



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 3 OF 2018

MOTION CITY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

IDB CAPITAL LTD.....1ST DEFENDANT/RESPONDENT

NDUTUMI AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

[NOTICE OF MOTION DATED 24TH MAY, 2018]

1. The Plaintiff/Applicant, Motion City Limited has brought the Notice of Motion dated 24th May, 2018 under sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, 2010. Through the application the Applicant seeks orders against the 1st Defendant/1st Respondent, IDB Capital Limited and the 2nd Defendant/2nd Respondent, Ndutumi Auctioneers as follows:

“1. THAT the application herein be certified as urgent and service thereof be dispensed with.

2. THAT this honourable court be pleased to grant an interim order of injunction restraining the 1st and 2nd Respondents, their servants, agents and or employees from trespassing on, or in any manner barring the Plaintiff from accessing or its continued operation on its rightful property being land subdivision Number 725 (original number 162/2) of section Number IV, Mainland North Kilifi, and subdivision Number 726 (original Number 162/3) of section Number IV, Mainland North, Kilifi (hereinafter referred to as the suit parcel of land) or interfering with the Plaintiff's peaceful occupation and enjoyment of the suit property in any way whatsoever pending the hearing and determination of this application.

3. THAT this honourable court be pleased to grant an interim order of injunction restraining the 1st and 2nd Respondents, their servants, agents and or employees from removing any of the remaining equipment belonging to the Plaintiff from the property, destruction of any equipment, vandalizing and/or engaging in any activity whatsoever in the said property which may in any manner whatsoever jeopardize the safety of the Plaintiff's equipment and or property on the suit parcel of land pending the hearing and determination of this suit.

4 THAT this Honourable Court do grant an interim order of injunction restraining the 1st and 2nd Respondents, their agents or servants from selling, transferring, charging or in any other way alienating the Plaintiff's suit parcel of land, and the properties listed in the Notification of sale by Ndutumi Auctioneers dated 22.05.2018 or any other property belonging to the Plaintiff pending the hearing and determination of the application inter-parties.

5. THAT this honourable court be pleased to grant a mandatory injunction compelling the 1st and 2nd Respondents to return all the equipment and machines that they unlawfully took and or carted away from the Applicant's property namely;

- i. Wheel loader KHMA 996J**
- ii. Nine (9) rails**
- iii. Four (4) big cutting discs**

iv. Four (4) batteries

v. Spanners and pliers

vi. Hanger support rods among others

6. THAT cost of this Application be provided for.”

2. The application is supported by the grounds on its face and an affidavit sworn on the date of the application by Samson Chome Ngallah the Applicant's head of operations. The application is also supported by a further affidavit sworn on 30th May, 2018 by the same Samson Chome Ngallah and a further supporting affidavit sworn on 23rd July, 2018 by the Applicant's advocate, Kevin Kinuthia.
3. The respondents opposed the application through an affidavit sworn on 11th June, 2018 by Priscilla Njuguna the 1st Respondent's legal affairs manager.
4. A perusal of the affidavits and documents filed in this case reveals that the Applicant obtained two loans from the 1st Respondent secured by two debentures over its moveable assets and a legal charge over L.R. No. Subdivision Number 725 (Original Number 162/2) of Section Number IV Mainland North, Kilifi and L.R. No. Subdivision Number 726 (Original Number 162/3) of Section Number IV Mainland North, Kilifi registered in the name of one of its directors and guarantors, Fredrick Tsofa Mweni.
5. The Applicant defaulted in the payment of the said loans triggering action by the 1st Respondent. The Applicant's case is that it has made efforts to repay the loans including setting up meetings with the 1st Respondent in order to find an amicable way of settling the debts. According to the Applicant, its business was down and it had even authorized the 1st Respondent to sell one of its properties but without success.
6. The Applicant avers that despite several requests, the 1st Respondent had blatantly refused or declined to furnish it with the statements of the loan accounts.
7. It is the Applicant's case that to its surprise and dismay the respondents had insisted on enforcing the securities in a manner that is irregular, unlawful and devoid of procedure.
8. The Applicant's averment is that the 1st Respondent had threatened to sell the charged property and had at the same time instructed the 2nd Respondent to attach its moveable property thus crippling its operations. According to the Applicant, the respondents' actions were bound to impair its ability to exercise its lawful right of redemption thus rendering its property vulnerable to sale by the respondents and occasioning it irreparable harm. Further, that the respondents had blocked the Applicant's access to its business premises.
9. The 1st Respondent's position is that the Applicant was indeed advanced two loans and had defaulted with Kshs. 68,362,254 being the total arrears. The 1st Respondent averred that the Applicant had not been denied loan statements and this is confirmed by the fact that the Applicant even annexed some of the statements to the instant application.
10. The 1st Respondent denied attempting to sell the charged property asserting that the statutory notice was yet to expire at the time the Applicant commenced these proceedings. According to the 1st Respondent, the moveable property was carried away by the administrator in the terms of the debenture. The 1st Respondent avers that this was done in good faith in order to preserve the goods. The 1st Respondent denies vandalizing the moveable property as alleged by the Applicant stating that vandalizing the property would go against its own interests.
11. The 1st Respondent avers that the Applicant failed to disclose to the court that it secured the loan by charging properties and through a debenture over its moveable property. This lack of candour, the 1st Respondent contends, should disentitle the Applicant the equitable relief of injunction.
12. The question is whether the Applicant has met the conditions for the grant of injunctive relief. An injunction is discretionary in nature. An applicant seeking the grant of an injunction must demonstrate that he has an arguable case and that unless an injunction is issued he is likely to suffer loss which cannot be cured by an award of damages. Where the court is in doubt, the matter is decided on a balance of convenience. In doing so, the court should be mindful that the decision whether or not to grant the order should be made in favour of the party that is likely to suffer greater harm if the injunction is denied or granted.
13. A perusal of the affidavits filed by the parties disclose that the 1st Respondent is a banking institution. The 1st Respondent has disclosed that the loans advanced to the Applicant attracts interest at 18% per annum. In the Applicant's view, the interest charged is unlawful as the law caps interest on loans from banks and financial institutions at no more than 4% of the base rate set and published by the Central Bank of Kenya. According to the Applicant, the 1st Respondent has been charging interest higher than the one set by the Central bank as per Section 33B (1) of the Banking Act as amended by the Banking (Amendment) Act, 2016.
14. It is the Applicant's case that although the 1st Respondent claims to have appointed an administrator to oversee its business, the 1st Respondent did not exhibit any evidence of the appointment of such an administrator.
15. The Applicant also asserts that the respondents did not follow the process of attachment of goods. Specific reference was made to alleged non-compliance with Rule 12(1)(c) of the Auctioneers Rules, 1997. The Applicant contends that the 2nd Respondent had not given it

notice of seven days as required by the said rules.

16. There was no response to the submissions of the Applicant by the respondents. This can be explained by the fact that the respondents filed their submissions on 14th June, 2018 over one month before the Applicant's submissions were filed on 23rd July, 2018. When counsel for the respondents was given an opportunity to respond to the Applicant's papers he declined to file any further papers.

17. Looking at the issues raised by the Applicant, and without necessarily making any findings on the same, it becomes clear that the Applicant has an arguable case. In saying so I am specifically referring to the interest charged on the loans.

18. The Applicant operates a business whose operations have been interrupted by the actions of the respondents. The damage to the Applicant's business including loss of jobs by the employees is irreparable in the circumstances of this case. The Applicant has therefore satisfied this court that it will suffer irreparable loss if an injunction is not granted.

19. In view of what is stated above, the balance of convenience also tilts in favour of the Applicant.

20. The Applicant's Notice of Motion dated 24th May, 2018 is therefore allowed as prayed on condition that the Applicant continues servicing the loans in the terms of the contracts entered between it and the 1st Respondent. Reconciliation of accounts can always be done later if the Applicant succeeds on the issue of the interest charged on the loans. For avoidance of doubt, the orders granted herein shall lapse if the Applicant fails to service the loans in accordance with the terms of the loan agreements. The costs of the application shall be in the cause.

Dated, signed and delivered at Malindi this 18th day of October, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT