

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 132 OF 2018

SPECIALTY INGREDIENTS TECHNOLOGY

EAST AFRICA LTD.....PLAINTIFF

Versus

NIC BANK LIMITED.....DEFENDANT

RULING

1. There is no inconsistency in a Judge who has dismissed an Application for Interlocutory Injunction to grant the unsuccessful Applicant an Injunction pending an appeal against that dismissal. In doing so, the Judge would be granting the restraining order to prevent the decision of the Appellate Court from being nugatory should the Appeal succeed. (See *Madhupaper International Limited v. Kerr* [1985] KLR 840).

2. On 6th April, 2018 the Court dismissed the Plaintiff's Application for Injunction dated 3rd April, 2018. Upon dismissal Counsel for the Plaintiff requested this Court for an Order of Injunction pending an intended Appeal from that Order of Dismissal. There is an Auction slated for tomorrow (10th April, 2018). And this Court is asked to consider that the property which is the subject matter of this suit is a family home. This Court is requested to issue an Order even if it were on terms.

3. The Defendant objects and argues that in the event the Auction proceeds, then the Plaintiff can seek damages which the Defendant Bank has capacity to pay.

4. It is common ground that the relationship between the Plaintiff and the Defendant is that of a Borrower and Lender. Through a Letter of Offer dated 4th January 2013, the Bank lent a sum of Kshs. 34,664,000 to the Plaintiff. As security therefor the Plaintiff, inter alia, charged all that property known as LR.No.Ngong/Ngong/18333 in favor of the Bank.

5. In this arrangement, it must have been in the contemplation of the parties that should the Plaintiff default in the repayment of the loan then the Bank would be entitled to sell the charged property. The Bank thinks that the occasion has arisen. It is expected that the Plaintiff was well aware that the property was a family home yet choose to turn it into a potential commodity for sale when it offered it as security. In the circumstances, the nightmare scenario that the property could one day be sold in the event of default cannot be said to be an unexpected.

6. On the other hand, the Plaintiff may succeed in the Appeal. However, I would have to agree with Counsel for the Defendant that should the intended Auction proceed and the Court of Appeal were to find that it was improper or unlawful then a recourse for the Plaintiff would be an Order for Damages. If the Defendant would not be in a position to meet such an Order for damages, then the success of the Plaintiff would be hollow and therefore nugatory. The Defendant is a Bank and it has not been alleged or proved by the Plaintiff that it will not be able to perform such Order or Decree that may ultimately be binding on it.

7. The Court is unable to find merit in the Application for an Injunction pending the intended Appeal. The same is dismissed.

Dated, Signed and Delivered in Court at Nairobi this 9th Day of April, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Wangui Shaw for Plaintiff/Applicant

N/A for Defendant/Respondent

Nixon - Court clerk