



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 141 OF 2019**

**QUALITY BITUMEN PRODUCTS LIMITED.....PLAINTIFF**

**VERSUS**

**EQUITY BANK KENYA LIMITED.....DEFENDANT**

**RULING**

1. Through the application dated 24<sup>th</sup> June 2019 the applicant herein seeks the following orders:

**a. Spent**

**b. That this Honourable Court be pleased to issue a temporary injunction order restraining the defendant, whether by itself, agents, or servants from doing any of the following acts, that is to say, commencing realization of security, exercising power of sale, further advertising, selling, disposing, alienating, transferring and/or in any other manner interfering with the plaintiff's quit possession, occupation and enjoyment of all that piece of land known as LAND REFERENCE NUMBER 336/203 (original Number 336/188/1) pending the hearing and determination of this application interparties.**

**c. That this Honourable Court be pleased to issue a temporary injunction order restraining the defendant, whether by itself, agents, or servants from doing any of the following acts, that is to say, commencing realization of security, exercising power of sale, further advertising, selling, disposing, alienating, transferring and/or in any other manner interfering with the plaintiff's quit possession, occupation and enjoyment of all that piece of land known as LAND REFERENCE NUMBER 336/203 (original Number 336/188/1) pending the hearing and determination of this suit.**

**d. That costs of the application be borne by the defendant/respondent.**

2. The application is supported by the affidavit of one **Peter Mugambi** who outlined the detailed background of the dispute. A summary of the applicant's case is that on or about the year 2011, the applicant obtained a loan facility of Kshs 63,000,000 to enable it purchase the suit property herein, being LR No. 336/203 which facility the applicant offset in full on or about 31<sup>st</sup> December 2015.

3. The applicant states that despite settling the loan, it did not retrieve its charged title document from the respondent in anticipation of future engagements but that in an unexpected turn of events and without any notice to the applicant, the respondent purported to consolidate loan facilities obtained by another company known as Welcap Company Ltd by irregularly using the suit property as a collateral.

4. The applicant further states that the said Welcap Limited is a corporate entity in which one director, is also a director in the plaintiff company and that the said company sought individual finances from the respondent on the strength of securities belonging to said other director in his individual capacity namely;

**i. Kiambu/Municipality Block 5 (Kiamumbi) 478.**

**ii. Maisonette No. 6 on L.R. No. 1/446, Bristol Court, Ngong Road.**

**iii. Naivasha/Mwichiringiri Block 4/5898.**

**iv. Mikindani Block of Flats, 9 units.**

5. The applicant's case is that the respondent was expected to create charges over the said securities provided to it. The applicant contends that it learnt of its alleged indebtedness to the respondent, through a newspaper advertisement of the intended auction of the suit property for non-payment of the loan secured by the said Welcap Company.

6. It is the applicant's contention that it learnt of the unlawful creation of a charge over its property for the sum of Kshs 45 million which it never borrowed and which property it never offered as security.

7. At the hearing of the application the applicant's counsel submitted that the plaintiff is a separate and distinct legal entity which stands to suffer irreparable loss if its property is auctioned for a loan facility that was never extended to it.

8. The respondent opposed the application through the replying affidavit of its advocate **KARIUKI KINGORI** who avers that the applicant's deponent, in his capacity as the plaintiff's director, executed a letter of offer and mortgage for a loan facility of Kshs 45 million and a revolving letter of credit limit of Kshs 18 million thereby making a total of Kshs 63 million.

9. He further avers that in October 2016 the applicant's deponent, in his capacity as applicant's director, sought a further loan facility by signing a letter of offer and guarantee in favour of Welcap Works Ltd for a facility of Kshs 45 million whereupon he offered the suit property as an existing security for the loan facility together with other properties.

10. It is the respondent's case that the applicant defaulted in repaying the loan and that the respondent is therefore entitled to exercise its statutory power of sale. He further states that the intended auction of the suit property was however called off/halted so as to accommodate the applicant who had approached the respondent and made an undertaking to pay the outstanding loan. He states that while making the undertaking, the applicant's deponent presented an executed sale agreement dated 11<sup>th</sup> February 2019 to the respondent wherein at paragraph 4.2 thereof, there is a confirmation that the purchase price was to be deposited in the applicant's account held by the respondent in order to offset the loan. It is the respondent's case that the said undertaking was not honoured thereby prompting the respondent to engage the auctioneers to realize the security through public auction.

11. Parties canvassed the application by way of written submissions which I have carefully considered. At the heart of this application is the issue of whether the applicant has made out a case for the granting of the injunctive orders sought.

12. The principles governing the issuance of orders of injunction were stated in the landmark case of **Giella v Cassman Brown and Company Limited (1973) E.A 3859** wherein it was held that all the court was required to do was to satisfy itself if either party had shown a prima facie case with a probability of success and whether, if the temporary injunction was refused, the party seeking it stood to suffer irreparable harm for which damages would not be an adequate remedy. If in doubt, the court was to consider the balance of convenience and determine, on the facts of the case, whether the balance of convenience lay with the appellants or with the respondents.

13. Courts have taken the position that it is not the role of the court, when considering the interim applications, to make a final determination on the conflicting affidavit evidence. Lord Diplock warned in **American Cyanamid Co (No 1) v Ethicon Ltd [1975] UKHL 1** as follows:

**“it is not part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”**

14. Similarly in **Mbuthia v Jimba Credit Finance Corporation & another [1988] KLR 1** it was held that:

**“the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions.”**

15. Expounding on the principles in **Giella v Cassman Brown & Co Ltd** (supra), this Court, in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, stated that:

**“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. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”**

16. Having regard to the known principles of injunction as set out in the above cited cases, I will now turn to consider if the application meets the threshold set therein.

17. On prima facie case, it is well established that, in order to secure the injunctive relief sought, the applicant must first establish a prima facie case with a high chance of success. In **Mrao Ltd v First American Bank of Kenya Ltd [2003] eKLR**, the Court of Appeal expressed itself on what constitutes a prima facie case as follows:-

**“...In civil cases, it is a case in which, on the material presented to the court a tribunal property directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

18. In the instant case, it is not disputed that the applicant obtained a loan Kshs 63 million from the respondent to enable it purchase the suit

property which loan it repaid in full. The bone of contention however, is in respect to a subsequent loan that was allegedly obtained by a separate company (Welcap Ltd), which incidentally has the same shareholders/directors as those of the applicant company.

19. The applicant argued that the loan obtained by Welcap Ltd was secured by different properties from the suit property and that the applicant is therefore not responsible for the loan obtained by the separate legal entity. On its part, the respondent argued that it was entitled to consolidate the loan facilities as envisaged under Section 83 of the Land Act where the borrower is the same but having separate/different accounts. The question then arises as to whether the applicant herein is one and the same as Welcap Company.

20. I am convinced that the issues I have isolated hereinabove raise substantial issues that sufficiently demonstrate a prima facie case which the respondent will need to explain at a hearing. This need for an explanation is enough for a court to say that let the status quo now prevailing be maintained by way of a temporary injunction pending such explanation at the hearing.

21. Flowing from the finding on the issue of prima facie case, I find that in the event that the suit property is sold on account of a loan facility that the applicant alleges it never secured, the applicant may suffer irreparable loss unless the order of temporary injunction sought are granted.

22. I note that the applicant also raised the critical question of non-compliance with the requirement of issuance of statutory notices before listing the suit property for sale by way of public auction. On this issue, I find that the respondent did not come out clearly on whether or not it issued the statutory notices to the applicant as it envisaged under Section 90 of the Land Act. The rationale for issuing the said notices is to give the borrower notice on how much debt is in arrears so as to enable it make good the debt.

23. In this case, I reiterate that apart from stating that the applicant signed instruments that allowed the respondent to consolidate the securities in order to offset the arrears, the respondent did not demonstrate that it issued the requisite statutory notices to the applicant. The question which then arises is whether the alleged lack of or improper service of notices is a proper ground for restraining the respondent, by way of a temporary injunction, from selling the suit property. The answer to the above question can be found in the decision by the Court of Appeal in the case of *National Bank of Kenya Limited v Shimmers Plaza Ltd* [2009] eKLR wherein the learned judges held as follows:

**“We venture to say that where the court is inclined to grant an interlocutory order restraining mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit.”**

24. Taking a cue from the above decision, I similarly find that irregularity in the issuance of the notices is not a *carte blanche* for issuance of orders restraining a chargee from exercising its statutory power of sale. I find that in circumstances where proper service of statutory notice is contested, such as this case, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.

25. In the circumstances of this case, I find that the balance of convenience tilts in favour of granting the orders of interlocutory injunction sought. I am guided by the decision in *National Commercial Bank Ltd V Olint Corporation* (2009) WLR 1405 wherein the Privy Council stated that the purpose of interlocutory injunction is to improve the chance of the court being able to do justice after a determination of the merits at the trial. In my opinion therefore the plaintiff has demonstrated through affidavit evidence that it has a prima facie case to be heard at the trial.

26. Having considered the parties' affidavits, the written and oral submissions and the case law in support of their respective cases and having applied the principles of granting an interlocutory injunction pending the hearing and determination of the suit herein, this court is satisfied that this is an appropriate case for the exercise its discretion in favour of the Plaintiff/Applicant herein.

27. For the above reasons, I find that the instant application is merited and I therefore allow it in the following terms.

**a. An order of temporary injunction is hereby issued to restrain the defendant, whether by itself, agents, or servants from commencing realization of security, exercising power of sale, further advertising, selling, disposing, alienating, transferring and/or in any other manner interfering with the plaintiff's quiet possession, occupation and enjoyment of all that piece of land known as LAND REFERENCE NUMBER 336/203 (original Number 336/188/1) pending the hearing and determination of this suit.**

**b. That the costs of the application shall abide the outcome of the main suit.**

Dated, signed and delivered in open court at Nairobi this 14<sup>th</sup> day of November 2019.

W. A. OKWANY

JUDGE

**In the presence of:**

Miss Wanjiku for Gachie for plaintiff

Mr. Rutere for Mwangi for defendant

Court Assistant – Sylvia