



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 15 OF 2017**

**DAVID MUTHIANI MUOKA.....PLAINTIFF**

**VERSUS**

**KENYA INDUSTRIAL ESTATES LTD.....DEFENDANT**

**RULING**

1. The plaintiff filed a notice of motion application dated 7<sup>th</sup> July, 2017 seeking the following orders:

a) That the defendant, its agents and or servants be restrained from advertising, auctioning, disposing or in any manner interfering with the applicant's ownership of L.R. No. Machakos/Matuu/2188, Machakos/Matuu/2189 and Machakos/Matuu/2190 (*the suit properties*) pending the hearing and determination of this application and the suit.

2. The motion is supported by the grounds on the body thereof and the supporting affidavit of the plaintiff. He stated that the he in the year 1993 and 1997 he applied for and was granted a credit facility by the defendant's Kangundo Branch to finance his Bakery in Matuu. The defendant was however not able to provide the entire facility and only supplied KShs. 1,400,000/= or thereabout. Unknown to the plaintiff, the defendant entered in its books that the entire equipment valued at KShs. 2,800,000/= had been supplied to the plaintiff's account. He refused to pay the wrongly claimed amount and the defendant claimed and placed the bakery under receivership. During the receivership period, the defendant confiscated the plaintiff's 3 Deck oven valued at KShs. 360,000/= and sold it but it failed to credit the amount. That the plaintiff complained to the defendant's head office and after several meetings the receivership was called off and it was resolved that the plaintiff do pay KShs. 500,000/= in full and final settlement of the loan. That the plaintiff settled the full sum of KShs. 500,000/= amid financial difficulties and exceeded the same by KShs. 20,000/=. That the defendant on or about 17<sup>th</sup> May, 2017 instructed Cash Crop Auctioneers to auction the plaintiff's properties on 19<sup>th</sup> July, 2017 unless a sum of KShs. 8,900,000/= is paid to the defendant. He contended that there is no justification for the defendant's said instruction and claim and that it is baseless. That unless the defendant is restrained, the suit properties are likely to be auctioned and the plaintiff shall suffer irreparable loss and damage.

3. The defendant in response thereto filed a replying affidavit through its Assistant Manager, Legal Services. It contested as follows. That on 21<sup>st</sup> August, 1987, the plaintiff together with Mr. Martin Munyao Kimeu, Mrs. Flora Muthoni Kimeu and Mrs. Elizabeth Tabitha Muoka incorporated a company known as Beta Bakers Co. Ltd and they were all Directors and shareholders of the said company and the said company had been advanced a loan by the defendant. By an extra ordinary meeting of Beta Bakers Company Limited held on 18<sup>th</sup> August, 1993, it was resolved that the assets and liabilities of the company be divided between the directors of the company and it was resolved that the company was to be split; Martin Munyao Kimeu and Flora Muthoni to retain the ownership of original Beta Bakers Company Limited; while another company was to be incorporated and registered having the plaintiff and Elizabeth Tabitha Muoka as the shareholders and directors; the assets be valued and divided between Beta Bakers Company Limited and the new company to be incorporated and that the loan with the defendant amounting to KShs. 800,000/= be shared equally between Beta Bakers Company Limited and the new company with the consent of the defendant. That as per the resolution, the plaintiff with Elizabeth Muoka on the 8<sup>th</sup> October, 1993 incorporated Muyo Bakeries Limited whereby the two became directors. The plaintiff together with his co-directors in Beta Bakers Company Limited entered into an agreement dated 9<sup>th</sup> November, 1993 whose terms were that:

a) *The plaintiff and Elizabeth Muoka's acquired bakery Beta B would form part of Beta Bakers Company Limited under the newly registered name of Muyo Bakeries Company Limited.*

b) *Martin M. Kimeu and Flora M. Kimeu retain ownership of the original Beta Bakers Company Limited.*

c) *The assets of Beta Bakers Company Limited be divided and the loan owed to the defendant be shared equally between Beta Bakers Company Limited and Muyo Bakeries Company Limited.*

4. As a consequence and in compliance with the above agreement and with the consent of the defendant, Muyo Bakeries Company Limited took over Beta Baker Limited's loan then amounting to KShs. 510,784/=. The plaintiff executed a power of attorney dated 8<sup>th</sup> February, 1989 in favour of the defendant to charge to itself suit properties for any sum at any rate of interest, lease the said properties for any terms of years

at ant rent, surrender of any lease to execute any lease, exercise and execute all powers vested in or conferred on the plaintiff among others. On or about 16<sup>th</sup> March, 1994 the defendant advanced a loan of KShs. 500,000/= to Muyo Bakeries Limited vide a loan agreement made on 16<sup>th</sup> March, 1994, payable in sixty (60) months comprising of both principal and interest in the sum of KShs. 18,750/=. The said loan was guaranteed by the plaintiff and his co-director by a deed of guarantee and the said loan advanced to Muyo Bakeries Limited was secured by debentures and further by charges over the suit properties. On or about 17<sup>th</sup> December, 1997, Muyo Bakeries Limited did bid for reallocation of Dadmeco Limited machinery and subsequently Muyo Bakeries Limited entered into a loan agreement made on 22<sup>nd</sup> April, 1999 with the defendant for a loan amount of KShs. 2,199,661/= for the purchase of the said equipment. The defendant did the handover to Muyo Bakeries Limited the entire value and or equipment as per the loan agreement. However, an amount of KShs. 1,700,000/= was debited to Muyo Bakeries Limited's account which amount covered only the value of the equipment in exclusion of the fitting charges for the equipment which amount ought to have summed up to KShs. 2,199,661/= as per the loan agreement of 22<sup>nd</sup> April, 1998. The defendant contended that among the fundamental terms of the agreement on 22<sup>nd</sup> April, 1998 was that the total amount of principal and interest payment per month is KShs. 61,407.20/=. the loan repayment period is seventy-two (72) months (6 years), the moratorium period is twelve months, the interest during moratorium period is KShs. 44,909.70 /=, the rate of additional interest in overdue instalments of principal and interest that shall have accrued thereon but which remains unpaid shall be two (2%) per annum and security creating a specific charge against LR. No. Machakos/Matuu/2281 together with buildings and improvements erected thereon.

5. That Muyo Bakeries Limited and the plaintiff defaulted in repayment of the said loan by issuing bouncing cheques and failing to meet their monthly repayment instalments and several notices were issued to the plaintiff and or Muyo Bakeries Limited to that effect which notices did not elicit any substantive response necessitating the defendant to exercise its statutory power of sale. That as of 26<sup>th</sup> February, 2016, Muyo Bakeries Limited was in loan arrears amounting to KShs. 8,912,919/= and the defendant issued Muyo Bakeries 90 days' notice to comply with the conditions therein. That Muyo Bakeries remained in default of the loan and upon the lapse of the 90 days' notice the repayment obligation had not been honoured and a second statutory notice to sell was given and upon the lapse of the period, the defendant instructed the auctioneer to proceed to dispose the suit property.

6. It was the plaintiff's submission that a company cannot attain legal status to enter into a contract before existence. That such contracts are entered into by promoters of a company on behalf of the company before it comes into existence. That the test therefore is whether the promoters intended to be party to the contract or not. **Mark v. Swallowood (1996) 117 CLR 52** was cited in reliance. That where a contract is non-existent then there is no contract. On grant of injunction, it was argued that it is important for this court to consider who is likely to suffer more prejudice. That if the suit properties are auctioned, the plaintiff stands to suffer serious loss and damage. That the defendant has not stated the kind of prejudice it stands to suffer and that it stands to suffer no serious prejudice since if at trial it is held that the respondent is entitled to the arrears claimed, the respondent can still auction the plaintiff's plots. That the balance of convenience is in the plaintiff's favour since he is the registered owner of the properties and the allegations by the defendant remain allegation. In support thereof, the plaintiff cited **Central Bank of Kenya Deposit Protection Fund Board v. Uhuru Highway Development Ltd & 4 others, Nairobi Civil Appeal No. 91 of 1999** and **Joseph Mugo Njuguna v. Veronica Wangui Njuguna, HCCC No, 142 of 2011** among others.

7. The defendant on the other hand contended that the plaintiff having employed perjurious conduct and being in default of the loan does not deserve equitable relief from this court and relied on **Peter Chomba Gachina v. Kenya Commercial Bank Limited (2016) eKLR**. That it is evident that the plaintiff charged the properties and the court have over time held that a person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan and it is not sufficient to state that the sale shall occasion him loss.

8. The law on temporary injunction is now well settled. An applicant must demonstrate a prima facie case with a probability of success and that he will otherwise suffer irreparable injury unless the injunction is granted. If the court is in doubt on the above, the application would be determined on a balance of convenience. **Giela v. Cassman Brown & Co. Ltd [1973] E. A 358**.

9. Applying the test, while it is not in contention that the charged properties are registered in the names of the plaintiff, there is a contention as to whether or not the plaintiff is in the alleged arrears. Delving into this issue shall pre-empt the merit of the suit. In that regard I shall consider the balance of convenience. I acknowledge the fact that courts as was held in Peter Chomba (supra) that a person who charges his property to secure a loan does so knowing only too well that upon default and the plaintiff should not be heard to say that if the property is sold he shall suffer irreparable loss, it must be noted that there is evidence that the defendant has carried out a valuation of the suit properties. In the circumstances I find that the convenience is in favour of the plaintiff. Considering further the provisions of Article 159 (2) (d), I am of the view that there is need to preserve the properties for purposes of fairly discharging justice. The defendant is unlikely to suffer any loss since if it is found that the plaintiff is in arrears then the properties shall be available for the defendant's disposal to recover its claim. The suit properties appear to have been valued by the Defendant and which are likely to appreciate in value even as the suit is being heard and hence the Defendant's interest in the realization of the assets will not be prejudiced in the event the suit is ruled in its favour. The Plaintiff has also disputed the amounts so far paid and which calls for reception of evidence as to the amount so far paid and what is outstanding. Again the Plaintiff has raised an issue to the effect that the Plaintiff could not attain a legal status to enter into a contract with the Defendant before the Plaintiff's entity came into existence. All these require a full trial in order to determine them. It is therefore appropriate and prudent to issue conservatory orders of the suit properties pending the determination of the suit which should be set down for hearing on priority basis.

10. In the end I find merit in the Application and make orders as follows:

- a) That the defendant, its agents and or servants be restrained from advertising, auctioning, disposing or in any manner interfering with the applicant's ownership of L.R. No. Machakos/Matuu/2188, Machakos/Matuu/2189 and Machakos/Matuu/2190 (**the suit properties**) pending the hearing and determination of the suit.
- b) Costs shall be in the cause.

Orders accordingly.

Dated and delivered at Machakos this 8<sup>th</sup> day of May, 2018.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

No appearance for Mutua for the Plaintiff

Mukula for Masivo - for the Defendant

Kituva - Court Assistant