



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 20 OF 2016
UBA KENYA BANK LIMITED.....PLAINTIFF
VERSUS
MIT'S ELECTRICAL COMPANY LIMITED.....1ST DEFENDANT
SATYA BHAMA GANDHI.....2ND DEFENDANT
PRIEYA DARSHANI GANDHI.....3RD DEFENDANT
DEVELOPMENT BANK LIMITED.....INTERESTED PARTY

RULING

1. By its application dated 27th January 2016 the plaintiff sought attachment before judgement. The plaintiff sought to give effect to the order for attachment before judgement through the following means:

- a. Requiring the defendants to deposit USD 610,764.06 in an interest bearing account. The account would be in the joint names of the advocates acting for the parties.*
- b. An Order of Prohibition, restraining the 3rd defendant from disposing of the property L.R. No. 3734/96, CONVENT DRIVE, LAVINGTON.*
- c. An Order of attachment, which was subordinate to the charge held by DEVELOPMENT BANK of KENYA LIMITED, over L.R. No. 3734/96, CONVENT DRIVE, LAVINGTON.*
- d. The deposit of the residual proceeds of sale of L.R. No 3734/96, CONVENT DRIVE, LAVINGTON; such deposit would be into a joint account held by the advocates for the Plaintiff and for the Defendants.*

2. The plaintiff asserted that the 3rd defendant was in the process of disposing of the property in Lavington.

3. The plaintiff also asserted that the 2nd defendant was arranging to abscond from Kenya, with a view to joining the 3rd defendant abroad.

4. According to the plaintiff, the defendants do not own any other known property in Kenya, save for the property in Lavington.

5. Therefore, because the defendants allegedly owed huge sums of money to almost all banking institutions, it was necessary to ensure that the defendants were not allowed to dispose of their only known asset, as that would defeat any judgement which the plaintiff may obtain against the defendants.

6. However, the plaintiff does acknowledge that the property in Lavington was charged to the Development Bank of Kenya Limited. Therefore, any actions which the plaintiff could undertake in relation to the Lavington property would have to be subordinate to the rights of the chargee.

7. It is within that context that the plaintiff sought orders in relation to the residue of the sale proceeds, in the event that the chargor sold off the charged property.

8. I understand the plaintiff to be saying that the defendants had the option of depositing into a joint account, the sums claimed by the plaintiff.

9. In answer to the application, the 2nd defendant swore an affidavit, denying the assertions that;

a. the 3rd defendant had absconded to Canada;

b. the 3rd defendant was in the process of disposing of the Lavington property.

10. The 2nd defendant explained that the 3rd defendant was partially paralysed and that she was undergoing treatment within the country. In the light of the 3rd defendant's health status, the 2nd defendant said that that defendant was not in a position to transact the sale of the Lavington property.

11. In any event, as the property was charged to the Development Bank of Kenya Limited, the defendants submitted that they could not sell the property without the concurrence of the chargee.

12. And as the chargee had never given any consent to the 3rd defendant to sell the property, the defendants insist that the plaintiff's allegation, that the property was in imminent danger of being disposed of, was far fetched.

13. Another issue which was raised by the 2nd defendant was that her travel documents were in the custody of the Chief Magistrate's Court, Kibera in the case of **REPUBLIC Vs KENYA BHAMA GANDHI, CRIMINAL CASE No. 4029 of 2015**. In those circumstances, the 2nd defendant deponed that she was not in a position to travel out of the country.

14. As far as the defendants were concerned, there was no imminent threat of their assets being disposed of or of the defendants absconding from the jurisdiction of the court.

15. The defendants also expressed the view that the plaintiff did not have any *prima facie* case with a probability of success.

16. Thirdly, the defendants indicated a willingness to offer to the plaintiff, alternative forms of security, if the court should so order.

17. On its part, the Interested Party, the **DEVELOPMENT BANK of KENYA LIMITED** confirmed that the Lavington property was charged to it, as security for a loan which the Interested party had advanced to the 1st defendant, **MITS ELECTRICAL COMPANY LIMITED**.

18. The Interested Party stated when the 1st defendant defaulted in the repayment of the loan, the bank took steps to realize the security.

19. At that stage, the 1st defendant filed a case against the Interested Party. However, the suit had been dismissed and the Interested Party said that it was renewing steps to realize the security.

20. If the security was realized, the Interested Party was ready to comply with such orders as the court may give, concerning any balance which would remain after the loan was cleared.

21. In reply to the defendants affidavits, the plaintiff reiterated that whilst the Interested Party was owed about Kshs. 59 million, the Lavington property was worth about Kshs. 170 million. Therefore, the plaintiff was convinced that if the Interested party realized the security, there would be a balance after the loan was cleared.

22. Therefore, in order to ensure that the excess funds did not get into the hands of the defendants, who might then flee the court's jurisdiction, the plaintiff submitted that that was reason enough to warrant the attachment of the residual proceeds.

23. The plaintiff poured cold water on the defendants' assertions that they had always been ready and willing to find an amicable solution to the plaintiff's claim. According to the plaintiff, there was lack of commitment and dedication on the defendants' part.

24. The plaintiff reiterated that the defendants had no capacity to settle the debt it owed to the plaintiff. The reason for that contention was that if the defendants had the capacity to settle the debt, it would never have become necessary for the plaintiff to bring these court proceedings.

25. And whereas the defendants had indicated that they were ready to offer alternative securities, the plaintiff pointed out that no such alternative securities had ever been offered. It is the opinion of the plaintiff that no such alternative securities exist.

26. In determining this application I remind myself that it was brought pursuant to Order 39 rules 1, 2,3,4,5 and 7 of the Civil Procedure Rules.

27. The plaintiff was well aware that Order 39;

“requires the Applicant to demonstrate that the Defendant, with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him –

i. Has absconded or left the local limits of the jurisdiction of the Court; or

ii. Is about to abscond or leave the local limits of the jurisdiction of the court; or

iii. Has disposed of or removed from the local limits of jurisdiction of the court, his property or any part thereof....?

28. Having given due consideration to all the evidence before me, I find that the plaintiff has failed to demonstrate any of the 3 circumstances which could trigger the issuance of the orders sought.

29. The defendants have not left Kenya.

30. Secondly, the only property which is known to belong to the 3rd Defendant is firmly in the hands of the chargee. It has not been disposed of by the 3rd defendant or any other defendant.

31. Thirdly, the 3rd defendant has no legal capacity to dispose of the property as the same is currently charged to the Development Bank of Kenya Limited.

32. The plaintiff submitted that the 3rd defendant had absconded to Canada, where she has relocated to,

permanently.

33. That contention is said to be based upon “*credible information?*”. However, the source of the alleged credible information was not revealed to the court. Therefore, the court was unable to assess for itself whether or not the information was credible.

34. In any event, the *onus* is upon the person who makes an assertion, to prove it.

35. Reference to an undisclosed source, who provided the plaintiff with alleged credible information is a far cry from discharging the applicant’s onus of proof.

36. It is not lost on the court that whereas the plaintiff expressed the view that the 3rd defendant was “busy disposing of her assets in Kenya”, the plaintiff was only aware of one property belonging to the 3rd defendant.

37. If the plaintiff wished to persuade the court about the credibility of the information it had on the 3rd defendant, I would have expected the plaintiff to demonstrate to the court the particulars of the properties which the 3rd defendant was busy disposing of.

38. Considering that the plaintiff failed to lead any evidence to show how the 3rd defendant was disposing of her assets in Kenya, that casts doubt on the credibility of the information which the plaintiff may have been given.

39. I appreciate the plaintiff’s apprehension about the possibility that it may never recover the money it is owed by the 1st defendant, even if it should finally get a judgment against the defendants. However, such apprehension is not reason enough, in law, to warrant the grant of attachment before judgement, pursuant to the provisions of Order 39 of the Civil Procedure Rules.

40. I appreciate the Interested Party’s willingness to hold the residual of the sale proceeds to the order of the court, however that good gesture is not reason enough, in law, to justify the issuance of the reliefs sought.

41. In the circumstances, although I have every sympathy with the plaintiff’s position, I find that the plaintiff has failed to meet the threshold for the grant of the reliefs sought. Therefore, the application dated 27th January 2016 is dismissed, with costs to the defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 1st day of September 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Nyaanga for the 1st Plaintiff

Nyarango for the 2nd Defendant

Nyarango for the 3rd Defendant

Nyarango for the Interested

Collins Odhiambo – Court clerk.