



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 201 OF 2017

NEW ZAWADI HARDWARE LIMITED.....PLAINTIFF

- VERSUS -

BANK OF BARODA KENYA LIMITED.....DEFENDANT

RULING

1. **New Zawadi Hardware Limited** (*New Zawadi*) by this action seeks a declaration that the advertisement of sale of property **Thika Municipality/Block 19/663** and **Thika Municipality/Block 23/775** (both referred to as subject properties) were wrongly and fraudulently and unlawfully advertised for sale by **Bank of Baroda Kenya Limited** (The Bank). **New Zawadi** also sought an injunction to restrain the bank from selling or transferring the subject properties.
2. **New Zawadi** filed an interlocutory notice of motion dated **12th May, 2017** seeking an injunction, pending determination of this suit, to restrain the bank from selling the subject properties.
3. The application is supported by the affidavit of **Jacob Kigaa Kiruthi**. He described himself as one of the directors of **New Zawadi**. He deponed that the subject properties, namely; **Thika Municipality Block 19/663** was registered in his name and **Thika Municipality/Block 23/775** is registered in the name of **Elizabeth Wanjiru Gakumo**. He stated in that affidavit that the bank instructed an auctioneer to sell those properties by public auction.
4. **New Zawadi** in support of their application stated that the bank had failed to serve the requisite legal notice, before auction; that the bank had failed to supply the plaintiff with statements of account despite being requested; that the bank had charged interest not agreed; and that unless the public auction is stopped by the court, **New Zawadi** was likely to suffer prejudice and that the sale would impoverish the owners of the subject properties.
5. The bank by its replying affidavit sworn by its credit manager of its Thika Branch confirmed that **New Zawadi** is its customer at the Thika Branch. He further deponed that **New Zawadi** had several loan facilities with the bank, that is, overdraft facility of **Ksh 25 million** and loan of **Ksh 19,020,000**, totalling to **Ksh 57 million**. That **New Zawadi** had failed to service those facilities according to the terms of offer letter. Further that **New Zawadi** has been supplied with the bank statements. That the bank at the request of **New Zawadi** had guaranteed **New Zawadi** for a credit facility with **Savannah Cement Limited**, which guarantee the bank was required on **9th November, 2016** to honour by paying on behalf of **New Zawadi ksh 12, 806,418**. That although **New Zawadi** had sold by private treaty a property namely; **LR No. 10890/69** Thika Municipality, the bank had only received 6.2 million from that sale. That the **New Zawadi** had been given bank statements and that the registered owners of the subject properties had been served with the requisite legal notices which were acknowledged by them.

ANALYSIS AND DETERMINATION

6. **New Zawadi** has moved this court under Order 40 of the Civil Procedure Rules (the rules). Order 40 rule 1 provides as follows:

“Where in any suit it is proved by affidavit or otherwise-

a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the

suit.”

7. **New Zawadi** is required to meet the principles of granting an injunction enaciated in the case of **Giella Vs Cassman Brown & Co. Ltd [1973]E.A.**

8. The first of those principles is that **New Zawadi** needs to show a **prima facie** case with probability of success. Having that principle in mind, what is New Zawadi’s case?

9. New Zawadi alleged that the bank failed to serve it with bank statements, even though it was requested to do so. There was no proof before court of any such request being made to the bank. Indeed, the documentary evidence before court clearly shows a party who was acquainted with the status of the account. This is evident from the various correspondence made to the bank on behalf of New Zawadi. One such letter is dated **29th February, 2016** which I shall reproduce herein as follows:

“*New Zawadi Hardware Ltd*

P. O. Box 35-01004 Thika

29-Feb-2016

0723 688 472

The manager

Bank of Baroda

Thika Branch

RE: CLEARING OF THE OUTSTANDING ARREARS

I Mr Jacob Kigaa Kiruthi account holder of account no. 958404/70 do promise to clear the outstanding arrears on or before 11th March 2016. Since we are expecting the amount of 4.2 million from the following customers

—China JiANXI co. Ltd

-China Road & Bridge corporation

-China AERO Technology Corp

Attached are the copies of the invoices of the said amount. Thanking you inadvance for your continued support.

Yours faithfully

JACOB KIGAA KIRUTHI “

10. In my view, **New Zawadi** having failed to prove that it did request for bank statements and with the correspondence which reveal that it was aware of its debt to the bank, that allegation is rejected.

11. **New Zawadi** also alleged that the bank failed to serve upon the registered owners requisite statutory notices before mounting the sale of their property by public auction.

12. The bank annexed to its replying affidavit statutory notices that were addressed to the registered owners of the subject properties and also attached copies of certificate of posting of those letters.

13. **New Zawadi** by the further affidavit sworn by **Jacob Kigaa Kiruthi** sworn on **29th May, 2017**, did not make mention of those statutory notices. Silence on that issue can be taken as admission that indeed the registered owners were served with requisite statutory notices. It follows therefore that the registered owners were indeed served with those notices.

14. **New Zawadi** alleged that the bank had applied illegal interest to the loan balance. In making that allegation **New Zawadi** failed to address itself to the schedule attached to the offer letter, which schedule seems to have been acknowledged by **New Zawadi**, and by which the interest applicable is clearly set out, and which corresponds to the interest the bank applied. It follows that the allegation of the application of the wrong interest is also rejected.

15. **New Zawadi** also alleged that the bank honoured the guarantee to **Savannah Cement Ltd** without notice to it.

16. Contrary to that allegation, **New Zawadi** wrote two letters to the bank both dated **3rd November, 2016**, which I will reproduce hereunder as follows:

“The Branch Head

B.O.B (K) Ltd

Thika Branch

P. O. Box 794-01000

THIKA

3RD NOVEMBER, 2016

Dear Sir,

RE: REQUEST FOR PAYMENT OF BANK GUARANTEE OF KSH 12,806,000 TO SAVANNAH CEMENT LTD

Following the meeting held on 4th November 2016 the board of directors mutually agreed to request the bank to pay Savannah Cement Ltd the total amount for the bank gurantee which they have recalled.

Currently we request to be given a period of one week to have the proposal on how to clear the said amount which we owes the bank.

We await your positive response and we always appreciate your kind assistance.

Yours faithfully

.....

JACOB KIGAA KIRUTHI

.....

ELIZABETH WANJIRU GAKUMO”

“The Branch Head

B.O.B (K) Ltd

Thika Branch

P. O. Box 794-01000

THIKA

3RD NOVEMBER, 2016

Dear Sir,

RE: PAYMENT OF OUTSTANDING DEBT TO SAVANNAH CEMENT LTD

Following demand by Savannah Cement for payment of our outstanding debt on our guarantees, we wish to authorize you to pay the amount due to them.

We further request you to change the overdraft on account 958404/70 amounting to 22,500,000; loan on account 958406/634 amounting to 14,869,318.90 and the guarantee amounting to 13,000,000 totaling to 50,369318.90 into a term loan payable in ten years.

We await your positive response and we always appreciate your kind assistance.

Yours faithfully

.....

JACOB KIGAA KIRUTHI

.....
ELIZABETH WANJIRU GAKUMO”

17. It is also not true that the bank did not provide the statement reflecting the payment it made to Savannah Cement Limited in honour of its guarantee for New Zawadi. The bank exhibited “RN5” which provided the overdraft account which reflects that on **9th November 2016**, the bank paid out **Ksh 12,806,418**.

18. It is also not true that the bank did not supply statements of loan accounts. The bank annexed to its replying affidavit exhibit “RW2” and “RW5” statements of the loan and overdraft account respectively.

19. It is clear from the above, that New Zawadi has failed to show a **prima facie** case with probability of success. The Court of Appeal in the case of Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR stated:

“The principles on which the courts will grant an injunction are well known. This Court restated those principles in

NGURUMAN LIMITED V JAN BONDE NIELSEN & 2 OTHERS, CA NO. 77 OF 2012, together with the mode of their application as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) Establish his case only at a prima facie level,

(b) Demonstrate irreparable injury if a temporary injunction is not granted, and

(c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. 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. The existence of a prima facie case does not permit ‘leap-frogging’ by the applicant to injunction directly without crossing the other hurdles in between.” (Emphasis added).”

20. From the above decision, it is clear that the three principles of granting an injunction are sequential. New Zawadi having failed to show a **prima facie** case with a probability of success, this court need not consider the other principles of **Giella Vs Cassman brown** (supra).

21. It is because of the above finding that this application before court is **dismissed**.

22. On my perusal of the court file, I found that the summons to enter an appearance in this case were issued by the **Deputy Registrar** of this court on **12th May, 2017**. All of the three copies of the summons are still lying in this file. It is evident from the affidavit of service of **Joseph Kiema Musyoki**, dated **17th May, 2017**, the bank was only served with a copy of the application dated **12th May, 2017**. The bank was not served with the summons in this matter.

23. **Order 5 rule 1 (6) of the Civil Procedure Rules** provides:

“(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.”

24. The bank should have been served with the summons within 30 days from **12th May, 2017** when the summons were issued by the Deputy Registrar. They were not. They are still lying in the court file. It follows that from the provisions of **Order 5 Rule 1 (6)** this suit abated on **13th June, 2017**. It means that on **13th June, 2017**, this suit was extinguished or nullified. I will therefore proceed to strike out this suit on that ground.

25. In the end the orders of the court are:

a. The notice of motion dated 12th May, 2017 is dismissed with costs to the defendant.

b. This suit is hereby struck out with costs to the defendant for having abated under Order 5 Rule 1 (6) of the Civil Procedure Rules.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of July 2018.

MARY KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant