



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 473 OF 2015**

**MUIGA ENTERPRISES LIMITED.....PLAINTIFF-**

**-VERSUS -**

**KENYA COMMERCIAL BANK LIMITED...DEFENDANT**

**RULING**

1. The plaintiff seeks an injunction to restrain the defendant from seizing or selling, (*whether by private treaty or by public auction*) or from dealing with the plaintiff's Power crusher Machinery.
2. The plaintiff also seeks the re-scheduling of the Asset Finance Facility which the defendant had granted to the plaintiff, and which the plaintiff had used to purchase the Power crusher machinery.
3. It is the plaintiff's case that the loan which it got from the defendant had escalated because the gypsum, for which the machinery was purchased, had not been processed on schedule due to Acts of God, which were beyond the control of the plaintiff.
4. As a result of the said Acts of God, the plaintiff stated that it had been without any regular income, which it could have used to service the loan facility.
5. However, as the plaintiff was well aware of its obligations, to service the loan facility, it had offered to the defendant 2 real properties.
6. According to the plaintiff, the said 2 properties were worth over Kshs. 25 million. Therefore, as the loan facility was worth about Kshs. 10 million, the plaintiff contends that the 2 properties would provide the defendant with more than enough security for the loan facility.
7. Having offered alternative security to the defendant, the plaintiff believes that the defendant was being very unfair by insisting that it would take over the Power crusher Machine, and have it sold off.
8. The plaintiff had also requested the defendant to restructure the repayments of the loan. However, the defendant rejected the plaintiff's said request.
9. In the circumstances, the plaintiff was apprehensive that the defendant would take away the machine, thus depriving the plaintiff of the ability to do any further business. If that were to happen, the plaintiff believes that a great injustice would have been visited upon it.

10. The plaintiff described the Power crusher Machine as its tool of trade. Therefore, the plaintiff submitted that the said machine was exempted from attachment.
11. If the machine were sold by the defendant, the plaintiff submits that it would suffer irreparable loss and damage. It is the view of the plaintiff that damages cannot be adequate compensation for the loss of the machinery.
12. The plaintiff also believes that the balance of convenience tilts in favour of preserving the machinery which is the subject matter of the suit.
13. It is the plaintiff's case that it has come to court with clean hands, and that the court ought to therefore protect it.
14. The plaintiff has been, in its own assessment, candid. Therefore, it requests the court not to punish it for having acted in good faith and in an open and honest manner.
15. Instead, the court was invited to favourably consider the plaintiff's prayers, so that the plaintiff may have an opportunity to repay the loan in the manner it had proposed.
16. The law governing applications for interlocutory injunctions is well settled in Kenya. As the plaintiff has expressly stated, the principles were espoused as follows, in the case of **GIELLA Vs CASSMAN BROWN & COMPANY [1973] E.A. 358**;

***“a) An Applicant must show a prima facie case with a probability of success;***

***b) An injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which could not be adequately compensated by an award of damages; and***

***c) If the Court is in doubt, it will decide the application on a balance of convenience?.***

17. In answer to the application, the defendant asserts that the plaintiff had failed to make out any case with a probability of success.

18. The first reason for that submission was that the defendant had never expressed any intention or desire to seize the Power crusher Machine, with a view to selling it off, either through public auction or by private treaty.

19. It is the understanding of the defendant that pursuant to the contract, it can only appoint a Receiver and Manager if the plaintiff defaulted in the repayments of the banking facility. In other words, the defendant does not have any legal authority to directly seize the plaintiff's machinery.

20. In the circumstances, there is no issue on the allegation that the defendant was about to seize the subject matter of the application. I so find because an issue only arises when one party has denied the assertion made by another party.

21. As the defendant has no intention or desire to directly seize the Power crusher Machine, there cannot arise any reason to justify the issuance of a court order to stop it from seizing the machine.

22. In any event, the plaintiff has expressly acknowledged that it is in default. Indeed, a perusal of the statements of account exhibited by the plaintiff, reveals that from November 2014, the plaintiff made nominal payments to the defendant.

23. Considering that the monthly installments were agreed upon in the sum of Kshs. 574,369.94, the arrears over a period of 12 months would be in excess of Kshs. 6.8 million.

24. Pursuant to the provisions of Clause 20 of the Debenture executed by the plaintiff, the defaults by the plaintiff would give to the defendant the right to appoint a Receiver or a Receiver and Manager over the assets of the plaintiff.
25. In the circumstances, if the defendant were to take steps which were in tandem with the terms of the contract between the parties herein, it could not be said, on a *prima facie* basis, that the defendant was doing something which was unlawful, irregular or illegal. Therefore, there would not be a lawful reason for the issuance of an injunctive relief.
26. A plaintiff cannot come to court saying that although I am well aware that I have been in default, I need the court to protect me from the defendant who is seeking to enforce the contract.
27. It is possible that Acts of God have frustrated the plaintiff's efforts to extract gypsum as efficiently and as continually as the plaintiff had hoped. As a result of the said Acts of God, the plaintiff found itself unable to raise funds to use to service the loan facility.
28. However, it was not a term of the contract that if there should arise matters which were beyond the control of the plaintiff, the repayments would be put on hold.
29. I appreciate the fact that the plaintiff appears keen to find alternative means to raise funds, which it could then utilize towards paying-off the loan.
30. However, the court cannot compel the defendant to accept the plaintiff's proposals. I so find because it is not a matter of an entitlement bestowed upon the plaintiff, whether by statute or by contract.
31. A party who comes to court seeking relief, does so on the understanding that that which he is asking for is a right or an entitlement. For instance, a party who has mortgaged his land to the bank is entitled to receive Notices, as provided for in the statutes, as well as in the Instrument of Charge. Therefore, when those notices were not given, or if the notices were inadequate or irregular, the court could order the chargee to stop the intended realization of the security.
32. There is no statutory provision or contractual term which the defendant is accused of flouting in this case. Therefore, I find no basis, in law, for holding that the defendant should be restrained by injunction from taking such steps as are specified in the contract between the parties.
33. The Power crusher machine was given by the plaintiff as security for the loan facility which the defendant provided to the plaintiff. In my considered opinion, it would be extremely mischievous of the plaintiff to turn around and say that the very security it provided was exempt from the task in respect to which it was made available. If the court were to accept such a contention, the court would have perpetrated a grave injustice to the defendant. I refuse to be an instrument of such an injustice.
34. The plaintiff had willingly offered the machine as security. And in the contract, the plaintiff had expressly acknowledged that if he was in default, the defendant could appoint a receiver or a receiver/manager over the machine.
35. Having given the machine as security, the plaintiff cannot be heard to complain that the very thing which it had anticipated from the outset, would now cause it to suffer irreparable loss and damage.
36. As regards the balance of convenience, I do not think that is an issue in this application, because the plaintiff's case is without merit.
37. But, in any event, the balance of convenience cannot be in favour of the plaintiff, who was not remitting the installments payable. I so hold because it is inequitable to allow a defaulting party to

keep the security whilst he was not taking steps to meet his contractual obligations.

38. An injunction which gives to a defaulter the security would occasion an injustice to the defendant.

39. Finally, a person who confesses that he was a defaulter, and whose default had persisted for awhile, cannot be said to have come to court with clean hands. He had, been defaulting, become a violator of the terms of the contract.

40. Such a person's "*clean hands? could* only so described if the phrase was meant to portray him as a person without anything in his hands. In other words, he was a person who was unable to meet his obligations.

41. That is exactly what the plaintiff is; a person who was unable to fulfill its part of the contract.

42. The plaintiff may not be guilty of under-hand deals. But it is not only persons who were involved in shadowy dealings or actions who are un-deserving of the court's favourable discretion in applications for interlocutory injunctions.

43. A person may be very honest, yet financially unable to meet his obligations. His honesty would not be sufficient ground to justify the grant of an injunction in his favour.

44. In the result, the application by the plaintiff is without merit. It is dismissed with costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 9<sup>th</sup> day of March 2016.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

*No appearance for the Plaintiff*

*Wilson for the Defendant*

*Collins Odhiambo – Court clerk.*