



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 275 OF 2017

HFC LIMI.....PLAINTIFF

VERSUS

HOTEL ACCRA LIMITED.....1ST DEFENDANT

JOHN MWANGI KING'ORI.....2ND DEFENDANT

SUSAN NYOKABI MWANGI.....3RD DEFENDANT

ALEX KIMANI MWANGI.....4TH DEFENDANT

RULING

1. The plaintiff (HFC Ltd) is a limited liability company licensed to carry on banking business under the provisions of the Banking Act Cap 488 of the laws of Kenya.

2. The 1st defendant *Hotel Accra Ltd*, by letter dated **7th June 2013** applied for a loan facility for a sum of **Ksh 70 million** from the plaintiff. The plaintiff extended to the 1st defendant **ksh 70 million** which facility was secured by all assets, debenture of the 1st defendant, registered in favour of the plaintiff, and by a legal charge over **LR. No. 209/1413/28** herein after referred to as the charged property. That charged property is registered in the name of the 2nd defendant. The 1st defendant runs a business on the charged property. The facility was also secured by guarantees executed by the 2nd to the 4th defendants.

3. All the above facts are admitted by the defendants.

4. The plaintiff has pleaded in this case, which is denied by the defendants, that unknown to the plaintiff, the charged property was the subject of a succession cause at the time it was charged in favour of the plaintiff. That the court in that succession cause on **21st January 2014** determined that the 2nd defendant was registered as trustee and not absolute owner of the charged property. As a consequence of that determination, the court in the succession cause ordered that the legal charge over the charged property to be vacated and further order that the charged property be sold and the proceeds be divided amongst the beneficiaries of the estate.

5. The plaintiff deponed, through the affidavit of its legal officer that it had been deprived of the whole security through the wrongful act of the 2nd defendant.

6. The plaintiff has filed an interlocutory notice of motion application dated **29th June 2017** seeking the following prayers:

“(3) An order directing appointment of a receiver over all those properties known as L.R No. 209/1413/28, L.R. No. 209/4401/761 Makadara Estate and plot number CP-3A, Mayor’s Village, Kayole-Nairobi or any other property owned by the 2nd Defendant upon such terms as the Court deems fit pending the hearing and determination of this suit.

(4) An order for attachment before judgment of all property belonging to the 2nd defendant, including property over which or over the profits of which he has a disposing power which he may exercise for his own benefit, whether that property is held in his name or in the name of another but on his behalf as well as amounts due or determined to be due to him as a beneficiary of the estate of Laban King’ori Macharia in High Court Succession Cause No. 16 of 1988 – in the matter of the Estate of Laban King’ori Macharia (deceased);

(5) In the alternative, an order directing the 1st and /or the 2nd defendant within a specified period time fixed by the court to provide alternative security in place of Land Reference No. 209/1413/28 for the loan advanced or financial facilities extended by the

plaintiff;

(6) A temporary injunction be issued restraining the defendants, whether by themselves, their its agents, servants, employees, invitees, and/or otherwise whomsoever from selling, disposing of, charging, subdividing, dealing, alienating, trespassing, occupying, manging, letting, advertising for sale, offering for sale, or otherwise using or in any way whatsoever from interfering with all that piece of land known as L.R No. 209/1413/28, L.R. No. 209/4401/761 Makadara Estate and plot number CP-3A, Mayor's Village, Kayole-Nairobi pending the hearing and determination of this suit;

(8) The plaintiff be at liberty to apply to the Honourable Court for such further directions and orders for purposes of meeting the ends of justice."

7. **John Mwangi Kingori**, the 2nd defendant, filed a replying affidavit to the notice of motion whereby he deponed that although the court in the succession cause vacated a legal charge, that the charged property had however remained registered in his name. Further that the property **LR.No. 209/4401/76/Makadara & Plot no. CP-3A, Mayor's Village Kayole, Nairobi** (herein after referred to as the properties) are charged to the plaintiff and therefore there would be no reason for injunction to be issued as sought.

8. The 2nd defendant further deponed that he had no intention of disposing the properties.

ANALYSIS AND DETERMINATION

9. By and large the plaintiff's prayers are for an interlocutory injunction to issue. This court is very much aware that the application being interlocutory does not require this court to decide the rights and obligations of the parties but that this court should merely make orders that maintain the status quo pending final determination of this suit. In carrying out that duty, this court shall not decide the issues of fact to finality. This caution is guided by the Court of Appeal holding in the case of **Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR1**. In that case the court stated as follows:

"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. The lower court judge in this case had gone far beyond his proper duties and made final findings of disputed affidavits."

10. The plaintiff in order to succeed in its application has three hurdles to overcome. This were discussed in the Court of Appeal case of **Lucy Wangui Gachara vs Minudi Okemba Lore [2015] eKLR** where the court stated:

"The principles on which the courts will grant an injunction are well known. This court restated those principles in NGURUMAN LIMITED VS JAN BONDE NELSEN & 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 Vs 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).

11. It is clear from the above quoted case that the three hurdles are sequential.

12. The plaintiff must first show that it has a prima facie case with probability of success. Prima facie case was said to be in the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR** to be:

"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

13. The plaintiff's case is that the court in the succession cause in vacating the legal charge over the charged property left it exposed and without security. That it was left without security and yet the defendants are indebted to it.

14. The 2nd defendant although admitting the legal charge was vacated, however stated that the charged property is still registered in his

name. Further that the properties, that the plaintiff now seeks injunction over, were charged to the plaintiff and therefore there is no need to grant the injunction orders over them.

15. The defendant did not prove, on a balance of probability that the properties were charged to the plaintiff. It follows that the plaintiff is owed money but it has no security for that debt since the legal charge was vacated in the succession cause.

16. In my view, the plaintiff has showed a prima facie case with probability of success.

17. Has the plaintiff proved it is likely to suffer irreparable injury which cannot be adequately compensated by an award of damages?

18. Although the plaintiff claim is in monetary terms, and it can be argued that it can adequately be compensated by damages, the fact remains that there can be no guarantee that by the time this claim is finally heard whether the 2nd defendant will be in a position to compensate the plaintiff if he is not enjoined from selling his immovable property. In this regard, refer to the case of **Waithaka vs Industrial & Commercial Development Corporation [2001] KLR** at page 381 as follows:

“As regards damages, I must say that in my understanding of the law, it is not inexorable rule that where damages may be an appropriate remedy an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy.

By using the word “normally” the court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not enjoined.”

19. The plaintiff, in my view has summounted the two principles of granting an interlocutory injunction. Since in my view, I have not doubt in respect to those two principles, I shall not proceed to consider where the balance of convenience lies.

20. In regard to the plaintiff’s prayer for attachment before judgment, having regard to the affidavit evidence, I find that I am not satisfied that the 2nd defendant has intention to delay or avoid the process of the court or to obstruct or delay execution of the decree. The plaintiff did not provide evidence to prove the same, which is mandatory under order 39 of the Civil Procedure Rules in order for the court to order attachment before judgment. That prayer therefore fails.

21. In the end the court grants the following orders:

a. Pending the hearing and determination of this suit, an injunction shall issue restraining the 2nd defendant from disposing or selling LR No. 209/4401/761 Makadara Estate and Plot No. CP-3A, Mayor’s Village, Kayole Nairobi

b. The plaintiff is awarded costs of the notice of motion dated 29th June 2017 to be paid by the 2nd defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE