



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA MOMBASA**

**MISC. CIVIL APPL. NO. 127 OF 2014**

**STEPHEN MICHUKI KIUNGA.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The plaintiff moved this court by way of a Notice of Motion under a certificate of urgency seeking for a temporary injunction restraining the defendant from selling or alienating the land registered in Mombasa as CR. NO. 33720/3 and land sub-division No. 1/11517 Section 1 Mainland North (measuring 0.0949 acres).

2. The defendant is a Limited Liability Company who is in the business of lending money and it avers that the plaintiff owes it Ksh 7,167,117.97/= being the balance on unpaid loans plus interest as at 10.11.2014.

**The Application dated 13/10/14**

3. The application sought following specific reliefs:

*a. That this application be certified as urgent and be heard ex-parte in the first instance.*

*b. That pending the hearing and determination of this application there be a temporary injunction restraining the defendants by themselves or their agents, servants and / or employees from selling or in any manner alienating the plaintiff's property/land known and registered in land Title Registry at Mombasa as CR NO.33720/3 and land sub-division No. 1/11517 section 1 mainland north (measuring 0.0949 acres)*

***c. That pending the hearing and determination of this suit there be a temporary injunction restraining the defendants by themselves or their agents, servants and / or employees from selling or in any manner alienating the plaintiff's property/land known and registered in land Title Registry at Mombasa as CR NO.33720/3 and land sub-division No. 1/11517 section 1 mainland north (measuring 0.0949 acres)***

*d. That the costs of the application be provided for.*

4. The Grounds of the application were set out in the Notice of Motion as follows:

*a) The plaintiff is the registered owner of the whole land known and Registered in the land Title Registry at Mombasa as CR NO. 33720/3 and land sub-division No. 1/11517 section 1 mainland north (measuring 0.09409 acres)*

*b) On the 25<sup>th</sup> day of October 2001 and 28<sup>th</sup> day of November 2008 the Plaintiff executed a Charge and further charge in the above state property/land respectively for a total sum of Kshs7,000,000. (Seven Million Shillings Only).*

*c) On various days thereafter the plaintiff settled the entire amount secured by the charge together with the interest accruing thereto in response of which the defendant issued a bank statement indicating that the plaintiff has settled the whole amount secured under the charges.*

*d) On the 14<sup>th</sup> day of August 2014 the defendant through their agents **SPOTLIGHT INTERCEPTS PUBLIC AUCTIONEERS** served the plaintiff with a notification of sale above named property on account of the charges created as above which sale is to*

recover an alleged sum of Kshs. 6,980,220.17.

e) The plaintiff does not owe the defendant any money at all as far as the Charge and further charge made on the 25<sup>th</sup> day of October 2001 and 28<sup>th</sup> day of November 2008 are concerned.

f) The plaintiff has formidable case as against the defendant, which ought to be heard and determined.

g) Unless the orders sought in this application are granted then the defendant may proceed to sell the plaintiff's property in a public auction thereby defeating the purpose of this case.

5. The application was supported by the Affidavit sworn by Stephen Kiunga dated 15/10/2014", principally, as follows

a) THAT the plaintiff is the registered owner of the whole land known and Register in the land Title Registry at Mombasa as **CR NO. 33720/3** and land sub-division **No. 1/11517** section 1 mainland north (measuring 0.09409 acres)

b) THAT on the 25<sup>th</sup> day of October 2001 and 28<sup>th</sup> day of November 2008 I executed a charge and further charge in the above stated property/land respectively for total sum of Kshs.7,000,000. (Seven Million Shillings Only). (Annexed is a copy of the statement marked S-1)

c) THAT on various days thereafter I settled the entire amount secured by the charge and further charge together with the interest accruing thereto in response of which the defendant issued a bank statement indicating that I had settled the whole amount secured under the charges. (Annexed in a copy of the statement Marked S-2).

d) THAT on the 14<sup>th</sup> day of August 2014 the defendant through their agents **SPOTLIGHT INTERCEPTS PUBLIC AUCTIONEERS** served me with a notification of sale above named property on account of the charges created as above which sale is to recover an alleged sum of Ksh 6,980,220.17. (Annexed are copies of the notices Marked S-3)

e) THAT I do not owe the defendant any money at all as far as the Charge and further charge made on the 25<sup>th</sup> day of October 2001 and 28<sup>th</sup> day of November 2008 are concerned.

f) THAT I have a formidable case as against the defendant which ought to be heard and determined.

g) THAT unless the orders sought in this application are granted then the defendant may proceed to sell my property in a public auction thereby defeating the purpose of this case.

h) THAT the land subject matter to this suit is currently valued at Ksh. 18,000,000 (Eighteen Million Shillings Only) I have constructed a several expensive buildings thereon and intend to enhance the construction of the building further.

i) THAT I have established a business on the premise being residential/rental business.

j) THAT the land subject matter herein is strategically located at a crucial high class residential area within the out-skirts of the Mombasa Island and if the property is sold by the defendant it will be difficult for me or any other person to replace it with another since almost the entire surrounding is already fully occupied.

k) THAT the land is so strategic to my business and I verily believe that it will be difficult to get another such strategic area of business within the same area or as good as my land.

l) THAT in the premise I verily believe that the defendants have no other claim against me hence there is no right as to statutory power of sale as against.

#### **Defence dated 18/11/2014**

6. The Defendant filed its Defence on 19<sup>th</sup> November 2014 setting out the following facts:

a) The admits paragraph 5 of the Plaintiff to the extent that the Plaintiff executed a charge and further charge over the suit property in favour of the Defendant for a sum of **Ksh.7,000,000/=**.

b) The Defendant denies the contents of Paragraph 6 and the Plaintiff is put to strict proof thereof. Further, the Defendant contends that contrary to the Plaintiff's representation, the Plaintiff owes the Defendant a sum of **Ksh. 7,167,117.97** being the balance on unpaid loans plus interests as at 10.11.2014 which comprises of the principal amount of Ksh. 5,419,876.86 and accrued interest of Kshs.1,747,241.11 in respect of the Plaintiff's Term Loan Account number 01115057001900.

c) The Defendant admits the contents of Paragraph 7 of the Plaintiff.

d) The Defendant denies the contents of Paragraph 8 of the Plaintiff and the Plaintiff is put to strict proof thereof. In addition, the Defendant contends that the Plaintiff operates 2 accounts with the Defendant namely **Corporate Current Account number**

**01020057001900 and Term Loan Account number 01115057001900** both of which are operated under the name Kanjalu Building Contractors.

e) The Defendant contends that the bank statements to which the Plaintiff is referring are for the Corporate Current Account while the debt for which the Defendant is claiming has accrued from the Term Loan Account.

7. The Defendant's case was supported by the Replying Affidavit sworn by Raphael Were Orimba dated 13/11/14 as follows:

a) **THAT** I have read and had understood and had explained to me by the defendant's advocate on record the contents of the plaintiff's notice of motion and affidavit dated 13.10.2014 and wish to reply as follows.

b) **THAT** the plaintiff has not adduced any sufficient grounds in order to entitle him to the orders sought in this application.

c) **THAT** the plaintiff's sole ground and application and course of action is the plaintiff has fully repaid the loan advanced to the plaintiff by the defendant.

d) **THAT** the Defendant avers that the Plaintiff has deliberately misled the Honourable Court in respect of his financial status with the defendant.

e) **THAT** the Plaintiff operates two bank accounts with the Defendant namely **Corporate current Account number 01115057001900** [hereinafter "loan account"] and the Term Loan Account number 01115057001900 [hereinafter "Loan account"] both of which are operated under the name Kanjalu Building Contractors.

f) **THAT** the plaintiff by a charge dated 25.10.2001 and further charge dated 28.11.2008 charged the property to the Defendant as security for several loans amounting to **Kshs.7,000,000** which are under the loan account.

g) **THAT** the Plaintiff defaulted in repaying his loans on Loan Account number **01115057001900** and overdraw his **Current 01020057001900** past the set the limit, prompting the Defendant to issue demand letters to the Plaintiff to regularize his accounts. I hereby annex demand letters from the Defendant to the Plaintiff and mark them as exhibit "NBK-1"

h) **THAT** the plaintiff has on several occasions sought to have the loan and overdraft facilities restructured to accommodate his financial strains and the Defendant has indulged and accommodated his requests. I hereby attach the Plaintiff's requests for restructuring and the Defendant's responses and mark them as exhibit "NBK-2"

i) **THAT** the plaintiff has since regularized his Current Account number **01020057001900** but has defaulted in repaying the loan granted to him on Loan Account number **01115057001900** and that the Defendant has therefore had no choice but to exercise its statutory power of sale.

j) **THAT** as at 10.11.2014, the outstanding balance plus accrued interest on the loan account was Ksh. 7,167,117.97 which comprises of the principal amount of Kshs.5,419,876.86 and accrued interest of Kshs.1,747,241.11, while the current account had a balance of Kshs.0. I hereby attach the bank statements for both the Current Account number **01020057001900** and loan Account number 01115057001900 and mark them as exhibits "NBK-3" and "NBK-4" respectively.

k) **THAT** the bank statements attached to the Plaintiff's Affidavit dated 13.10.2014 are for the current account number **01020057001900**, which he has since regularized, and not for the loan account number **01115057001900**, which still has an outstanding unpaid balance. I verily believe that the Plaintiff selectively attached the Current Account bank statements with the aim of misleading this Honourable court.

l) **THAT** I am advised by the Defendant's Advocate on record, which advice I verily believe to be true, that the Plaintiff therefore has no case against the Defendant and that if anything, the Defendant is the aggrieved party herein.

m) **THAT** the Plaintiff is fully aware of all that I have stated above since the Defendant has made the distinction between the two accounts clear in all its correspondences with the Plaintiff.

n) **THAT** the Plaintiff is therefore willfully and fraudulently misleading the court into believing that the plaintiff has cleared his liability to the Defendant by supplying the court with incorrect, misleading and incomplete information.

o) **THAT** in relation to Paragraph 11 of the Affidavit, the Defendant contends that the suit property is a commercial property whose value has been established by a valuation report. It is therefore not true that the Plaintiff would be unable to recuperate his losses if the property was to be sold, as his loss is quantifiable.

#### **Issue for Determination**

8. The question for determination is whether the applicant has satisfied the required conditions for an interlocutory injunction to be granted in accordance with principles laid down in **Giella v. Cassman Brown** (1973) EA 358.

#### **Determination**

9. Expounding on *Giella v. Cassman Brown*, the Court of Appeal held significantly as follows:

“3. *The principles for granting an interlocutory injunction are that:-*

- a) *The applicant must show a prima facie case with a probability of success;*
- b) *An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;*
- c) *If the court is in doubt, it will decide an application on the balance of convenience.*

**4. 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.”**

#### **Prima facie case**

10. The applicant moved the court by way of an application seeking temporary injunction against the defendant, the court granted a temporary injunction. The respondent urged that the orders be vacated since the applicant was guilty of non-disclosure of information. The applicant averred he had cleared all his outstanding loan of Ksh 7,000,000/=. In his supporting affidavit he annexed a bank statement for the current account 01020057001900 which showed zero balance and business loan account no. 01115057001900 which showed a balance of Ksh 5,419,876.87/=. In this case the applicant did not inform the court whether he had cleared the Debit balance shown in the bank statement, he chose to remain silent on this. As was held in the 1917 case of *R V Kensington Income Tax Commissioners, ex p. Princess Edmond de Polignac* [1917] 1 KB 486 famously adopted in Kenya by *Uhuru Highway Development Limited v. Central Bank of Kenya and 2 Ors* Nairobi CA Civil Appeal No. 126 of 1995, [1995] eKLR –

“[I]t is perfectly well settled that a person who makes an *ex parte* application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage may have already obtained by him. That is perfectly plain and requires no authority to justify it.”

11. On this principle of non-disclosure of material facts, the applicant’s case to an interlocutory injunction must collapse as he was silent on the material information surrounding the lending transaction including that the applicant had effected a further charge between himself and the respondent on 2<sup>nd</sup> Dec 2008. The applicant executed the charges agreeing to the terms stipulated therein. The charged property was subdivision no. M.N/ Section 1/11517 Mombasa which was referred to as the Mortgaged property in a Further Charge for a sum of Ksh 5,000,000/= and a further amount of Ksh.2,000,000/= which was advanced to him making the sum owed Ksh.7,000,000/- being the existing and additional mortgage debt. Clause two and three of the Further Charge gave the conditions upon which in default the respondent would exercise its statutory power of sale over the mortgaged property.

12. The respondent also in their replying affidavit annexed two documents as “NBK-2”: one dated 26<sup>th</sup> January 2010 and 23<sup>rd</sup> August 2010 which showed a loan of Ksh 11,375,463.60 and Ksh 13,660,657.30, respectively. The securities that were offered for the advancement of the loans and overdrafts were L.R No. MN/Sec 1/1157 Msa and L.R No. Nyaki/Thuura/718 Meru Central District. The right of set-off was included to state as follows: “ *The bank reserves the right to set off all or any accounts of the borrower and to consolidate all the securities on any account to be made inter-available for liabilities which may be guaranteed by the borrower but are not covered in this offer letter*”

13. The applicant in his affidavit annexed two sets of statements, one with a zero balance and the other with a balance yet he wants the court to protect him from sale of his charged property. In order for him to have a prima facie case he must have shown a zero balance on the loan account or any form of payment as an effort to clear the outstanding balance. The applicant has failed in the first threshold of *Giella*.

14. Further, the evidence advanced by the applicant has to show that indeed there has been an infringement of a right and the probability of success of the case upon trial. The further charge that was annexed showed the property in Mombasa as the charged property and the two letters shown above clearly indicated the properties would be subject to sale in case of a default, which condition was accepted by the applicant by signing the same.

#### **Irreparable Loss**

15. As to likelihood of irreparable loss to the applicant if injunction is refused, the applicant has only stated that he shall suffer irreparable loss but has not demonstrated or shown the kind of loss he shall suffer. The applicant had charged his property and the value of the L.R. No. Mainland North/ Section 1/1157, Mombasa was valued at Ksh 18,000,000/=. The applicant in its plaint at paragraph 3 has stated that the respondent was actively engaged in Banking business of lending money to its customers. The respondent being in such business is and shall still be in a position to pay damaged in case the sale goes on and the applicant is adjudged to have suffered loss.

16. As held in *Tradeline Express Limited v. Mburungar Limited & 2 Ors* [2014] eKLR “*if damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff claim appear to be at that stage*”.

17. Additionally, I would respectfully agree with Ringera, J. (as he then was) in *Isaac O. Litali v. Ambrose W. Shubai & 2 Ors* HCCC NO.

2092 of 2000 that once land was given as security for loan, it became a commodity for sale and the default in payment of the debt would result in the sale of the security, and there was no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages.

### ***Balance of Convenience***

18. The evidence before the court is that the applicant either was issued with an overdraft and he was always in default of repayment. It is no wonder he would always asked for extension of time to enable him repay. He negotiated a further loan secured by a further charge, which he was unable to pay. He paid the Current Account balance after several reminders. The court finds that the respondent would always be inconvenienced by the acts and omission of the applicant.

19. Having found that the applicant has failed to demonstrate a *prima facie* case and that the loss, if any, is remediable by an award of damages, there is no need to consider the placing of the balance of convenience. Suffice it to state the his having offered the suit property as a security for the loans, the applicant must be deemed, as in ***Isaac O. Litali v. Ambrose W. Shubai & 2 Ors***, to have been ready for the eventuality that befalls it upon default of loan repayments and the Bank is entitled to realize its security in those circumstances, to give effect to certainty of commercial lending transactions.

20. The court finds that the applicant has failed to meet the conditions set in ***Giella v. Cassman Brown (supra)***. As in ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others***[2003] eKLR, this cannot help to find that the applicant “came to a court of equity but having failed to show utmost good faith, the court could not but hold that it was not entitled to the injunction in application.”

### **Orders**

21. Accordingly, for the reasons set out above, the Court makes the following orders:

1. The application seeking a temporary injunction restraining the defendant by themselves or their agents, servants and/or employees from selling or alienating in any manner the plaintiff’s property subject of the suit is dismissed.
2. The costs shall be in the cause.

***Order accordingly.***

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF OCTOBER 2018.**

**E.K. OGOLA**

**JUDGE**

**Appearances:**

M/s C.K. Areba & Co. Advocates for the Plaintiff.

M/s Munyao, Muthama & Kashindi Advocate for the Defendant.