



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 296 OF 2016

IN THE MATTER OF APPLICATION UNDER ARTICLE 22(1)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 21(1), 24, 27,28, 29(a), 31, 39, AND 40 OF

THE CONSTITUTION OF KENYA 2010

BETWEEN

TONAK STOCK LIMITED..... PETITIONER

VERSUS

SIDIAN BANK LIMITED (FORMERLY KNOWN

AS K-REP BANK LIMITED).....1ST RESPONDENT

FINANCE INNOVATION FOR

CLIMATE CHANGE FUND.....2ND RESPONDENT

RULING

[1] The Petition herein was filed by **Tonak Stock Limited** on **22 July 2016** before the Constitutional and Human Rights Division of the High Court, along with the Notice of Motion of even date, against the two Respondents, **Sidian Bank Limited (formerly K-Rep Bank)** and **Finance Innovation for Climate Change**. The Notice of Motion seeks orders prohibiting the 1st Respondent, whether by itself, its servants, employees and/or agents from harassing, intimidating it or forwarding its name to the Credit Reference Bureau; or disposing of its property pending the hearing of the application and the Petition. The matter, which was filed under Certificate of Urgency, was promptly transferred to the Commercial & Tax Division for hearing and determination, whereupon the Petitioner was directed to serve the application on the Respondents. The application was thus fixed for hearing *inter partes* on **25 July 2016**, when prayer (b) thereof was granted pending *inter partes* hearing of the application.

[2] The application is expressed to have been filed pursuant to **Article 40(1)(a) and (b)** of the Constitution of Kenya on the grounds that the Applicant was a participant in the initiative by **Finance Innovation for Climate Change Fund**, the 2nd Respondent; and that as such, it was entitled to enjoy interest rates at **Sidian Bank Ltd** at the rate of 12% through UKAID funds, granted that **Sidian Bank Ltd** was a participating bank. It was the Applicant's contention that the Respondents continue to harass and intimidate it, threatening to forward its name to the Credit Reference Bureau.

[3] In support of the grounds aforesated, the Applicant's director, **Anthony Mwau Wambua** averred, in his affidavit sworn on **22 July 2016**, that on or about the month of **March 2015**, the Applicant applied for a loan under Limit Type "**Kilimo Plus**" whose interest rate ought to have been 12% per annum; but that the 1st Respondent, without any justification, fraudulently and illegally categorized the said loan under a personal loan whose interest rate is 19%. It was further averred that the loan facility was not meant for the Applicant's personal use, but to boost its farming initiatives, and was based on the programme "**Finance Innovation for Climate Change Fund**", which had been launched at **Hilton Hotel** on **4 March 2015**. Thus when the Applicant received a Short Text Message via telephone that its name would be forwarded to the Credit Reference Bureau for being in default in its repayments, it had no option but to seek protection from the Court to forestall this threatened violation of what it considered to be its constitutional rights.

[4] In response the application, the 1st Respondent filed the Replying Affidavit, sworn by its Legal Officer, **Arnold Kwesiga**, on **14 October 2016**. It was the contention of the 1st Respondent that the facility that the Applicant applied for under **Limit Type "Kilimo Plus"** attracted an interest of 19% per annum; and that at the time of signing the Letter of Offer for the facility, the Applicant was well aware that the loan of **Kshs. 3,280,000** was to be repaid with interest at the said rate of 19%. It was further averred by the 1st Respondent that the Applicant did not repay the loan as agreed and that it, on several occasions, reminded the Applicant of its default, which the Applicant failed to heed. To buttress the 1st Respondent's averments, the Letter of Offer, the reminders, and statements of account were annexed to the Replying Affidavit as exhibits. It was thus the contention of the 1st Respondent that in the foregoing premises, it was within its rights as a lender to forward the name of any recalcitrant debtor, such as the Applicant herein, to the Credit Reference Bureau.

[5] It was further the contention of the 1st Respondent that the Applicant, having concealed pertinent facts of the transaction, is not entitled to the enjoyment of the injunction order issued on **25 July 2016**; and that the same should therefore be set aside, discharged or varied pursuant to **Order 40 Rule 7** of the **Civil Procedure Rules**. Finally, it was the contention of the 1st Respondent that the allegations in support of the application do not raise any constitutional issue; and that the Applicant had failed to prove infringement of any of its constitutional rights. The 1st Respondent, while positing that this is a dispute founded on a commercial contract; urged the Court to dismiss the application with costs on the ground that it is misconceived.

[6] Having carefully considered the Petition, the Notice of Motion itself and the affidavits filed in respect thereof, including the respective written submissions filed herein by and on behalf of the parties, there appears to be no dispute that the Applicant obtained a loan facility from the Respondents and that it defaulted in servicing the said facility. The two letters dated **14 June 2016** and **21 June 2016** annexed to the Replying Affidavit and marked **Annexures AK3** and **AK4** confirm this position. Similarly, there appears to be no contestation that, following the default by the Applicant, the 1st Respondent threatened to report the company and its Directors to the Credit Reference Bureau; which is why the Applicant filed this Petition.

[7] As has been alluded to hereinabove, the Applicant, who is herein represented by one of its Directors, filed this Petition before the Constitutional and Human Rights Division of the High Court, whereupon a direction was given for its transfer to the Commercial and Tax Division, granted the nature of the dispute. It is therefore understandable why the matter is not particularly tailored as a commercial dispute. Nevertheless, **Article 159(2)(d) of the Constitution** mandates that parties be accorded a hearing without

undue regard to procedural technicalities; which, to my mind, includes ascertainment by the Court of the nature of the dispute and prescribing appropriate remedy, if any, that would suit case and meet the ends of justice. It is for this reason that the Legislature, in its wisdom, included **Sections 3A and 63(c)** in the **Civil Procedure Act**. Indeed **Order 51 Rule 10** is explicit that:

"(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

[8] In the premises, the 1st Respondent having conceded that this is indeed a commercial dispute, I would find and hold that the instant application is properly before the Court for consideration as an application for temporary injunction pursuant to **Sections 3A and 63(c)** in the **Civil Procedure Act**. Although, Counsel for the 1st Respondent submitted that a permanent injunction was issued herein without affording the Respondents a hearing, the record shows otherwise. The matter was filed under a Certificate of Urgency on **22 July 2016**, but out of caution, it was directed that the application be served for *inter partes* hearing on **25 July 2017**; and that it was upon the failure by the Respondents to attend Court after due service that the interim orders were issued. It is instructive that the Respondents did not dispute service in the Replying Affidavit or otherwise. Thus the only issue to resolve, as I see it, is whether a good case has been made for the issuance of a temporary injunction pending the hearing and determination of this suit; or whether the injunctive order should be discharged, as was urged by the 1st Respondent.

[9] It is noteworthy that although interim orders were issued on **25 July 2016** pending hearing *inter partes*; the extracted Order appeared to suggest that the same was to subsist during the pendency of the suit. This apparent ambiguity could be attributed to the fact that in its application, the Applicant fused the two prayers into one. Nevertheless, a reading thereof leaves no doubt that the disposal of the application was to precede the hearing, hence the use of the word "subsequently". In any event, if the Court was minded to issue a "permanent injunction" as suggested by Counsel for the 1st Respondent, there would have been no need to direct that the orders would last pending the hearing of the application *inter partes*. Moreover, even if the order was intended to last pending the hearing of the Petition, it would still be an interlocutory as opposed to a permanent injunction. Needless to say that a permanent injunction properly so called would only issue after trial and a determination on the merits of the Petition itself.

[10] Additionally, if indeed a permanent injunction had been issued as suggested, on what basis would the parties file written submissions to urge the same application? Thus, there can be no doubt that the order of **25 July 2016** was in respect of the first limb of prayer (b) and was meant to subsist pending the *inter partes* hearing and determination of the Notice of Motion dated **22 July 2016**; and that this is why the said application proceeded to hearing *inter partes* to determine whether a good case has been made for the same orders to be kept in place pending the hearing and determination of the Petition itself.

[11] From the nature of the relief sought in prayer (b) of the Notice of Motion, what the Applicant is after is a temporary injunction to restrain the 1st Respondent from harassing or intimidating him; and from forwarding its name to the Credit Reference Bureau, or from disposing of the Applicant's property pending the hearing and determination of the Petition. According to the 1st Respondent, the Applicant has not met the conditions for the issuance of an injunction as per the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** namely:

[a] That it has a prima facie case with a probability of success.

[b] That it stands to suffer irreparable injury which would not adequately be compensated by an award of damages unless a temporary injunction is granted in the interim.

[c] That the balance of convenience is in its favour.

Other authorities were cited by the 1st Respondent in support of this argument, including **Uhuru Highway Development Ltd vs Central Bank of Kenya & 3 Others Civil Appeal No. 126 of 1995** and **Mrao vs First American Bank of Kenya Ltd [2005] KLR 125**; which I have given due consideration.

[12] As to whether the Applicant has made out a prima facie case, I find instructive the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123** in which the Court of Appeal had the following to say:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in 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...It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

[13] The Applicant's case is that he was meant to enjoy an interest rate of 12% as a contracting farmer for the implementation of the **Climate Smart Agriculture Programme** but that the Respondents did not disclose to him, at the time he applied for the loan, that the 2nd Respondent's project had been withdrawn. It was further argued that, on account of the withdrawal by the 2nd Respondent, there was a mix up attributable to the 1st Respondent when it approved a **Kilimo Plus Facility** as opposed to **Climate Smart Agriculture Programme Facility**; with the result that the Applicant had to contend with a higher rate of interest. It is also evident that in the Applicant's written submissions, it questioned various transactions set out in the statements of account and even alleged fraud on the part of the 1st Respondent, thereby suggesting a dispute as to accounts. However, it is now trite that a dispute over interest or accounts is insufficient in such cases. In **the Mrao Case** (supra) **Kwach JA** expressed himself thus on the point:

"I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether... "

[14] The Letter of Offer that was relied on by the Applicant in support of the instant application is explicit as to the nature of the facility and the terms thereof. The Facility Type is indicated therein as **Kilimo Plus** and the rate of interest is 19%. The document was evidently signed by the Applicant's directors; and in any event, this fact has not been disputed. There is no other document availed to contradict the terms as set out in the Letter of Offer. Accordingly, it is presumed that the Applicant was well advised before executing and appending its seal to the Letter of Offer. In the premises, the Court is far from satisfied that the Applicant has made out a prima facie case with a probability of success.

[15] As to whether the Applicant has demonstrated that it stands to suffer irreparable harm for which damages would not be adequate as a remedy, there appears to be no proof in this regard in the Supporting Affidavit or the Further Affidavit filed on **1 November 2016**. All there is is the apprehension by the Applicant that its property would be sold, and that its name as well as the names of its directors would be forwarded to the Credit Reference Bureau. From the evidence availed herein, it is manifest that the Applicant lawfully offered its property as security with the knowledge that the Respondents could at any time realize the same in the event of default. In this respect, I would agree entirely with the expressions of **Ringera J** (as he then was) in **Isaac O. Litali vs Ambrose W. Subai & 2 Others HCCC No. 2092 of 2000** that:

"...once land has been given as security for a loan, it becomes a commodity for sale by that very fact, and any romanticism over it is unhelpful ... for nothing is more clear in a contract of charge than that default in payment of the debt will result in the sale of the security. In that respect, land is no different from a chattel such as a motor vehicle or any other form of security. And needless to state, there is no commodity for sale whose loss cannot be adequately compensated by an appropriate quantum of damages."

[16] Lastly, with regard to the issue of balance of convenience, having found that the Applicant has neither established a *prima facie* case nor shown that it stands to suffer such injury as cannot be compensated by an award of damages, it follows that the balance of convenience tilts in favour of the Defendant. Moreover, it is apparent that the Applicant is justly indebted to the 1st Respondent and the said arrears continue to accrue interest. The interests of justice would require that the debt be repaid.

[17] In view of the foregoing, it is my resultant finding that the Applicant's application dated **22 July 2016** is completely devoid of merit and the same is hereby dismissed with costs. In the same vein, the order of temporary injunction issued herein on **25 July 2016** is hereby discharged.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF APRIL 2017

OLGA SEWE

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF APRIL, 2017

RACHEL NG'ETICH

JUDGE