property and has been a trespasser thereon since 18th November 2017.

13. In a bid to end what it considered an unlawful occupation, the 1st Defendant issued a 3 month notice upon Menengai Stores. The notice issued on 18th November 2017 is said to have lapsed on 18th February 2018 or thereabouts.

14. In the meantime, Menengai Stores was not paying rent and so the 1st Defendant instructed the 2nd Defendant to levy for distress of rent upon the goods of Menengai Stores which were to be found in or on the premises.

15. In light of these, it is the 1st Defendant's case, *inter alia*, that the distress for rent levied on Menengai Stores is lawful as it owed it rent arrears.

16. Mr. Botu Jagannadha Rao who swore an affidavit on 15th September 2018 on behalf of the 1st Defendant makes the following averment:-

a) The Purchaser has always been the entity in possession of the property. The company has never dealt with the Plaintiff in any capacity whatsoever

b) The Plaintiff and the Purchaser- Menengai Stores Limited- are entities. Not only do the two entities share a first name and postal address, but the affidavit supporting the application was also deposed by one Vikash Anikumar Gudhka who is also a director with the Purchaser, Menengai Stores Limited. The Plaintiff is thus using the veil of incorporation as a device and a sham; a mask to perpetrate a fraud on the 1st Defendant.

c) The supporting affidavit conveniently left out any documents explaining how the Plaintiff came into possession of the property since the Plaintiff was neither a Purchaser nor a permitted tenant on the property. As such, if it is true that the Plaintiff is in possession of the property then the Plaintiff is also a trespasser who has no legal right of possession of the property and should therefore be evicted.

17. This Court has considered the arguments for and against the application and proposes to dispose of the matter on a narrow issue for reasons that become apparent shortly.

18. From my reading of the Motion under consideration, the 2nd Defendant has caused a proclamation of the goods and machinery belonging to the 1st Plaintiff. The same have not been removed or physically attached. Nevertheless, the 1st Plaintiff seeks both a temporary injunction and one of mandatory nature.

19. The principles upon which a Court will grant a temporary injunction are agreed to be:-

a) An Applicant must show a prima facie case with a probability of success.

b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately compensated by an award of damages.

c) If the Court is in doubt, it will decide an application on the balance of convenient.

As for a mandatory injunction, the Court of Appeal in Tom Onyango v Mimosa Investments Limited [2017]eKLR stated:-

“[11] The principles for granting mandatory injunctions at an interlocutory stage are not in dispute. It is the application of those principles in the context of the case which is in contention. As the authorities cited by the respective counsel show, a mandatory injunction may be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not be normally granted. It may be granted in clear cases where, inter alia, the court is satisfied that the matter ought to be decided at once or where the circumstances are such that the court is satisfied that the case is unusually strong and clear. In exceptional cases, the court has discretion to grant an interim relief although it amounts to granting the final relief itself prayed in the suit”.

These principles guide my hand.

20. The Bank asserts that the assets which are the subject of proclamation have been charged to it under a Debenture registered on 30th April, 2014. The Debenture predated the date of proclamation which is 30th July 2018. This is about 4 years after. While the 1st Defendant has forcefully argued that the 1st Plaintiff and Menengai Stores are one and the same entity, it has not put forth material to debunk the assertion of both the Bank and 1st Plaintiff of the existence of a debenture over the said property. An interim finding is thus made by this Court that the property under proclamation is the subject of the Debenture of 30th July 2018 in favour of the Bank.

21. The Bank's argument is that it has priority over the said properties. The answer by 1st Defendant is that, as of now, the Debenture is a floating charge and has not crystallized.

22. For its argument the 1st Defendant relies on the decision of Sewe J. in Ayaz Hussein Mukhi v Sundip Patel & 3 others [2017] eKLR where her Ladyship approved the finding in Diversity Lever East Africa Ltd vs. Mohanson Foods Distributors Ltd and Another [2004] 1 EA 43, as follows:-

"Where there was a floating charge over the movable property of an execution debtor created by a debenture, the floating charge crystallized on the date of appointment of the receiver. As no receiver had been appointed by the objector in the present case, the debenture had not crystallized. If before the appointment of a receiver by a debenture holder the machinery of execution by attachment and sale is put in motion by an execution creditor, then the execution creditor has priority over the debenture holder whose charge has not yet crystallized."

23. This Court has read this decision and the Court of Appeal decision in Lochab Brothers v Kenya Furfural Co. Ltd [1983] eKLR. The Court has understood the law to be that the right of an executing creditor ranks in priority over that of a debenture-holder only where execution has been completed by sale of the attached property before the charge crystallizes (see Mackenzie (Kenya) Ltd v Pharmico Ltd [1976] eKLR). On the other hand, a floating charge which crystallizes into a fixed charge defeats any incomplete execution.

24. Crystallization in this context is the process of a floating charge converting into a fixed charge upon the occurrence of certain events. In the matter at hand, the Bank and the company, contractually provided the events upon which the floating charge constituted in the debenture would automatically crystallize. This is found in clause 14 of the Debenture document which reads:-

"14. The principal moneys and interest and other moneys and liabilities hereby secured shall immediately become due and payable without any demand or notice of any kind all of which are expressly waived by the Company and the Company shall provide cash over on demand for all contingent liabilities of the Company to the Lender for all notes and bills confirmed and accepted endorsed or discounted and all bonds guarantees indemnities documentary and other credits or any instruments whatsoever from time to time entered into by the Lender for or at the request of the Company on the happening of any event stated hereunder and any floating charge constituted by this debenture shall automatically crystallize and attach by way of the fixed charge on all the assets herein comprised:

14.1 if any amount due by the Company hereunder or under any other agreement made between the Lender and the Company is not paid when demanded or on the due date of payment thereof (whether or not demanded) or if any amount due by the Company under any other agreement or instrument available by or to the Lender or any other creditor, bank, person or Company is not paid on the due date for payment thereof; or

14.2 if a distress or execution either by Court order decree or process or otherwise is levied upon any part of the property and assets of the Company or the Company commits any act or default by reason of which any such distress or execution might be levied; or

14.3 if the Government or any other competent authority nationalizes seizes or otherwise expropriates or assumes custody or control of all or any substantial part of the share capital property assets business or operations of the Company or takes any action for the dissolution of the Company or any action (including but not limited to the withdrawal Company) which would prevent the Company from carrying on its operations or a substantial part thereof; or if any Government or any such authority gives notice of its intention to perform any such action as hereinbefore in this sub-clause set out; or

14.4. if a receiver is appointed by any Court or by any other person over any part of the property and assets of the Company; or

14.5. if an order is made or a resolution is passed for the winding up of the Company or a petition for such winding up is filed or a notice of a meeting to pass such resolution is issued; or

14.6 if the Company without the consent of the Lender ceases to carry on its business or threatens to cease to carry on the same; or

14.7 if the Company commits or attempts or purports to commit any breach of the covenants herein contained; or

14.8 if the Company stops payment or becomes unable to pay its debts within the meaning of Section 220 of the Companies Act or if the Company proposes to enter into any composition or arrangement with its creditors or any class of its creditors; or

14.9. if the Company does or suffers to be done any act likely to prejudice the effectiveness of the Lender's rights under this Debenture or there is good reason to assume that the Company's financial position or standing has materially deteriorated; or

14.10 if any civil war revolution insurrection action by local national or foreign or international forces blockade riots or any event acts of God or otherwise beyond the control of the Company shall seriously impair the efficient and proper conduct of the business of the Company or render the same unreasonably hazardous; or

14.11 upon demand made by the Lender for the moneys due to it under the provisions of these presents; or

14.12. if the security constituted by any debenture charge mortgage or other security granted by the Company becomes enforceable whether the same is actually enforced or not; or

14.13 if the Company pledges or otherwise encumbers any of the property and assets hereby charged or attempts so to do without the consent in writing of the Lender.

14.14 if any circumstances arise which may in the opinion of the Lender materially and adversely affect the ability of the Company to perform its obligations under this Debenture; or

14.15 if any of the above events occur in relation to any third party who or which now or hereafter has guaranteed or provided security or given an indemnity in respect of any of the moneys obligations or liabilities secured by this Debenture or if any such person gives notice terminating his or its liability under the relevant guarantee indemnity or security". (my emphasis)

25. Clause 14.2 would be of relevance because distress or execution of a Court order, or process or distress or execution of any other kind upon the charged property has the automatic and immediate effect of converting the floating charge to a fixed charge. Once there has been crystallization then the debenture holder's interest takes precedence of that of the executing creditor, but only if, the execution is not complete.

26. In the matter before Court, the acting of proclaiming the charged property had the immediate effect of crystallizing the charge. Since the execution is not complete as there has been neither a seizure nor a sale, then the Bank's interest in the property would be in priority to that of the 1st Defendant. That is an interim verdict of this Court on the basis of the material before it. That makes for a prima facie case in favour of the Plaintiffs, as would do for the Bank.

27. The 1st Defendant nevertheless argues that the Bank does not stand to suffer irreparable loss as there are various rights and options under the Debenture Deed that they can resort to. The 1st Defendant does not however point out those rights and options.

28. Yet the Bank would not be entitled to such protection if it is conniving with the 1st Plaintiff simply to frustrate the 1st Defendant. On this, I observe that it has not been stated or demonstrated that there is a collusion between the Bank on the one part and the 1st Plaintiff and/or Menengai Stores on the other. This Court would therefore be reluctant to overlook what may amount to an infringement of the right of a Debenture Holder. The law is and has always been that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury. Looked at from another perspective there will be occasion, though in the exception, where a temporary injunction will be allowed notwithstanding that the Applicant will not suffer irreparable damage. I would hold that this case belongs to that class of cases, if only, because to decline the application will be to send a signal that a Debenture holders' right over charged property is really not a strong hold.

29. That said, the grant of order of injunction is motivated only by the secured position of the Bank. For that reason the order of injunction is granted only in so far as the Debenture subsists. Should the Bank want to discharge the properties, then it must give the 1st Defendant a notice of 30 days prior to doing so to enable the 1st Defendant move the Court as against the 1st Plaintiff, if it so wishes.

30. Each party to bear its own costs on the application.

Dated, delivered and signed in open Court at Nairobi this 19th day of July, 2019.

F. TUIYOTT

JUDGE

Present:-

Odhiambo for Nganga for 1st Plaintiff

Bundotich for 1st Defendant

Kabugu for 2nd Defendant

Nixon -Court Assistant